Appeal No. UKEAT/0111/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 October 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS L PARSONS APPELLANT

AIRPLUS INTERNATIONAL LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID GRANT (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR STEFAN BROCHWICZ-LEWINSKI (of Counsel) Instructed by: DWF LLP 1 Scott Place 2 Hardman Street Manchester M3 3AA

SUMMARY

VICTIMISATION DISCRIMINATION - Protected disclosure

VICTIMISATION DISCRIMINATION - Dismissal

Automatic unfair dismissal - protected disclosures

The Claimant, a qualified non-practising barrister, had been employed by the Respondent as its Legal and Compliance Officer, subject to a six-month probationary period. From early in her employment, the Claimant raised numerous concerns with the Respondent and the manager in the parent company to whom the Claimant reported. She was given training and support but those managing her became increasingly concerned as to the way in which the Claimant was raising matters, her inability to work with others and her rudeness. After attempting to reassure the Claimant and to remove some of the pressure, the Respondent was unable to see any improvement and decided she should be dismissed, essentially due to what was described as a "*cultural misfit*". The Claimant brought ET proceedings, complaining that this amounted to an automatically unfair dismissal by reason of various protected disclosures she had made.

The ET dismissed the Claimant's claim. Save in one respect, it did not accept the matters relied on by the Claimant amounted to protected disclosures; it was, in any event, satisfied that the dismissal was not for a prohibited reason. The Claimant appealed.

Held: dismissing the appeal.

(1) Qualifying Disclosures

The Claimant sought to challenge the ET's rejection of certain matters as qualifying disclosures. On one disclosure, the Respondent accepted the ET had erred in its conclusion that this could not be a qualifying disclosure as it related to something of which the Respondent was already aware. In respect of three other matters, the Claimant contended that the ET had erred in failing to consider the disclosures cumulatively and had wrongly approached its task on the basis that a disclosure in self-interest could not also be in the public interest.

As was common ground, the ET had erred in respect of one disclosure. As for the other matters relied on, however, it was apparent that the ET had rejected the Claimant's case on the facts and, on the findings made, there was nothing that could properly be found to amount to a qualifying disclosure. More particularly, the ET had found as a fact that the disclosures were solely made in the Claimant's self-interest; it had not wrongly assumed that this could not also be a matter of public interest but had found, on the facts, that it was not.

(2) Reason for Dismissal

The Claimant argued the ET's findings on reason were perverse given the chronology (the first discussion regarding her future employment taking place very shortly after one of the qualifying disclosures) but it was clear the ET had fully engaged with the apparent coincidence of timing but rejected the suggestion that gave rise to an inference that the disclosures were the reason for dismissal, not least as the Respondent had still given the Claimant a chance to improve before making its decision. In any event, the ET was clear that the reason was not the Claimant's disclosures: the decision was made not because of the Claimant's disclosure of information but because of her reaction thereafter - her inability to explain her concerns, her failure to listen to others and her rudeness. Given the evidence before the ET and its primary findings of fact, that was a permissible conclusion: this was a case where the matters relied on by the Respondent were genuinely separable from any protected disclosure by the Claimant.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the London (Central) Employment Tribunal (Employment Judge Grewal, sitting alone over five days in March 2015; "the ET"), by which the ET dismissed the Claimant's claim of automatic unfair dismissal by reason of having made protected disclosures.

2. The Claimant appeared in person before the ET but at the earlier hearing under Rule 3(10) of the **EAT Rules 1993**, and today, has had the benefit of representation by Mr Grant, of counsel, acting *pro bono*. The Respondent's interests are represented by Mr Lewinski, of counsel, as they were before the ET.

3. The Claimant's proposed appeal was initially considered on the papers by HHJ Peter Clark to disclose no reasonable basis to proceed. After a hearing under Rule 3(10), on 20 April 2017, I allowed the appeal to proceed on the basis of amended grounds (referenced below).

The Factual Background

4. The Respondent, a small company with around 45 employees, is a wholly owned subsidiary of the German company Lufthansa. Its function is to enter into agreements with corporate clients for the provision of charge cards to be used by their employees for the purposes of business travel. It is regulated by the FCA and the Payment Services Regulator.

5. The Claimant is a qualified non-practising barrister. She started working for the Respondent as its Legal and Compliance Officer on 17 August 2015, subject to an initial six-month probation period. The Respondent had found it difficult to recruit into the role and had accepted the Claimant notwithstanding she had no compliance qualifications or experience.

6. In the early months of her employment, the Claimant raised various queries in relation to her duties. The nature of her role meant that she reported not directly to the Respondent's UK management but to the relevant Associate Director for Global Regulatory Affairs for Lufthansa, Mr Bullwein. The ET's findings of fact detail the support given to the Claimant in terms of training and coaching in her role and also the various responses to her concerns which evidenced support and reassurance, both from the Respondent's own management and also from Mr Bullwein. In seeking to provide the Claimant with support, however, there was also a concern that she needed to be clear that what she was advising might be wrong and it was felt that she was failing to address matters in a professional way due to an irrational fear of facing personal liability. As the Claimant continued to pursue certain issues, the Respondent further became increasingly concerned that she was apparently unable to explain the bases of her views and that her conduct was confrontational, rude and unhelpful. Various concerns and complaints also started to be voiced by other members of the workforce.

7. From 3 to 8 September 2015, the Claimant spent four days working at Lufthansa's site in Germany. On 4 September she attended that company's summer party at which she was observed by many of the employees present as being very drunk and behaving in a physically inappropriate manner towards male colleagues. Her conduct made others feel uncomfortable and two colleagues mentioned this to Mr Modler, the Director of Global Regulatory Affairs and Mr Bullwein's line manager.

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8. During the evening of 7 September a colleague of the Claimant's sent her a copy of the Respondent's Licence Register, which showed the Respondent's Consumer Credit Licence ("CCL") had lapsed on 29 July 2013. Half an hour later the Claimant emailed Ms Haywood (the Respondent's Managing Director) and Mr Bullwein, attaching this Register and advising that a CCL should be sought as soon as possible, asking them to confirm they would get one to ensure they were compliant (this was cited by the Claimant as the third protected disclosure on which she relied for her ET claim). The Claimant also asked Mr Bullwein to provide written confirmation that she would not be liable for any non-compliance.

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9. Ms Haywood responded that she could not understand how the Respondent was not compliant by not having a CCL as it did not provide any consumer products. A little later she emailed Mr Bullwein to suggest they "*talk when you have a minute over the next couple of days*". For his part, Mr Bullwein responded to the Claimant's email, on a 'reply all' basis, the next morning, advising:

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> **"Before making such a big thing out of it, we should carefully analyze these two questions and then come onto a conclusion on how to proceed. I would highly advise not to send such warnings on 'non-compliance' without knowing all the facts!" (Paragraph 23)**

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He suggested the Claimant should later discuss a strategy with him as to how to get all the facts right and then come to a conclusion on how to proceed.

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10. Also on 8 September, the Claimant attended a pre-arranged meeting with Mr Bullwein, at which she was visibly upset - crying and saying she was a single parent and did not want to go to prison. Mr Bullwein reassured her there was no question of her being held personally liable or going to prison but was concerned about her response. In any event, to address her concern about any potential personal liability, it was agreed the Claimant's job title should change to Analyst for Regulatory Affairs and Contract Management.

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11. On 9 September 2015, the Claimant spoke to Mr Gibbons, the Respondent's Product Manager for the UK and Ireland. She discussed with him certain compliance issues, a number of which Mr Gibbons explained did not apply to the products the Respondent offered. One of the issues raised by the Claimant related to whether the Respondent required a CCL, something the Claimant continued to raise when she and Mr Gibbons then went into a meeting with Ms Haywood. Ms Haywood explained the Respondent had looked at this issue extensively in the past and asked why the Claimant considered there was a compliance issue. The Claimant responded she could show why the Respondent was behaving unlawfully and being "dodgy". She also raised a concern that the Respondent did not have a Money Laundering Reporting Officer ("MLRO") (later relied on by the Claimant as her fourth protected disclosure).

12. At one stage during the meeting the Claimant suggested the Respondent should make contact with the FCA by using their process for having a conciliated approach in respect of any potential breaches. Mr Gibbons expressed his view that before taking such a step they would need to be better informed of the facts. The Claimant was agitated during the meeting and on several occasions said Mr Gibbons and Ms Haywood could go to prison. Ms Haywood and Mr Gibbons agreed to contact the Respondent's lawyers and take advice before any approach was made to the FCA. Ms Haywood was, however, concerned about the Claimant's conduct at this meeting, which she felt was confrontational, rude and unhelpful. Her concerns were then echoed in feedback she received later that day from a member of the management team, Mr Duder, who complained that the Claimant did not listen, made up her mind on things without looking into anything thoroughly enough and had no commercial awareness.

13. Later, still on 9 September, Ms Haywood had a telephone call with Mr Bullwein about the Claimant during which she informed him of the earlier meeting. Mr Bullwein said he

shared some of her concerns, both having reservations as to whether the Claimant had the ability to do her job. Mr Bullwein was due to be on annual leave the following week so it was agreed he would review the situation once he returned to see whether there had been any improvement following the change to the Claimant's job title, which was confirmed in writing and agreed by the Claimant on 10 September.

14. The Respondent did not find, however, that this changed the way in which the Claimant conducted herself with others, with various complaints being made in the period 9 to 21 September as to how she continued to raise her concerns; in particular, it was felt that the Claimant was disrespectful in an exchange with Ms Haywood on 21 September (a conversation relied on by the Claimant as what she said were her sixth, seventh, and eighth protected disclosures). Given the importance of the exchange, it is worth setting out the ET's findings in this regard in full:

> **"45. The following Monday afternoon (21 September) the Claimant stopped Ms Haywood as she was walking past her office and again asked her whether the Respondent kept minutes of key decisions. Ms Haywood queried what she meant by "key decisions" and the Claimant did not immediately provide a clear answer. In the course of the discussion the Claimant said to Ms Haywood in a tone that Ms Haywood found particularly disrespectful and contemptuous "Do you actually know how to run a company"? Ms Haywood was taken aback by that comment and it signified to her that the Claimant had no respect for her. Ms Haywood asked the Claimant what the issue was and why she wanted the minutes to try and elucidate what the Claimant was asking for. The Claimant said that she was concerned about having compliance decisions recorded so that if she made a suggestion that was not followed she would be covered. Ms Haywood responded to that by saying something like: "So you want your ass covered", and walked away. Later she returned and apologised to the Claimant for making that comment. However, following that exchange it was very clear to Ms Haywood that it would be difficult for her and the Claimant to work together. Following that exchange the Claimant sent Ms Haywood a link which showed the requirement under the Companies Act to record minutes of members' and directors' decisions."**

15. The following day the Claimant had a further meeting with Mr Bullwein in which she raised a number of concerns and herself complained of Ms Haywood's conduct the previous day. The ET found, however, that, contrary to her case, she did not request that the Respondent should take minutes of compliance decisions and Mr Bullwein did not say that would take at least two years. On the contrary, the ET concluded, there was nothing to stop the Claimant

from recording any compliance advice that she gave. More generally in this meeting, Mr Bullwein tried to motivate the Claimant by encouraging her to focus on goals that were easily achievable rather than doing everything at once.

16. Following that discussion with the Claimant, however, Mr Bullwein met with Ms Haywood, who updated him on the further negative feedback she had received and the Claimant's conduct the previous day. Mr Bullwein concluded there had been no improvement and there was no point in continuing the Claimant's employment, observing she had proved worse than expected and "*left behind burnt soil pretty much everywhere after only six weeks in the job*". That decision was communicated to the Claimant during the afternoon of 22 September, explaining it was felt there was a cultural misfit, in particular arising from the Claimant's approach to her work and those she worked with. Her employment was thus terminated with two weeks' pay in lieu of notice.

The ET's Decision and Reasoning

17. The Claimant brought ET proceedings complaining, relevantly, of automatic unfair dismissal by reason of having made protected disclosures. As the Claimant did not have sufficient service to bring a claim of unfair dismissal under section 98 of the **Employment Rights Act 1996** ("the ERA"), she bore the burden of demonstrating that the reason or principal reason for her dismissal was the prohibited reason in issue for the purposes of section 103A.

18. The ET did not accept that the Claimant had made any protected disclosures save in respect of one disclosure of information, disclosure 3 (wrongly labelled "disclosure 6" by the ET), concerning the Respondent's lapsed CCL. Relevantly for the purposes of this appeal, the ET rejected the Claimant's contention that disclosure 4 was a qualifying disclosure. That

related to her case that she had disclosed information that the Respondent did not have an MLRO. The ET found that was not a qualifying disclosure as the Claimant was not disclosing anything of which the Respondent was not already aware; concluding that:

> **"53. The Claimant's case is that she disclosed information that the Respondent did not have a registered MLRO. I concluded that the Claimant did not at any stage disclose information, in the sense of making the Respondent aware of something which it was not previously aware, that the Respondent did not have a registered MLRO. The Respondent was aware of the fact that it did not have a registered MLRO. … The Claimant expressing her opinion that the Respondent was required to have somebody registered as an MLRO does not amount to the Claimant disclosing information that tended to show that the Respondent was in breach of legal obligations or committing a criminal offence. …"**

I pause at this stage to note it is conceded by the Respondent that the ET there erred in its approach to the question of protected disclosure; it was wrong to take the view that there could only be a protected disclosure if it related to information the Respondent did not already know.

19. It is also relevant to have regard to the ET's findings in respect of disclosures 6, 7 and 8, as follows:

> **"56. I have not found that the Claimant told Ms Haywood on 21 September that it was an offence not to keep minutes under the Companies Act or that keeping minutes of compliance decisions for the purposes of accountability for a FCA regulated firm was important. I found that the Claimant asked Ms Haywood whether the Respondent kept minutes of key decisions and clarified later that she was referring to minutes of compliance decisions. The Claimant also made it clear that the reason she was asking them that was that she wanted to make sure that if she made a suggestion which was not followed, she would be covered. The Claimant did not in that discussion give Ms Haywood any information that tended to show that the Respondent was likely to be in breach of its legal obligations. She made an inquiry as to whether certain minutes were kept and made clear that the reasons she was asking was to ensure that she was protected. It follows from that that the Claimant could not reasonably have believed that what she was raising was in the public interest."**

20. Although there had been a discussion between Ms Haywood and Mr Bullwein about terminating the Claimant's employment only two days after the Claimant had made disclosure 3, the ET found it unlikely there was any causal link. First, because Mr Bullwein had himself asked the Claimant to find out what the position was regarding the CCL and then report back to him; that is, inviting the very disclosure she then made. Second, because the ET was satisfied that what caused the Respondent concern was not the Claimant's disclosure of information but

how she reacted to that information thereafter: her inability to give rational and cogent reasons for her belief, her failure to investigate the background, her irrational fixation on, and fear of, her personal liability, her inability to put forward any constructive proposals for a resolution of an issue, and her failure to listen to the views of others. The ET concluded it was that conduct which caused the Respondent concern. While it followed the protected disclosure, it was genuinely separable from it (see ET, paragraph 63). Moreover, as the ET observed, the Respondent did not decide to dismiss immediately after the protected disclosure but waited to see if the change in Claimant's the job title - intended to alleviate her concerns about personal liability - might lead to an improvement. Given the various complaints and concerns raised by others about the Claimant (allowing that individual incidents - which included the Claimant's behaviour at the summer party in Germany, a matter drawn to Mr Bullwein's attention during his annual leave - might not have been sufficient on their own to warrant her dismissal), together with Ms Haywood's own experience, the ET was satisfied "*the principal reason for the Claimant's dismissal was that, because of her conduct and her relationship with her colleagues, the Respondent had grave doubts about her ability to be effective at her job*" (paragraph 65). It was not because of her protected disclosure, but because "*Ms Haywood had had reservations about whether the Claimant's conduct would improve following the change of title and the [Claimant's] exchange with her on 21 September when the Claimant was rude and disrespectful to her confirmed her view that the Claimant could not work together*" (paragraph 64). Thus, because "*of her conduct and her relationship with her colleagues, the Respondent had grave doubts about her ability to be effective at her job*" (paragraph 65).

21. In the alternative, even if any of the other matters relied on by the Claimant were protected disclosures - albeit rejected as such by the ET - it further concluded:

> **"65. … the Claimant suggesting that legal advice be sought on those issues was not the reason or principal reason for her dismissal. Ms Haywood agreed that legal advice should be sought**

on two of the issues raised by the Claimant. The only dispute about the third matter was not whether legal advice should be sought but when it should be sought."

The Statutory Framework and the Case Law

22. Section 43B of the **ERA** (inserted by the **Public Interest Disclosure Act 1998** and as amended by section 17 of the **Enterprise & Regulatory Reform Act 2013** ("the 2013 Act")), relevantly provides:

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following -**
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> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
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> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
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> **…**
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> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."**

23. As to whether or not a disclosure is a protected disclosure, the following points can be made:

23.1. This is a matter to be determined objectively; see paragraph 80, **Beatt v Croydon Health Services NHS Trust** [2017] IRLR 748 CA.

23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540 EAT.

23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information:

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the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 EAT.

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24. As for the words "*in the public interest*", inserted into section 43B(1) of the **ERA** by the **2013 Act**, this phrase was intended to reverse the effect of **Parkins v Sodexho Ltd** [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).

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25. More generally, in **Chesterton**, Underhill LJ offered the following guidance. First, as to the approach that has to be taken in general:

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> **"27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of s.43B as expounded in *Babula* (see paragraph 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
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> **28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the 'range of reasonable responses' approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to 'the *Wednesbury* approach' employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative.**
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> **29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the**

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worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase '*in* the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

26. More specifically, where the disclosure relates to something that is in the worker's own interest:

"37. … where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be though that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case …"

27. Turning then to the question whether a dismissal was because of a protected disclosure and thus automatically unfair. Section 103A of the **ERA** provides:

"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."

This requires an enquiry into what facts or beliefs caused the decision-taker to decide to dismiss. This may require the ET to do more than simply consider what was the reason for dismissal by reference to any particular protected disclosure, in isolation; it might be necessary to consider that question against a history of protected disclosures and to ask whether, taken together in that history, the prohibited reason was the reason or principal reason for dismissal; see **El-Megrisi v Azad University (IR) In Oxford** UKEAT/0448/08.

28. A further issue that may arise when determining what was the reason for dismissal, is sometimes referred to as the question of separability: the ET may need to resolve whether the real reason (or principal reason) for the dismissal was the protected disclosure itself *or* the manner in which that disclosure was made. In addressing this issue in **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500, the EAT gave the following guidance:

> **"49. First, as a matter of statutory construction, s.47B of ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. A protected disclosure is 'any disclosure of information' which in the reasonable belief of the employee tends to show the existence of one of the state of affairs specified in s.43B(1) of ERA, eg that a criminal offence has been or is being committed or that a person is failing or is likely to fail to comply with a legal obligation or that a miscarriage of justice has occurred, is occurring or is likely to occur. There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed.**
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> **50. Secondly, that distinction accords with the existing case law which recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself. In *Bolton School v Evans* [2007] IRLR 140, the Court of Appeal recognised a distinction between disclosing information - in that case, that the school's computer system was not secure - and the fact that the employee hacked into the computer system in order to demonstrate that the system was not secure. Disciplining the employee on the ground that he had engaged in unauthorised misconduct by hacking into the computer system did not involve subjecting the employee to a detriment on the grounds that he had made a protected disclosure. The conduct, although related to the disclosure, was separable from it. The Court of Appeal noted, however, that a 'tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself' (see the comments of Buxton LJ at [2007] IRLR 140 at paragraph 18).**
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> **51. The Employment Appeal Tribunal reached a similar conclusion in *Martin v Devonshires Solicitors* [2011] ICR 352. That case concerned discrimination contrary to s.4 of the Sex Discrimination Act 1975 (essentially victimisation of a person for doing a protected act) rather than the provisions governing protected disclosures under ERA. The principle is, however, similar. The appellant in that case had made allegations of sex discrimination against two partners in the firm of solicitors involved. The statements were in fact untrue. However, the appellant, who had mental health difficulties, did not appreciate that they were untrue. The fact that the appellant had done protected acts, in that case making complaints of sex discrimination, formed part of the facts leading to her dismissal. The reason why the employer dismissed the appellant, however, was not the making of those complaints but rather the fact that the complaints involved false allegations which were serious, that they were repeated, that the appellant refused to accept that they were untrue and that she had a mental condition which was likely to lead to unacceptably disruptive conduct in future. The reason for the dismissal was that the appellant was mentally ill and the management problems to which that gave rise. The Employment Appeal Tribunal accepted that the reason for the dismissal constituted:**
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> > **'23. … a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.'**

52. Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

53. That conclusion is not, in my judgment, altered by the decision in *Woodhouse v West North West Homes Leeds Ltd* [2013] IRLR 773. That case involved alleged victimisation. The appellant had lodged a series of grievances alleging racially discriminatory conduct against himself. The grievances had been investigated and ruled to be unfounded. The appellant, however, remained of the view that he had been subjected to racially discriminatory conduct and the fact that his grievances had been rejected reinforced that conclusion in his mind. The employer decided to dismiss the appellant. The appellant had always done his job properly and there were no doubts about his abilities when performing his job and that was not the reason for the dismissal. Rather, the tribunal found that the reason for the dismissal was that the employer considered that the appellant was convinced that the managers were treating him in a racially discriminatory fashion and so concluded that he, the employee, had lost trust and confidence in the employment relationship. The Employment Appeal Tribunal considered that, on the facts, there were no features which were separable from the fact of making the grievances. The features relied upon by the employer involved a view of the appellant's subjective state of mind and the possibility that he may make further complaints in future. In reality, the Employment Appeal Tribunal considered that, on an analysis of the tribunal's findings the reason for the dismissal, described in terms of a loss of confidence and trust by the employee in the employment relationship, was the fact that the appellant had made complaints of racial discrimination. The factors relied upon were not therefore properly separable on the facts of that case from the doing of the protected acts.

54. The Employment Appeal Tribunal in *Woodhouse* suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional. In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did. In considering that question a tribunal will bear in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph 22 of the decision in *Martin v Devonshires Solicitors* [2011] ICR 352 that:

> **'Of course such a line of argument is capable of abuse. Employees who bring complaints often do 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 purposes to object to "ordinary" unreasonable behaviour as 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 made in some cases does not mean that it is wrong in principle.' "**

29. Further, see **Beatt** at paragraph 94:

> **"94. … it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500 is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made)."**

The Appeal and the Parties' Submissions

30. The first of the amended grounds of appeal complains that the ET erred in finding that disclosures 4 and 6, 7 and 8 were not protected disclosures. Specifically, in relation to disclosure 4, it is said the ET erred in directing itself (see paragraph 53) that a qualifying disclosure must be of information of which the Respondent was unaware. As I have recorded, that point is conceded by the Respondent. As for disclosures 6, 7 and 8, it is claimed that the ET erred (at paragraph 56): first, in holding that the Claimant did not provide information that tended to show the Respondent was likely in breach of its legal obligations, and second, in holding that a disclosure made partly out of self-interest would not be a protected disclosure.

31. By what is now the Claimant's second ground of appeal, she further takes issue with the ET's finding as to the reason for her dismissal, i.e. as other than her protected disclosures. First, she contends that, in holding that the conduct which caused the Respondent concern was genuinely separable from protected disclosures she had made, the ET erred in failing to have regard to or apply the approach set out in **Panayiotou**; see above. Secondly, she contends that the ET's conclusion at paragraph 65 - that the principal reason for her dismissal was not because of one or more of her disclosures, was perverse given that:

(a) the Claimant made a protected disclosure on 7 September at 6.38pm (i.e. disclosure 3);

(b) at 6.50pm Ms Haywood emailed Mr Bullwein saying "*Can we talk when you have a minute over the next couple of days*";

(c) conversations about terminating the Claimant's employment first took place on 9 September 2015, two days after that disclosure;

(d) the Respondent's case as to whether it was aware that the CCL had expired shifted - see, for example, an email of 22 September 2015 at 4.12pm.

A The Respondent resists the appeal essentially relying on the Reasons provided by the ET.

The Claimant's Submissions

B 32. Disclosure 4 was the disclosure that the Respondent did not have a registered MLRO. The ET rejected this as a protected disclosure as the Claimant was not disclosing anything of which the Respondent was not already aware. That, however, was a requirement not present in the **Act** (as I have recorded above, the Respondent accepts that the ET thereby erred in law). C The EAT could not be certain that the ET's error in this regard would have made no difference to the ultimate finding (going to the question of reason - see below).

D 33. As for disclosures 6, 7 and 8, the ET erred in the two respects set out above. First, it was clear that in meetings and by email there was a clear provision of information by the Claimant (see paragraph 45, cited above.); the ET had erred in failing to adopt a cumulative E approach; had it done so, it would have been bound to find that this was a disclosure of information; see **Norbrook**. Second, on the question of self-interest, per **Chesterton Global**, just because a protected disclosure was also made in self-interest that did not preclude it from being a qualifying disclosure. In this case, the issue of the minutes was capable of meeting the F public interest requirement; if there is a statutory duty to minute compliance decisions, there must be a public interest in that matter.

G 34. Turning then to the issue of the reason for dismissal and section 103A **ERA**, more than one disclosure together might be a protected disclosure and, where there is more than one protected disclosure, it may be necessary to consider the cumulative effect of the history of H disclosures when determining the reason for dismissal; see **El-Megrisi**. Whilst possible to distinguish between disclosure and manner of disclosure (and allowing that the manner of

A disclosure need not be exceptional before separability could be invoked) - see **Panayiotou**, and cases to similar effect including **Shinwari v Vue Entertainment Ltd** UKEAT/0394/14 and **Eiger Securities LLP v Korshunova** [2017] IRLR 115 EAT, and **Beatt** as cited above - the ET needed to be careful when considering such an argument given the public policy behind the protection for whistleblowers in this regard. The case law gave examples of when a genuine distinction could be made; for example, in **Panayiotou**, the Claimant was completely unmanageable. Allowing that each case turns on its own facts, in the present case the reason given for the dismissal, as the ET recorded, was that there was a cultural misfit. In the notes of the meeting regarding the Claimant's dismissal and in the letter confirming the decision to dismiss it not only referred to the cultural misfit but also denied any suggestion she was being dismissed by reason of an issue relating to her competence. And, properly reading the ET's findings of fact, there was nothing in the Claimant's conduct that could be described as more than ordinary unreasonableness (see, for example, at paragraph 24 of the ET's findings).

35. It was further apparent from the ET's findings that the Respondent was concerned about the disclosures the Claimant had made. That was also supported by the background documentation. When the ET's reasoning was properly examined, it was apparent it had failed to appreciate that the way in which the Claimant raised her concerns - what was described as her conduct - was part and parcel of the disclosure.

36. If the ET had, as the Claimant contended, got the approach wrong, it was unnecessary to consider the further issue of perversity. If, however, it was found to have correctly approached the question of separability, then, in the alternative, the Claimant contended that the ET's findings were perverse, in particular given that the Claimant's third disclosure had triggered an immediate email response between Ms Haywood and Mr Bullwein to arrange a telephone call

(an email sent only minutes after the disclosure) and in the subsequent telephone call termination of the Claimant's employment was deemed to be highly likely.

The Respondent's Submissions

37. Addressing first the attempts to challenge the ET's findings on further specific disclosures, the Respondent, whilst accepting the ET's error in respect of disclosure 4, contended that could not reasonably be seen as having any impact on the outcome of the case. The ET found that the live and contentious issue between the Claimant and the Respondent was whether the Respondent should have an MLRO. Whether or not that should have been treated as a qualifying disclosure, the Claimant was not dismissed for raising that matter; on the question of reason, the ET had answered this point by its alternative finding. As for disclosures 6 to 8, the ET had found that the Claimant had asked Ms Haywood whether the Respondent kept minutes of key decisions but, although Ms Haywood had queried what she meant, she did not immediately provide a clear answer and only clarified to the extent she was talking about compliance decisions. Asking whether minutes of compliance decisions were kept was not a disclosure of information under section 43B; the Claimant was seeking to reconstruct a disclosure that was not there (both on the Claimant's pleaded case and on the ET's findings); ultimately the ET had found against the Claimant on the facts (see paragraph 56) and the answer to this ground of appeal was that there was no disclosure; at most, the Claimant's case was that she had said that the Respondent was not complying with minute taking requirements, but the ET had found she was not even saying that. Moreover, the ET's finding at paragraph 56 made clear the *sole* reason for the Claimant raising the issue of minutes was her self-interest. This was not a partly self-interest/partly public interest case such as **Chesterton** - there was simply no evidence that the public interest was in the Claimant's mind at all. In any event, it was clear from the ET's findings that there could be no basis for thinking that, even if these

were protected disclosures (taken separately or together), it would have led to any different outcome given the conclusion on the reasons for dismissal.

38. As for the reason for dismissal, there was no indication the ET had failed properly to apply the principles set out in **Panayiotou**; on the contrary, the conduct which gave rise to concern (described at paragraphs 61 and 62 of the Reasons) was plainly separable from the disclosure/s actually made; it went beyond the manner in which the Claimant made her disclosures. The Respondent was, as the ET found, concerned about the Claimant's conduct, which raised fundamental and legitimate concerns about her ability to do her job. This was more akin to a **Bolton School** case then **Panayiotou**. It was particularly important to note that, on one view, for someone in a compliance role almost everything they raised would be related to matters that could amount to protected disclosures; separability was of particular importance in such cases, allowing some degree of managerial scrutiny.

39. As for the suggestion that the ET's conclusions were perverse, its finding in terms of the reason of the dismissal was because of the Claimant's conduct and her relationship with colleagues, which led the Respondent to have grave doubts about her ability to be effective in her job. In making that finding, the ET was well aware of the relevant chronology and expressly rejected the suggestion it should thus infer that the Claimant's protected disclosure was the reason for her dismissal. And the other matters went nowhere, given the ET's findings.

Discussion and Conclusions

40. Addressing first the ET's finding in relation to disclosure 4, it is fairly conceded by the Respondent that this was founded upon an error of law, the ET wrongly directing itself that a qualifying disclosure must be of information of which the Respondent was unaware. The

Respondent accepts this renders the ET's decision on protected disclosure 4 unsafe but says it can make no difference to its decision on reason. I return to this point below.

41. As for disclosures 6, 7 and 8, the Claimant contends the ET erred in failing to look at what was disclosed on a cumulative basis: had it done so, it would have been apparent that the Claimant's question, her subsequent explanation for asking that question and then her sending the link to the **Companies Act** requirements, did just not make an allegation but, taken together, amounted to the disclosure of information; alternatively, the ET erred in finding this was not a protected disclosure because it was partly made out of self-interest.

42. I note that the challenge to the ET's finding in respect of protected disclosures 6 to 8 was not put as a perversity ground. The Claimant thus has to make good her arguments on the basis of the ET's findings of fact in this regard. In my judgment, that is fatal to her appeal on this ground. First, because the ET - having clearly had regard to the three matters relied on as constituting one disclosure - made no finding to support a conclusion that the Claimant had disclosed information; see paragraph 45. And, given its primary findings of fact, I am unable to see that the ET did other than reach a permissible conclusion at paragraph 56 that the Claimant did not give Ms Haywood any information that tended to show the Respondent was likely to be in breach of its legal obligations: she made an enquiry as to whether certain minutes were kept and made clear that the reason she was asking was to ensure that she was protected on a personal basis. Even if that was not correct, it is simply not a fair characterisation of the ET's findings to say that it required the disclosure to be made wholly in the public interest, thus failing to adopt the approach laid down in **Chesterton**. Crucially, the ET made no finding that the Claimant's disclosure was in anything but her own interest; see paragraph 56. And, although I take Mr Grant's point that a failure to comply with the provisions of the **Companies**

Act in respect of certain minute taking obligations could be a matter in the public interest, I am, however, not concerned with a hypothetical case: here, neither the evidence nor the ET's findings go so far. On the Claimant's own evidence (having regard to the note provided by the Employment Judge in this respect), she was simply asking about minutes of compliance decisions. On the ET's finding, when she was asked why, she explained it was because she was concerned to make sure she was protected if any suggestion she had given was not followed. I am unable to see the basis for the contention that the ET ought properly to have found that the Claimant's desire to ensure her advice was recorded so she might not herself face criticism in the future was a matter of public interest.

43. I turn next to the reason for the Claimant's dismissal and first address the arguments on perversity. Again, it is important to keep in mind what was permitted to proceed to this Full Hearing in terms of the amended grounds of appeal. In large part, the perversity challenge is based upon the coincidence of timing: the fact that Ms Haywood emailed Mr Bullwein seeking to talk to him about the Claimant (that being a reasonable inference given it was shortly after the Claimant's email on 7 September) and the further fact that they did indeed speak about the Claimant only two days later and shared their concerns as to whether her employment should or could be continued. The ET was, however, very clearly aware of this apparent coincidence in timing - it expressly acknowledged the point at paragraph 63 - but did not infer that the third protected disclosure was the reason for the dismissal; on the contrary, it rejected that possibility. First, because it found the Respondent decided the Claimant should be given a further opportunity, with the change in job title intended to alleviate her concerns (which would thus allow her to go about her duties without the pressure she had apparently felt). More than that, however, the ET rejected that possibility because it found the dismissal was for other reasons.

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44. The other perversity points raised in the amended grounds of appeal were not the subject of focus in oral argument and I think that was sensibly judged. The argument that the Respondent's case on the CLL expiry had shifted is founded upon a nuanced and partial reading of the underlying materials and cannot go anywhere in terms of the ET's reasoning; it does not satisfy the high test for a perversity challenge.

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45. Turning then to the ET's finding on reason, it is apparent that it appreciated the difficulty identified in **Beatt**: a whistleblower may well be perceived (sometimes with justification) as a difficult colleague - they may well raise matters that others (even if not seeking to hide anything) would prefer not to have to deal with. It can be all too easy to think it is the *manner* of blowing the whistle that is the issue, when really it is simply the whistleblowing itself. In this case, however, the ET - looking at the question whether the third protected disclosure was the real reason for the dismissal - was clear: the Respondent was not concerned by the fact that the Claimant had drawn that information to its attention; it was not the disclosure of information that was the issue. The Respondent was, rather, concerned with what the Claimant did after she had made her disclosure; with her unresearched assumptions and demands; her conduct at meetings and failure to give rational, cogent reasons for her beliefs; her irrational fixation on her personal liability; and her inability to listen or take on board what her colleagues had to say. Of course, all of this was in the context of the Claimant's role in compliance, but the ET was clear: it was not *what* the Claimant was raising in that respect, but the *way* in which she was raising it and then, thereafter, conducting herself.

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46. Accepting that the ET's conclusion was dependent upon its finding that the third disclosure was the only protected disclosure, I now need to bring in the fourth disclosure and (for completeness) allow for the possibility that disclosures 6 to 8 should also be taken into

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account. The ET itself carried out this exercise in its alternative finding; see the end of paragraph 65 which I have set out above. That said, I can allow that the alternative finding might be said to focus on the Respondent's reaction rather than the question of reason. Approaching the question afresh, and thus bringing in the fourth disclosure, does not, however, avoid the ET's clear finding that no decision to dismiss was made until after 21 September; the Respondent still choosing to hope that improvements might be made. Again, for completeness however, I will allow that it still forms part of the relevant background and I should therefore still ask whether it might have changed the ET's conclusion: is there any real world basis on which the ET might have reached a different conclusion if required to take into account the fourth protected disclosure?

47. Adopting this approach, I am firmly satisfied that there is not. The ET concluded that the Claimant's conduct and relationship with her colleagues and ability to be effective at her job was the real reason for the Respondent's decision to dismiss. The Claimant seeks to suggest that that finding is contradicted by the reason she was given on dismissal, which did not identify her competence as an issue. That, however, seeks to take a perversity challenge, which is not one of the bases on which this matter has been permitted to proceed. In any event, the finding the ET was making about her conduct was not a finding about competence as such; although there were concerns as to whether the Claimant was raising points with any justification, it was the way she chose to do so rather than her possible incompetence that weighed with the Respondent.

48. Does the position change if I also allow that protected disclosures 6, 7 and 8 should be taken into account? Again, I conclude it does not. The ET's finding as to the principal reason for dismissal is as to a properly separable matter - the Claimant's conduct after she had

disclosed matters; her rudeness; her inability to work with others, in particular to follow up on the points she herself had raised; her failure to explain when she came to conclusions that the Respondent could not understand and questioned.

49. For all those reasons, whilst the ET made an error in its approach to the fourth protected disclosure, I am satisfied there was no failure on its finding on reason and I therefore dismiss the appeal.