Appeal No. UKEAT/0100/17/RN
UKEAT/0101/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21-23 November 2017
Judgment handed down on 17 January 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

DR N MALIK — APPELLANT

CENKOS SECURITIES PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JANE MULCAHY (One of Her Majesty's Counsel) Instructed by: Gibson Dunn & Crutcher LLP Telephone House 2-4 Temple Avenue London EC4Y 0HB
For the Respondent	MR SIMON FORSHAW (of Counsel) Instructed by Clyde & Co LLP 138 Houndsditch London EC3A 7AR

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Automatically unfair reasons

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

PRACTICE AND PROCEDURE - Perversity

VICTIMISATION DISCRIMINATION - Whistleblowing

VICTIMISATION DISCRIMINATION - Protected disclosure

VICTIMISATION DISCRIMINATION - Detriment

VICTIMISATION DISCRIMINATION - Dismissal

The Tribunal did not err in failing to refer expressly to an aspect of the Claimant's case that was neither pleaded nor identified in the agreed List of Issues. It is, in any event, implicit from the Judgment that the Tribunal considered the claim of collusion but rejected it.

The contention that the Tribunal failed to give reasons for its decision is misconceived and based on a misunderstanding as to the Tribunal's function in giving reasons.

Whilst the Tribunal might have misstated the test in respect of victimisation, that error made no difference to the outcome.

The reconsideration appeal and the application to adduce new evidence fail because the new evidence does not satisfy the first two limbs of the test in **Ladd v Marshall**.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The Claimant's main appeal is against a Decision of the Central London Employment Tribunal ("the Tribunal") dismissing his claims that he had suffered detriments and had been constructively dismissed on the grounds that he had made protected disclosures, and also dismissing his claim of victimisation on the grounds of race and/or religion. There is a subsidiary appeal against a Decision of the same Tribunal refusing an application to introduce new evidence by way of a reconsideration application.

Factual Background

2. The Claimant was employed by the Respondent from January 2012 until 8 December 2015 when he resigned. He was employed as a Senior Research Analyst.

3. The Respondent is an independent specialist securities firm which focusses on UK small and mid-cap companies. It is subject to the regulatory regime provided for in the **Financial Services and Markets Act 2000**. As is typical for such firms, the Respondent has in place policies and procedures designed to encourage its employees to avoid and declare potential conflicts of interest by disclosing all personal transactions undertaken by the employees concerned or their "connected persons".

4. The Respondent is divided into different teams. Each team has a stand-alone profit and loss account. The Respondent's teams are run *de facto* as independent businesses. One such team was the Growth Companies Team ("GCT"), headed by Mr Warner Allen, Mr Kerr and Mr Morse. The Claimant worked in GCT.

5. The Claimant was employed with the job title of "Head of Life Sciences Research". The Claimant's role involved the preparation of research notes in relation to the Respondent's clients, often with a view to helping them secure investment.

6. In about February 2014, the Claimant introduced a company called Advanced Plasma Therapies ("APT") to the Respondent. In February and March 2014, the Claimant sent confidential and financial information relating to APT to his personal email account and then forwarded it to his wife, Alia Minhas. The Director of APT, Mr Preston, accepted during cross-examination that the information sent to Ms Minhas was valuable to her in relation to a consultancy role that APT wanted her to perform.

7. On 21 March 2014, the Claimant sought permission from the Respondent's compliance department to participate in the current equity fund raise in APT. Mr Cooper, Head of Compliance at the Respondent, rejected that request on the basis that there would be a clear conflict between the Claimant's financial interests and the interests of the client.

8. APT became a client of the Respondent on 19 May 2014. In August 2014 the Respondent discovered that the Claimant's wife had acquired shares in, and was working as a consultant for, APT. Mr Cooper considered this to be a potential disciplinary matter and wrote to the Claimant on 12 August 2014 inviting him to attend a disciplinary investigation meeting to consider allegations that the Claimant's wife was a shareholder in APT in breach of the Respondent's personal account dealing rules.

9. The disciplinary investigation meeting took place on 15 August 2014 and was conducted by Mr Hodges, head of the IPO/Capital Markets Team ("IPO"). The Claimant's

position was that he did not know that his wife was a shareholder in APT or that his wife worked for APT. (Having regard to evidence of email exchanges between the Claimant, his wife and Mr Preston at the time, the Tribunal regarded the Claimant's position as "*unlikely*".)

10. Mr Hodges considered the matter to be extremely serious. However, as this was the Claimant's first involvement in anything of this nature, he decided to give the Claimant a written warning in September 2014. Mr Hodges gave evidence that, with hindsight, this was probably not the right decision and he was aware that some colleagues felt that he had been too lenient towards the Claimant. In deciding to give the Claimant a second chance, Mr Hodges was influenced by the Claimant's relationship with an institutional investor with whom the Respondent worked regularly, Mr Woodford of Woodford Investment Management ("WIM").

11. The Claimant was in the habit of recording meetings and conversations on his mobile phone. This was done covertly without permission. The Claimant sought to explain that he commenced making recordings after a matter concerning another client "in order to protect himself". However, the Tribunal considered that it was not given a satisfactory explanation as to why the Claimant had recorded these conversations and meetings.

12. During one such recorded conversation between the Claimant and Mr Hodges at around the time of his disciplinary hearing, Mr Hodges was heard to say that, "*These people are dangerous … Don't mess with them. They are dangerous people, including the guy upstairs, Cooper, he's dangerous. These people are fucking dangerous. Don't mess with them*". The Tribunal accepted that Mr Hodges was here referring to Mr Cooper and the Compliance Team, and not to GCT.

13. On 13 November 2014, the Claimant recorded a conversation in which Mr Kerr said, "*Everyone smile the world's safe again. Now let's bomb the Middle East*". Mr Kerr's evidence about this remark, which the Tribunal appears to have accepted, was that it was made during a news story showing some window cleaners who had got stuck on the side of a skyscraper, and was made as a joke. He denied that it was a joke aimed at the Claimant's race or religion. The Claimant is of Pakistani heritage and his religion is Islam.

14. In early 2015, there were conversations about the possibility of the Claimant moving teams. The Claimant wanted to move from GCT to the IPO Team (headed by Mr Hodges). Mr Warner Allen did not want the Claimant to leave GCT because of the progress GCT had made in the Biotech Sector, and he sought to persuade the Claimant to stay. However, by July 2015 the Claimant had decided that he would leave GCT and join the IPO Team. This was apparently pursuant to an offer made by Mr Hodges to that effect.

15. There followed a meeting between Mr Hodges, Mr Nally (the Head of the Respondent's Natural Resources Team) as well as Mr Warner Allen and Mr Kerr (of GCT) on 4 August 2015 about the Claimant's desire to move from GCT to the IPO Team. It is apparent from an email sent by Mr Kerr after the meeting that GCT was not happy about the moves between teams. He suggested that there be a moratorium on any further movement between teams and that any recruitment costs for a new GCT employee be met by the Claimant. This proposal was quickly dismissed by Mrs Gray of Human Resources ("HR").

16. GCT commenced looking for a replacement Analyst. On 24 August 2015, Mr Warner Allen wrote to Mrs Gray confirming that GCT was reluctantly acceding to the Claimant's wish to move teams.

17. The Claimant went on holiday in August 2015 and returned on 27 August 2015. When he returned from holiday, the Claimant was told by Mr Hodges that the GCT leaders wanted to recruit a replacement for him to work in the GCT. The recruitment of a new Analyst specialising in biotech within GCT would have affected the Claimant's position as the only specialist in this field at the Respondent. Mr Hodges advised the Claimant to complain to HR. The Claimant did so, by way of a formal grievance, in which he stated that the reason that he wanted to move to the Respondent's IPO Team was because of alleged bullying and harassment going back some years.

18. Mrs Gray wrote to the Claimant on 28 August 2015 to reassure him that the Respondent takes allegations of bullying very seriously and invited him to send some detailed examples and evidence of the general issues raised. She also informed the Claimant that GCT's recruitment of a new Analyst had been suspended.

19. On 1 September 2015, the Claimant moved to the IPO Team.

20. On 3 September 2015, the Claimant had a meeting with Mrs Gray in which he provided a few details of some of his allegations. The following day Mrs Gray met with Mr Kerr and Mr Morse to update them. They were told that the grievance was currently being dealt with informally but that in the meantime the recruitment of the new Analyst should remain on hold, that the GCT should act professionally with the Claimant at all times, and that they should ensure no derogatory comments were made about him either internally or externally. Mr Kerr expressed concern that he was being accused of making racist comments. He felt that the Claimant should provide details of his allegations or withdraw them.

21. The Claimant's grievance was investigated by Mr Chilton (the Respondent's Finance Director) and was ultimately dismissed. The grievance outcome was communicated to the Claimant on 20 October 2015.

22. Meanwhile, another issue arose in relation to a company called Northwest Biotherapeutics Inc ("NWB"). The background to this issue may be stated as follows:

(a) In April 2012, the Claimant had sought and obtained permission to become a non-executive Director of NWB. He was given permission on the basis of assurances from the Claimant that it would involve "*very limited commitments*" and would be "*restricted to conference calls in the evenings*". The Claimant had confirmed at the time that the position came with compensation of US $50,000 per year in cash. The Claimant had in fact told the Respondent that the compensation would be in cash or shares, although the Tribunal recorded only the reference to cash.

(b) It appears that the Claimant had acquired 10,000 shares in NWB by 30 April 2015. The cash value of those shares at the time was approximately $80,000. The US Securities and Exchange Commission form relating to the transaction bears the code 'P' for purchase. This shareholding was not disclosed to the Respondent. This was a breach of FCA requirements and the Respondent's rules.

(c) In September 2015, the Claimant's shareholding in NWB came to the attention of the Respondent as a result of Mr Kerr undertaking checks in relation to the holdings of WIM. Mr Warner Allen brought the Claimant's shareholding to the attention of Mr Cooper.

(d) Mr Cooper asked Mr Phillips (a Monitoring Executive employed by the Respondent) to investigate the matter. Mr Cooper was concerned not only by the Claimant's undisclosed shareholding but also about the possibility that the Claimant had been more involved in the day-to-day dealings of NWB than he had led the Respondent to believe and that the Claimant may have introduced Mr Woodford of WIM to NWB. That could give rise to a conflict of interest.

(e) Mr Phillips interviewed the Claimant on 7 and 21 October 2015 about his involvement with NWB. During the course of those meetings, the Claimant accepted that he was a shareholder of NWB and that he had introduced WIM to NWB. Notwithstanding this, the Claimant was not suspended at that time.

(f) On 28 October 2015 a report was published online by Phase V Research ("the Phase V Report"). The Phase V Report made further serious allegations about the Claimant and his relationship with NWB. It alleged that he had received a "*back hander*" for preparing a "*bullish*" research report about NWB in order to encourage investment. That "back hander" was alleged to have been executed through a somewhat complex method. It was said that the Claimant had incorporated a company in Delaware (Regen Med) and that Regen Med had been gifted shares and warrants in NWB (with a value of around US $5million). Regen Med had been incorporated by the Claimant, and his wife held "*the voting and dispositive power over the shares [in NWB] held by Regen Med*".

(g) The Phase V Report came to Mr Kerr's attention by way of an automated alert on 29 October 2015. The Claimant did not bring it to the attention of the Respondent himself, although he had told Mr Woodford about it.

(h) Mr Kerr forwarded part of the report to Mr Warner Allen commenting that it was "*Very concerning, needs an answer, could just be some shorting bullshit but needs to be looked into for all our sakes*". Mr Warner Allen notified Mr Phillips about the report. Mr Phillips, in turn, emailed Mr Cooper, who was on holiday at the time, about the report. Mr Cooper responded by suggesting the commissioning of a report on the allegations.

23. On 2 November 2015, Mr Cooper and Mr Phillips met the Claimant to discuss the report. There is no recording of this meeting or of any subsequent meetings or discussions. The Claimant sought to explain his actions, suggesting for example that his involvement with Regen Med was limited only to its incorporation. Following the meeting, Mr Cooper emailed Mr Chilton and Mr Aherne to say that having spoken with the Claimant:

> **"… we are not yet in a position to suspend. Navid has volunteered to provide further information in relation to the company set up with his wife which is mentioned, indeed featured, in the research report. That additional information and what comes out of the third party dd [due diligence] will guide us as to the next steps. My concerns regarding potential conflicts of interest are not assuaged but I do not have sufficient information to provide a provisional conclusion. …"**

24. The Tribunal records what happened next as follows:

> **"129. On 3 November Mr Cooper spoke to Mr Hodges and to the Respondent's legal advisers. He explained to the Tribunal that he would have expected Dr Malik to have produced the information which might exonerate him almost immediately. He had not produced any further information. Mr Hodges agreed that Dr Malik had been given his chance to explain himself and had not done so and therefore agreed that there was no other option at that time but to suspend, given the serious nature of the allegations and the potential damage to the Respondent's business if it continued to allow an employee about whom it had serious integrity concerns to work on client matters."**

25. The Claimant was suspended on 4 November 2015. The suspension letter referred to very serious allegations against the Claimant including failure to disclose his links with NWB and failing to comply with the Respondent's compliance manual and FCA requirements. The FCA was notified of the Claimant's suspension on the same day. Management at the

Respondent agreed a communiqué for clients informing them about the investigation into the allegations against the Claimant.

26. The Respondent received a report from Stroz Friedberg ("the Stroz Report") on 18 November 2015. The Tribunal set out extracts from the Stroz Report, which confirmed some of the factual allegations about the Claimant's and his wife's dealings with NWB and Regen Med, although the Claimant was not listed as an Officer or Director in Regen Med's most recent annual report.

27. The Claimant instructed solicitors. They responded to the allegations on his behalf on 26 November 2015. The Claimant declined to proceed with his appeal against the grievance outcome. By a letter dated 4 December 2015, Mr Cooper wrote to the Claimant's solicitors rescheduling the investigatory meeting for 8 December 2015. However, by a letter dated 8 December 2015 from the Claimant's solicitors, the Claimant resigned alleging repudiatory breach. It was alleged that the Claimant had been subject to intolerable treatment amounting to a fundamental breach of his contract of employment. It was also suggested that he had been constructively dismissed on the basis that the sole or principal reason for dismissal was the protected disclosures made by him over the period September 2014 to October 2015.

The Claimant's Claims

28. The Claimant lodged his claim on 1 April 2016. He claimed that as a result of the Claimant approaching potential investors directly, individuals in the GCT began to bully him and/or to harass him on racial and/or religious grounds. This bullying and harassment is said to have commenced in about May 2014. He claimed that he had made protected disclosures in respect of three matters:

(a) That there was a potential conflict of interest in relation to the Respondent's dealings with APT. Disclosures in relation to this were said to have been made from about late September and early October 2014.

(b) That the Respondent had failed to carry out any or any adequate due diligence in respect of a number of transactions. These disclosures were said to have been made from June 2015 onwards.

(c) Finally, the Claimant indicated that the Sales Team in GCT had approached investment funds about a company called Array Genomics without undertaking any or any adequate due diligence. These disclosures were said to have been made from about 3 September 2015 onwards.

29. The Claimant alleged that he had suffered detriments following the protected disclosures. Several alleged detriments were relied upon. These included:

(a) The recruitment of a replacement Analyst by GCT;

(b) The grievance outcome;

(c) The bonus for 2015, which at £229,000, was said to be less than he had been led to believe he would be paid in respect of a deal with Verseon;

(d) The investigation into his dealings with NWB; and

(e) His suspension. He also claimed that he had been constructively dismissed and that he had been victimised.

30. The Claimant's pleaded case alleged that, having made protected disclosures, he was subjected to an "*increasingly hostile environment at work as a result*". There was no express contention that his managers had colluded in targeting the Claimant with a view to getting rid of him. In fact, as to detriments, the pleaded case stated as follows:

"54. Pending disclosure, the Claimant is unable to identify which directors and employees of the Respondent were informed of the facts and content of the protected disclosures or on what date and by what means.

55. As a result of having made the protected disclosures set out above, the Claimant was subjected to the detriments set out below.

56. The Claimant believes that each of the pleaded detriments to which he was subjected were acts done by his employer on the grounds of him having made protected disclosures.

57. If, which is denied, the pleaded acts of detriment were not acts taken on the grounds of the making of protected disclosures but rather because of information or opinions provided to or withheld from the decision maker in relation to each such act of detriment or because of a prior decision of the employer that caused the subsequent decision maker to make the pleaded decision, it is to be inferred that each such prior act causing the pleaded act was an act done on the grounds of the Claimant having made protected disclosures.

58. As such, each such prior act amounted to the subjection of the Claimant to detriment on grounds of protected disclosures. Pending disclosure, the Claimant is unable to give further particulars of such prior acts."

The Tribunal's Judgment

31. The hearing before the Tribunal lasted 14 days. It was a heavy case. There were 350 pages of witness statements and a bundle extending to several thousand pages. Immediately following the hearing, the Tribunal spent 4 days in Chambers deliberating between 25 and 28 October 2016.

32. On 8 December 2016, the Claimant's solicitors wrote to the Tribunal providing it with transcripts of two further recordings of meetings which had apparently been discovered by the Claimant on the hard drive of an older laptop computer. It was said that this laptop computer had been given to one of the Claimant's sons approximately two years earlier and had since become inoperable. It was said that the Claimant had come across these recordings whilst trying to repair the old laptop for his son. On discovering the recordings the previous week, the Claimant had sent them to his solicitors who then produced transcripts. The Tribunal was invited to consider these transcripts on the basis that they, "*may be relevant to the Tribunal's deliberations*". However, there was no application at that stage for the Tribunal to recall its Judgment. On 12 December 2016, the Respondent's solicitors objected

to the admission of this evidence. They stated that their enquiries of the Tribunal had shown that the Judgment had already been typed up and that it was merely awaiting corrections. They relied, amongst other matters, on the principles established in **Ladd v Marshall** [1954] 1 WLR 1489. The Tribunal did not respond to this correspondence.

33. The Tribunal promulgated its Judgment on 21 December 2016. In summary, the Tribunal's conclusions were as follows:

(a) The Tribunal accepted that the Claimant had made some protected disclosures;

(b) However, the Tribunal found that none of the detriments alleged by the Claimant was on the ground that the Claimant had made protected disclosures;

(c) The Tribunal found that the Claimant was not constructively unfairly dismissed. It found that, save as set out in (d) below, the Claimant had not established any repudiatory breach;

(d) In relation to one alleged breach of the implied term of mutual trust and confidence, namely the steps taken by GCT in August 2015 to recruit a new Analyst, the Tribunal reached no conclusive view as to whether there had been a breach of contract. However, they concluded that the Claimant had taken no action in respect of the Respondent's acts, had continued to work, and had thereby affirmed the contract.

(e) In relation to victimisation, the Tribunal found that the Claimant had not done protected acts. However, it found that even if he had done so, he had not established that he was subjected to any detriment because he had done a protected act.

34. The Claimant then made an application for reconsideration, on the basis of the new evidence, by letter of 5 January 2017. That application was dismissed in the Reconsideration Judgment on the basis that:

(a) the new evidence could have been obtained and deployed at trial with reasonable diligence; and

(b) in any event, the new evidence would not have had an important impact on the outcome of the proceedings.

The Grounds of Appeal

35. The Notice of Appeal is very lengthy. It comprises 134 paragraphs over almost 30 pages, and is not easy to follow. Instead of setting out grounds based on errors of law, the Notice of Appeal to a large extent mounts a paragraph-by-paragraph challenge to many of the Tribunal's findings of fact. It is, therefore, unsurprising that Ms Mulcahy QC effectively abandoned the structure adopted in the Notice of Appeal, and instead relied upon the following grounds of appeal set out in her skeleton argument:

> **Ground 1: The Tribunal completely failed to engage with the case as put by the Claimant, that he was the victim of a concerted campaign to oust him from the Respondent by members of the GCT because of protected disclosures and/or protected acts. This failure was perverse and an error of law, in that the Tribunal failed to give any reasons as to why the Claimant's case was entirely ignored ("the Failure to Engage Ground").**
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> **Ground 2: The Tribunal proceeded on the basis that the Phase V Report (i) required the Claimant to be suspended when there was no evidence before the Tribunal that this was the case and/or (ii) insisted that suspension was "*a neutral act*" when the effect was to render the Claimant unemployable in any registered capacity. Further the Tribunal took no account of *Crawford v Suffolk Mental Health Partnership* [2012] EWCA Civ 138, [2012] IRLR 402 as to the requirements before suspending and wrongly distinguished *Gogay v Hertfordshire County Council* [2000] IRLR 703 ("the Suspension Ground").**
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> **Ground 3: The Tribunal found that the Claimant had made protected disclosures but (i) in relation to whistleblowing detriment claims, failed to direct itself as to the proper legal test/ the burden of proof, as well as failing to properly consider whether the protected disclosures materially influenced the treatment of the Claimant and (ii) in relation to dismissal, failed to consider whether the protected disclosures were the sole or principal reason for the dismissal.**
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> **Ground 4: In relation to the Claimant's claim of victimisation, the Tribunal:**
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> > **(a) Failed to apply the burden of proof in section 136 of the Equality Act 2010;**

(b) Failed to consider the effect of a complaint at a grievance meeting which the Tribunal found to be a protected act but then ignored;

(c) Wrongly stated the requirements for victimisation;

(d) Impliedly, at least, appears to have proceeded on the basis that the Claimant acted in bad faith in making complaints which clearly constituted protected acts; and/or

(e) Stated (both perversely and without giving any reasons) that there was "*nothing to suggest*" that the Respondent was motivated by the Claimant's allegations of race and religious discrimination when a large part of the Claimant's case was that the GCT - who were the subject of the Claimant's grievances - forced him out as a result.

Ground 5: The Tribunal misstated the law in relation to repudiatory breach, in particular in relation to the attempted recruitment of a replacement for the Claimant by the GCT while the Claimant was away on holiday, asserting (wrongly, both in fact and law) that, by continuing to work, the Claimant had affirmed the breach.

36. Whilst this was a helpful clarification of the grounds of appeal, the Claimant did not abandon the many challenges to findings of fact contained in the Notice of Appeal under the heading "Other Grounds of Appeal". An attempt to streamline the grounds of appeal merely resulted in the identification of around 20 challenges to findings of fact that were described as "mainly subsumed within other elements of our five grounds or are of a more minor nature", and which therefore did not need to be expressly addressed by the Respondent. None of the remaining challenges to findings of fact contained in the Notice of Appeal (and repeated in the skeleton argument) was either withdrawn or conceded by the Claimant.

Ground 1 - The Failure to Engage

37. The Tribunal is said to have erred in law by failing to engage with the Claimant's case that he was the victim of a concerted campaign to oust him from the Respondent by members of GCT because of protected disclosures and/or protected acts. In order to make good this ground of appeal, Ms Mulcahy QC referred to some 47 separate factual matters which she contended the Tribunal ought to have dealt with in its Judgment but did not. It was also submitted that those behind this concerted campaign by the GCT were Messrs Warner Allen,

A Kerr and Morse working together with Mr Cooper. The Claimant says that this aspect of the case was not referred to by the Tribunal at all, and that it merely approached the actions of individual players as if they were acting entirely independently.

B

38. The legal basis for this challenge is said to lie in the judgment of the Court of Appeal in **Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz** [2016] EWCA Civ 556. In that case, the Judge at first instance (Peter Smith J) found in favour of Mrs Harb that she had C made a binding contract with Prince Aziz that he would pay her £12 million and transfer to her two properties in Chelsea in return for her agreeing to withdraw certain allegations she had made about King Fahd of Saudi Arabia. The Prince appealed to the Court of Appeal on D several grounds including that the Judge had failed to deal fully with the evidence relating to the contract issue and failed to explain how he had reached his conclusions.

39. E The Court of Appeal concluded that the shortcomings in the way the Judge had dealt with the evidence were such that the appeal must be allowed. The Master of the Rolls (then Lord Dyson) stated as follows at paragraphs 34 to 39 (emphasis added):

> **"34. In our view the judge's approach to the evidence was unsatisfactory in a number of significant respects. First, he failed to identify in sufficient detail the questions that needed to be answered if he were to decide whether an agreement of the kind alleged by Mrs Harb had been made. In addition, he failed to carry out a proper evaluation of all the evidence in order to test its strengths and weaknesses. Having referred … to the fact that counsel for the Prince had made extensive criticisms of [Mrs] Harb's evidence on the grounds that it was inconsistent with her witness statement, he failed to deal with any of those criticisms and brushed them aside by saying that it was unrealistic to expect Mrs Harb to have a clear recollection of events 13 years after the event. …**
>
> **35. Similar criticisms can be levelled at the way in which the judge dealt with the evidence of Mrs Mustafa-Hasan. He did not subject it to any serious degree of scrutiny; in particular he did not deal with the submission that she had collaborated with Mrs Harb and was not truly independent. …**
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> **36. Secondly, the judge failed to advert to a number of aspects of the evidence that were potentially relevant to important areas of the case. …**
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> **37. Thirdly, the judge failed to draw together the evidence from the various different sources and analyse it in order to make his findings in relation to individual issues. The evidence, not just of the witnesses but also the documents, pointed in different directions. Whether the judge was right in his conclusions or not, in a case of this kind he owed it to the parties to identify the relevant evidence, discuss its significance and explain why he had**

> **reached the particular conclusion. That required him to analyse the various possible implications of different strands of evidence, as well as the inherent probabilities. He failed to do this. … Nor did he overtly consider the inherent probabilities and, if necessary, explain how they had been taken into account. …**
>
> **38. In light of these matters, it seems clear to us that the judge, in effect, took a short cut. Having decided that Mrs Harb was a reliable witness, he accepted that she had made out her case in all respects. …**
>
> **39. Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the ground of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."**

40. Ms Mulcahy QC submits that, as in **Harb**, the Tribunal in this case erred in failing to deal with the Claimant's primary case. She also submits that had the Tribunal done so and accepted that the three managers in GCT (referred to in Ms Mulcahy's skeleton argument as the "GCT 3") were extremely close and working in concert against the Claimant, then this would necessarily have affected the Tribunal's findings on detriment and/or repudiatory breach. As I understood the submission, the contention is that where, for example the Tribunal found that one of the GCT 3 knew about a particular disclosure, the Tribunal should have inferred "*from the closeness of the GCT 3 over many years and their obvious collusion in dealing with [the Claimant]*" that another of the GCT 3 would also have been aware of the disclosures. It is also suggested, although this is less clear, that where the Tribunal found that Mr Cooper had made certain decisions, the Tribunal ought to have inferred that that was a decision in which the GCT 3 played some part.

41. In my judgment, this ground of appeal has no merit whatsoever. In fact, it is difficult to see that the challenge raises any point of law at all. Instead, it appears to consist of little

more than disagreement with the Tribunal's findings of fact as to those who had knowledge of the disclosures and/or as to the decision-makers.

42. **Harb** provides no assistance to the Claimant. As is made clear by the Court of Appeal, that was a case which largely turned on oral evidence where the credibility of one of the principal witnesses was challenged. The present case is quite different. Not only was there a vast amount of documentary evidence but there were also transcripts of many of the meetings and discussions on which the Claimant relied. Furthermore, the Judge in **Harb** had failed to identify the essential questions which he had to ask himself in order to address the central issue of whether the contract was concluded. It is not submitted under this ground that the Tribunal in this case failed to identify any essential questions. (There was an agreed List of Issues here.) The complaint is that the Tribunal did not engage with part of the Claimant's case as put in closing submissions that there was a concerted campaign against him. However, it is important to note that it was no part of the Claimant's pleaded case that there was any such concerted campaign conducted by the GCT 3 whether with or without Mr Cooper. I was not taken to any passage in the Details of Complaint attached to the Claimant's ET1 making that allegation. The closest that any part of the pleaded case comes to the allegation that there was a concerted campaign is that following the making of protected disclosures the Claimant was subjected to a "hostile environment". It is not in dispute that the Tribunal did refer to the allegation of hostile environment in its Judgment. Furthermore, and perhaps more importantly, the allegation of a concerted campaign was not contained in the lengthy agreed List of Issues presented to the Tribunal. The Tribunal dealt with each of the identified issues systematically. It cannot be faulted for not expressly referring to a case theory that had not manifested itself in any form in the List of Issues specifying the critical issues to be determined.

A

43. I accept, having been taken to passages in the Claimant's closing submission to the Tribunal, that there were various references to the case being put in this way and to the factual matters relied upon in support. However, the mere fact that the Tribunal does not address every argument or allegation of fact relied upon in extensive closing submissions does not automatically give rise to an error of law (see **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409 at [17]). Moreover, it would appear that the case that was put to the Tribunal was one that went beyond the scope of the case as identified in the agreed List of Issues. Issue number 17 provided as follows:

> **"17. Did the following matters amount to repudiatory breaches of the implied term of trust and confidence implied by law into the Claimant's contract of employment …:**
>
> **a. That he had made the Protected Disclosures in and following September 2014 and had been subjected to an increasingly hostile environment at work as a result; …"**

44. Many of the factual matters which Ms Mulcahy QC says were not addressed by the Tribunal pre-date September 2014. Those matters could not therefore amount to anything more than background facts. They certainly cannot be said to be critical issues which the Tribunal was bound to determine. The Claimant's submissions to the Tribunal referred to rising tensions between the Claimant and members of GCT (including individuals other than the GCT 3) commencing from around February and March 2014. No permission appears to have been obtained to rely upon these matters as part of any amended pleaded case. Furthermore, the Tribunal made an express finding that the earliest disclosure made by the Claimant was on 29 April 2015. In so far as the Claimant's case is that the concerted campaign against him was a result of him making protected disclosures, the only factual matters that might conceivably be relevant as establishing that case would be those arising after that date. The Claimant's submissions were not so confined and sought to rely upon many matters that also preceded the April 2015 date.

45. The Claimant's skeleton argument identified only one adverse consequence of the Tribunal's so-called failure to engage with the Claimant's case, albeit this was said to be an "example". This is to be found at paragraph 19 of the Claimant's skeleton argument, which provides as follows:

> **"19. For example, the Tribunal's assessment of the first detriment (paragraph 166 of the Judgment [CB/1/59]) (recruitment of a replacement), and the finding that "*there is no evidence that Mr Kerr knew any of the alleged disclosures*" is extraordinary bearing in mind [Mr Warner Allen] had been aware of those disclosures at least from the meeting with [the Claimant] and Durkin on 29 June 2015 (paragraph 12(o) above) and it should have been inferred - from the closeness of the GCT3 over many years and their obvious collusion in dealing with [the Claimant] - that Kerr would undoubtedly also have been aware of the disclosures, as would Morse (no doubt as soon as [Mr Warner Allen] could tell them after leaving the meeting)."**

46. The thrust of the submission appears to be that the Tribunal ought to have inferred that the knowledge of one of the GCT 3 could be imputed to another, even where there was no express evidence that the other had such knowledge. The submission does not raise any point of law. The Tribunal made a clear finding that Mr Kerr did not know of the alleged disclosures. If there had been some evidence which demonstrated incontrovertibly that Mr Kerr did know of the relevant disclosure and that evidence was not taken into account by the Tribunal, then there might have been an argument that the Tribunal had reached a conclusion which was contrary to or unsupported by the evidence. However, I was not taken to, and the Notice of Appeal does not identify, any such evidence. In those circumstances, it was perfectly open to the Tribunal to reach the conclusion that it did. Even if the Tribunal had found that Mr Kerr worked closely with his GCT 3 colleagues and that he had colluded with them in some respects as alleged, it would not have been bound to draw the inference suggested.

47. Even though the Tribunal did not expressly refer to the Claimant's submissions about collusion, it can be inferred from its findings that that case was not accepted. The Tribunal

found that Mr Cooper was the decision-maker in relation to the investigation into the NWB matter:

> **"167. … The decision to investigate Dr Malik's relationship with NWB in September 2015 was a decision taken by Mr Cooper following receipt of information from Mr Kerr and Mr Warner Allen. The issue is therefore the motivation of Mr Cooper in taking the action. …"**

48. The Tribunal, therefore, had in mind that Mr Kerr and Mr Warner Allen had provided some input. Notwithstanding that, the Tribunal expressly found that the decision to investigate was Mr Cooper's alone. In other words, the Tribunal simply did not accept the contention that there was collusion. Bearing in mind that the claim of collusion was neither pleaded nor identified as an issue, I see no error of law in the Tribunal reaching the conclusion that it did.

49. It is right to note that the alleged failure to engage with the Claimant's case is relied upon under and in support of other grounds of appeal and overlaps with the "reasons" challenge. I shall deal with those points in the course of addressing those grounds.

Ground 2 - Suspension

50. The Claimant's submission here is that the Tribunal proceeded on the basis that the "*avowedly biased [Phase V Report] (i) required [the Claimant] to be suspended when there was no evidence before the Tribunal that this was the case and/or (ii) insisted that suspension was "a neutral act" when the effect was to render [the Claimant] unemployable in any registered capacity. …*".

51. More particularly, in relation to the basis for suspension the Claimant contends that the Tribunal:

(a) misapplied the law in that it failed to consider that the decision to suspend the Claimant was a "knee-jerk" reaction and that it thereby failed to apply the guidance in **Crawford v Suffolk Mental Health Partnership** [2012] IRLR 402 and wrongly distinguished **Gogay v Hertfordshire County Council** [2000] IRLR 703; and

(b) failed to give reasons for accepting Mr Cooper's account as to why, having decided that there was insufficient information to suspend on 2 November 2015, he felt able to suspend the Claimant just two days later on 4 November 2015.

Failure to consider that suspension was a knee-jerk reaction

52. In a section in the judgment of the Court of Appeal in **Crawford** entitled "Footnote", Lord Justice Elias said as follows:

> **"71. This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in *Gogay v Herfordshire County Council* [2000] IRLR 703, even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.**
>
> **72. I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did."**

53. I was also directed to the following passages in **Gogay**:

> **"55. Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. The conduct in this case was not only to suspend the claimant, but to do so by means of a letter which stated that 'the issue to be investigated is an allegation of sexual abuse made by a young person in our care.' Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The question is therefore whether there was 'reasonable and proper cause' to do this.**
>
> **56. In my judgment there clearly was not. The information considered by David Gibson and strategy meeting was indeed 'difficult to evaluate'. The difficulty was in determining what, if anything, EL was trying to convey. It warranted further investigation. But to describe it as an 'allegation of sexual abuse' is putting it far too high. A close reading of the records coupled with further inquiries of the therapist were needed before it could be characterised as such.**
>
> **57. Furthermore there was then a need to consider carefully what to do about the member of staff concerned. Was there indeed any reason to suppose that she had broken the guidelines for working with EL? How easy would it be to check? If there was some reason, however slight, it might indeed be right to separate her from EL for a short time. But how should this be done? Miss Sinclair argues that transfer was impossible because all the people in their care are vulnerable. But that leaves out of account the particular circumstances in this case. It is difficult to accept that there is no other useful work to which the claimant might not have been transferred for the very short time that it ought to have taken to make the further inquiries needed. It is equally difficult to accept that some other step might not have been contemplated, such as a short period of leave. In any event, given the timescale involved, what was the rush?"**

54. Ms Mulcahy QC's submission, based on these passages, is that Mr Cooper's decision to suspend in November was a "knee-jerk" reaction. That submission cannot be accepted. The matters which led to the suspension first came to light at the end of September 2015. As the Tribunal sets out in paragraph 100 of its Judgment:

> **"100. At the end of September 2015 Mr Kerr was undertaking checks on Mr Woodford's various shareholdings and he saw that WIM, Mr Woodford's company, had taken a shareholding in NWB. It was part of Mr Kerr's job as a sales person to know this sort of information about the Respondent's key investors so that the Respondent could help them know where they should invest. Mr Kerr thought the name NWB sounded familiar so he looked for the filings for NWB in order to obtain further information on who held shares. On doing this he saw that Dr Malik had also brought £10,000 shares in the company. At the time a shareholding of that size would have cost approximately US $80,000. Mr Kerr was concerned and telephoned Mr Warner Allen on 26 September 2015. At the time Mr Warner Allen was driving to Warwick to take his daughter to an open day at Warwick University. This is confirmed by the exhibits to Mr Warner Allen's second statement. Mr Kerr sent a print out of the relevant filings to Mr Warner Allen on 5 October 2015. He indicated that NWB had a class action law suit against it. Mr Warner Allen did not know of this and said he would ask Mr Cooper. Mr Warner Allen asked Mr Cooper for the personal dealing records for Dr Malik, which the Respondent holds for all staff. After Mr Warner Allen had looked at these records, he returned to Mr Cooper to tell him that he had discovered that Dr Malik held shares in NWB that he had not disclosed to the Respondent. Mr Warner Allen was hesitant and did not want to "drop Navid in it". Mr Cooper told him that at the time as an 'approved person' he had an obligation to bring any potential breach of company and/or FCA rules to Mr Cooper's attention. Mr Cooper told the Tribunal that the potential breach was serious. Dr Malik had previously been granted**

permission to act as non-executive director for NWB, but had never disclosed that he held shares in the company. It is a breach of FCA requirements for an employee not to notify their employer of personal transactions entered into. Mr Cooper indicated that it was potentially more serious because of the previous breach discovered in the APT disciplinary investigation.

101. Mr Cooper brought the matter to Mrs Gray's attention on 5 October …"

55. It is clear from the chronology of events set out in these paragraphs that there was no knee-jerk reaction to suspend upon finding out about the Claimant's involvement with NWB. Instead, we see that there was a measured escalation of the investigation over the period of a few days when it was referred to Mr Cooper and then to Mrs Gray by 5 October 2015. It was then decided that the matter needed to be investigated further. It is noteworthy that that decision was not taken by any of the GCT 3. The story in relation to NWB continues with Mr Phillips conducting an investigation meeting with the Claimant on 7 October and then a further meeting on 21 October. The allegations in relation to NWB had therefore already assumed a degree of seriousness even before the publication of the Phase V Report on 28 October 2015. Even after that publication came to light on 29 October 2015 (as a result of an alert received by Mr Kerr on his mobile phone) there was no immediate "knee-jerk" reaction to suspend. Instead, Mr Kerr sent an email to Mr Warner Allen in the following terms: "*Just read this - I could only copy a bit of it but look up the website. Very concerning, needs an answer, could just be some shorting bullshit but needs to be looked into for all our sakes*" (Ms Mulcahy QC sought to rely on the underlined words as suggesting that Mr Kerr did not take the report seriously. That suggestion seems to ignore the remainder of the message. Whilst Mr Kerr accepts that the report might not be reliable, he clearly acknowledges the need for it to be looked into). The matter was then referred to Mr Cooper in compliance.

56. The submission that the Tribunal proceeded simply on the basis of the Phase V Report as the basis for suspension is wrong. As the Tribunal found, there were numerous

A other matters of concern that had come to light even before that report was published. In my judgment, there was more than adequate evidence for the Tribunal to conclude that there was a proper basis for suspension.

B

Mr Cooper's change of position between 2 and 4 November 2015

57. Ms Mulcahy QC places great emphasis on the fact Mr Cooper changed his mind about suspension between 2 and 4 November 2015. However, contrary to her submission, C there were matters which the Tribunal took into account and which could legitimately support a change of position. At paragraphs 128 and 129 of the Judgment, the Tribunal said as follows:

D

> **"128. By an email dated 2 November 2015 Mr Cooper emailed Mr Chilton and Mr Aherne as follows (6/1850):**
>
> > **"My view, having spoken with Navid is that we are not yet in a position to suspend. Navid has volunteered to provide further information in relation to the company he set up with his wife which is mentioned, indeed featured, in the research report. That additional information and what comes out of the third party dd will guide us as to the next steps. My concerns regarding potential conflicts of interest are not assuaged but I do not have sufficient information to provide a provisional conclusion. …"**
>
> **129. On 3 November Mr Cooper spoke to Mr Hodges and to the Respondent's legal advisers. He explained to the Tribunal that he would have expected Dr Malik to have produced the information which might exonerate him almost immediately. He had not produced any further information. Mr Hodges agreed that Dr Malik had been given his chance to explain himself and had not done so and therefore agreed that there was no other option at that time but to suspend, given the serious nature of the allegations and the potential damage to the Respondent's business if it continued to allow an employee about whom it had serious integrity concerns to work on client matters."**

E

F

58. Thus, far from there being nothing to justify Mr Cooper's change of position from the 2 to 4 November, three specific matters were identified. The first was the discussion with G legal advisers. The advice was not disclosed. But that does not matter. The point is that there was additional information to which Mr Cooper had regard. The second was the fact that the Claimant had not provided any further information when he might have been H expected to do so. (I was taken to an email sent by the Claimant on 3 November 2015 in

which he said that he was expecting to receive a report which may be relevant. However, there is no specific information in that email as to when that report would be produced or as to what it might contain or even whether it would contain anything relevant. In those circumstances, the fact that the Tribunal did not expressly refer to that email does not undermine its conclusions in relation to this issue.) The third matter is that Mr Cooper had a discussion with Mr Hodges. Mr Hodges agreed that the Claimant had been given a chance to explain himself and had not done so. In the circumstances, Mr Hodges (whom the Claimant appears to regard as something of a supporter of his cause) agreed that there was no other option at that time but to suspend. Given these matters, I do not accept that the Tribunal was bound to find that there was no material to justify suspension as at 4 November 2015.

59. The question for the Tribunal was whether the decision to suspend amounted to a breach of the implied term of mutual trust and confidence. Having correctly set out the law in relation to constructive dismissal at paragraphs 185 to 188 of the Judgment, the Tribunal set out its conclusion on this issue at paragraph 199:

> **"199. The final alleged breach is:**
>
> > ***That Dr Malik had been suspended and faced disciplinary action on the basis of an anonymous internet report without adequate investigation being carried out into the Phase Five allegations by the Respondent.***
>
> **Ms Mulcahy argues that this breach was the worst of all. The decision in *Gogay v Hertfordshire County Council* [2000] IRLR 703 did find that the suspension was a breach of the implied term of mutual trust and confidence in that case. The case concerned a residential care worker against whom an allegation of sexual abuse had been made by a child and the local authority was suspended when there were other options available. Dr Malik's case is entirely different from the *Gogay* case. In the present case the Phase Five Report published information which raised questions for the Respondent's clients and could have adverse effect on the Respondent's business. The Respondent had compliance obligations. The Claimant had been given permission to take a non-executive director position, but he had failed to notify the Respondent, in accordance with his obligations as an approved person and in breach of his employment contract, of the shareholding. In addition, he failed to disclose the Phase Five Report when he first became aware of it. He also accepted that he had introduced NWB to WIM. A suspension was a neutral act in order that the Respondent could further investigate. In cross-examination (T2/12) Dr Malik agreed that on 29 October 2015 (5/1830) Dr Malik immediately contacted Mr Woodford when he became aware of the Phase Five Report before he contacted the Respondent. Dr Malik accepted that the Phase Five Report raised very serious matters and looked very bad.**

200. The Respondent operates in a highly regulated environment with heavy compliance obligations. In the face of the Phase Five Report they had to take appropriate and necessary action and the Tribunal is not satisfied that the suspension and investigation leading to disciplinary action amounts to a repudiatory breach."

60. In my judgment, that conclusion discloses no error of law and contains findings of fact which were open to the Tribunal to reach. Whether or not suspension is appropriate in any particular case will be a matter of fact and degree. The circumstances in **Gogay**, where an allegation had not been properly formulated, had not been the subject of any investigation at all, and where options other than suspension existed, were quite different to those in the present case. Here the matter had been the subject of an investigation, the allegations about improper dealings with NWB were clear, and, given the highly regulated environment in which the Respondent operated, the suspension was required. Even the Claimant accepted that the Phase V Report raised serious matters and "*looked very bad*".

Suspension - Neutral act

61. I do not accept the Claimant's further argument under this head that the Tribunal erred in referring to suspension being a "neutral act". The suspension was also relied upon as one of the detriments suffered on the grounds of having made a protected disclosure. The Tribunal rejected the Claimant's case on detriments in that some of them were not found to be proved. For example, the Tribunal rejected the payment of £229,000 bonus as amounting to detriment. It also rejected the Claimant's case that the Respondent's act of contacting the Claimant's clients following his suspension amounted to a detriment. However, it did not expressly reject the suspension itself as amounting to a detriment, but found that the decision to suspend was not on the ground of having made a disclosure. Thus, insofar as the Tribunal refers to suspension as being a neutral act, it cannot have intended to mean that suspension was not detrimental. The suspension was "neutral", in the circumstances of this case, in that

it was not a final disciplinary decision and did not render a disciplinary sanction more likely. Of course, in the context in which the Claimant worked, suspension has certain consequences. These consequences are imposed by regulation. However, the fact that there are these consequences does not mean that suspension can never be imposed. The question in each case will be whether there is a proper basis for suspending the employee. In my judgment, the Tribunal has clearly and adequately explained why it thought that there was a proper basis for suspending in this case. Nothing that the Claimant has raised in the course of this appeal affects that conclusion.

62. For completeness, I should mention that the Claimant also referred to the case of **Agoreyo v London Borough of Lambeth** [2017] EWHC 2019 QB. This was another case confirming that suspension is not neutral in that it "inevitably casts a shadow over the employee's competence". However, for the reasons already set out, the Tribunal's reference to suspension being a neutral act is not synonymous in this case with it not being detrimental. The real issue is whether there was a proper basis for the suspension or whether it was a knee-jerk reaction. As I have said, I find that the Tribunal did not err in finding that there was a proper basis for the suspension.

63. In addressing some of Mr Forshaw's arguments under this head, Ms Mulcahy QC referred to the following matters:

(a) There was evidence that Mr Cooper had not used the power to suspend on previous occasions despite there having been 200 or so incidents in the Respondent's reports register. However, the question is whether this particular incident was serious enough to warrant suspension. It was part of the background to the NWB matter that the Claimant had already received a

written warning for a not dissimilar issue involving shareholdings in third parties. This Court was not referred to any evidence suggesting that other persons were in a comparable position to that in which the Claimant found himself on 4 November 2015;

(b) The Respondent did not await the Stroz Report before deciding to suspend. However, the Respondent was not obliged to await the outcome of that report before deciding to suspend if there was sufficient material as at 4 November to do so. As set out above, it was open to the Tribunal to conclude that there was sufficient material.

64. It was also submitted that the Tribunal failed to give reasons for some of its findings in relation to this matter. I do not consider any of these submissions to have merit. For example, the Claimant submits that the Tribunal's finding that Mr Cooper "persuaded" Mr Hodges that the Claimant must be suspended because he had not produced any further information, makes no logical sense and was not explained. However, the Tribunal's finding is not simply that Mr Hodges agreed with Mr Cooper because of the Claimant's failure to produce information; a proper reading of paragraph 129 of the Reasons shows that Mr Hodges was also of the view that "*given the serious nature of the allegations and the potential damage to the Respondent's business if it continued to allow an employee about whom it had serious integrity concerns to work on client matters*", there was no other option at that time but to suspend. The fact that other managers on other occasions might have had a different view about the suspension, or that Mr Hodges was relying on information provided by Mr Cooper, is not determinative. The question is whether the person making the decision to suspend had reasonable and probable cause to do so. That person was Mr Cooper and the basis for *his* decision is adequately explained by the Tribunal.

65. The Claimant also complains that the Tribunal failed to refer to an email from Mr Chilton and to some oral evidence from Mr Phillips. This evidence only shows that Mr Phillips held a similar view to Mr Cooper on 2 November 2015 that there was insufficient material to suspend, and that on 3 November 2015, Mr Chilton had raised some questions that might be considered by Compliance. However, it was the Tribunal's conclusion that the decision to suspend was that of Mr Cooper, and that he had had regard to other matters before deciding to suspend on 4 November. The further evidence from Mr Phillips and Mr Chilton does not undermine that conclusion. It merely raises other matters which it was argued Mr Cooper ought to have taken into account. That he did not do so is correctly reflected in the Tribunal's Reasons setting out what he did take into account. The Tribunal then correctly proceeded to decide whether Mr Cooper's decision to suspend was justified on the basis of what he did take into account. The Claimant's argument, as with much of this appeal, is really that the Tribunal did not address every single item of evidence and argument raised. But that is not what the Tribunal was required to do. (The contention that there was a failure to give reasons permeates much of this appeal, and is addressed separately under ground 3 below.)

66. Ms Mulcahy's principal submission under this head is that suspension on 4 November was not warranted given Mr Cooper's decision not to suspend on the 2 November. However, for the reasons set out, that submission ignores all the matters that arose in late September and throughout October in relation to the NWB allegation, and the three matters which may be identified from the Tribunal's decision as occurring between 2 and 4 October. The mere fact that Mr Cooper may have thought that there was not sufficient information to suspend on 2 November did not mean that he could not take account of all of the earlier matters again when reconsidering the question of suspension on 4 November.

Ground 3 - Whistleblowing Detriment

67. Several arguments are raised under this ground. These are that the Tribunal erred in that:

(a) It considered that good faith was relevant in considering whether there was a protected disclosure;

(b) It erred in its approach to causation;

(c) It failed to give reasons for its conclusions;

(d) It failed to accept that the bonus received by the Claimant amounted to a detriment;

(e) It only considered whether the APT disclosures were the reason for the alleged detriments and failed to do the same for the Array Genomics and Due Diligence disclosures; and

(f) It misapplied section 103A of the **Employment Rights Act 1996** ("**the Act**").

68. Each of these is dealt with in turn.

(a) Reference to "Good Faith"

69. The first point raised under this ground is that the Tribunal mistakenly considered that good faith was relevant to the question of whether a disclosure amounted to a protected disclosure within the meaning of the **Act**. At paragraph 155 of the Judgment, it said as follows:

> **"155. The next question is whether there was a disclosure of information, in the public interest and in good faith. We have to consider this in relation to each of the matters at issues 1a to g. The Respondent's position is that this requires the Claimant to believe (reasonably) that in all the circumstances, disclosures in the public interest and the following matters are relevant considerations namely, whether there is a 'public interest element' to the disclosure or whether the disclosure relates solely to the private or commercial interests of the parties as in *Chesterton Global Limited v Nurmohamed* [2015] IRLR 614 and *Underwood v Wincanton Plc* UKEAT/0163/15/RN, the extent to which the disclosure serves any purpose and the extent to which the Claimant is making a disclosure to secure personal gain for himself."**

70. Ms Mulcahy QC submits that the reference to good faith in the first sentence was an error. This is because of the amendment to the legislation effective from 25 June 2013 that good faith is limited to the question of remedy under section 123(6A) of the **Act**. Mr Forshaw submits that the reference to "good faith" was not incorrect because of the obligation on the Tribunal to take account of all the relevant circumstances. He further submits that even if he is wrong about that, the challenge under this ground is academic in any event because the Tribunal found in the Claimant's favour that there were protected disclosures (save for two which were rejected).

71. I was referred to the case of **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837. Lord Justice Underhill said as follows at paragraph 37:

> **"37. Against that background, in my view the correct approach is as follows. In a whistleblower case 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 thought 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, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at paragraph 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."**

72. Mr Forshaw submits that the reference to the question being one which is to be answered by the Tribunal on a consideration of "*all the circumstances of the particular case*" means that the Tribunal is entitled to take into account good faith. However, the reference to "*all the circumstances*" in that passage was in the context of determining whether or not there was a reasonable belief that disclosure was being made in the public interest. The circumstances to be considered were, therefore, those relevant to that question. I do not therefore gain any assistance from that passage in determining whether the Tribunal was correct to refer to good faith in the way that it did, which was apparently to identify good

faith as a separate requirement to be met by the Claimant. It seems to me that the express removal, as from 25 June 2013, of any reference to good faith in section 43C, and the express inclusion of good faith elsewhere in relation to remedy, was intended to remove good faith as a separate requirement to be met by claimants before liability can be established.

73. I therefore do not accept Mr Forshaw's argument that the Tribunal was right to refer to good faith in the way that it did. However, I do accept his submission that in the circumstances of this case that incorrect reference does not matter. That is because the Tribunal expressly found that there were protected disclosures. On any view, therefore, the Claimant has not been prejudiced at all by this reference to good faith. The two disclosures that the Tribunal did not accept were not rejected on the basis that the Claimant was not acting in good faith. They were rejected for other substantive reasons: in one case there being a finding that the meeting at which the disclosure was said to have occurred did not take place; in the other case the Tribunal found that the alleged disclosure did not correspond with the Claimant's pleaded case. Accordingly, I find that this part of this ground of appeal, although correct, is academic.

(b) Causation

74. The second aspect of this ground is that the Tribunal erred in terms of causation in considering whether "the reason" for the detriment was the making of a protected disclosure. It is said that the Tribunal erred in law in that:

(i) It did not direct itself as to the burden under section 48(2) of the **Act**, i.e. that it is for the employer to show the ground on which any act was done.

(ii) It focused on "*the reason*" for the treatment and failed to determine, as required by the Court of Appeal in **NHS Manchester v Fecitt** [2012] IRLR

64, whether the protected disclosure in question materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

(iii) It failed to consider whether there was a "chain of command" such that any decisions made were materially influenced by protected disclosures: **Western Union Payment Services UK Ltd v Anastasiou** (UKEAT/0135/13, 21 February 2014, unreported).

I shall deal with each of these submissions in turn:

(i) Burden of Proof

75. Section 48(2) of the **Act** provides:

> **"48. *Complaints to employment tribunals***
>
> **…**
>
> **(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

76. Whilst it is correct that the burden of proof provisions contained in section 48(2) of the **Act** were not expressly mentioned by the Tribunal, the Claimant does not identify any particular error as a result. It is certainly not suggested that the Tribunal impermissibly placed the burden on the Claimant to, for example, disprove any reason that might be put forward by the Respondent for the detrimental treatment. Mr Forshaw submits that this is a case where the Tribunal was able to make clear findings as to the reason for the treatment and that in those circumstances, as in discrimination cases, the burden of proof provisions do not take the matter much further. He placed reliance on the case of **Hewage v Grampian Health Board** [2012] IRLR 870, where it was stated that:

> **"32. The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, paragraph 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance."**

77. That passage was directed to the specific burden of proof provisions under the discrimination legislation. Those provide for a shifting burden of proof where the Claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. Once that *prima facie* case has been established the second stage requires a Respondent to prove that he did not commit or is not be treated as having committed the unlawful act. Those provisions operate very differently from section 48(2) which simply requires the employer to show the ground on which treatment complained of was done. However, Mr Forshaw does gain some support for his argument that there should be a similar approach in whistleblowing cases from the case of **International Petroleum Ltd and Others v Osipov and Others** UKEAT/0229/16/DA & UKEAT/0058/17/DA (19 July 2017, unreported), in which President Simler said as follows:

> **"Burden of proof and inference drawing**
>
> **115. Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> > **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
> >
> > **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: *see London Borough of Harrow v Knight* at paragraph 20.**
> >
> > **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found..**

78. I was also taken to the case of **London Borough of Harrow v Knight** [2003] IRLR 140 to which reference is made by President Simler in **Osipov**. As to the burden of proof in whistleblowing cases, Underhill J (as he then was) said as follows:

> **"19. Mr Knight also placed reliance on s.48(2) of the Act, which applies to all complaints of victimisation under the numerous heads now covered by Part V of the 1996 Act (eg for raising health and safety issues, for insisting on rights under the Working Time Regulations, for taking time off for training). It is in the following terms:**
>
> > **'On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'**
>
> **20. We were referred to no authority as to the effect of this sub-section (which does not appear to have any equivalent in the "victimisation" provisions of other statutes: see, e.g. s.4 of the Sex Discrimination Act 1975, s.2 of the Race Relations Act 1976 and s.146 of the Trade Union and Labour Relations (Consolidation) Act 1992). On the face of it, it might seem to be intended to have the same effect as s.98(1) of the 1996 Act, which requires an employer in a claim of unfair dismissal to prove (a) what the reason for the dismissal was and (b) that it was one of the category of admissible reasons: it is well established that if the employer fails to establish either of those matters the dismissal is, without more, unfair. But in fact the two situations are not wholly analogous. The concept of "unfair dismissal" does not require the Tribunal to be satisfied of anything save that the section has not been complied with: it has in that sense no positive content. The definition of victimisation, on the other hand, requires the ingredient that the employer has acted on the prohibited ground. There is no doubt no reason in principle why the statute could not have provided that the employer be deemed to have so acted where he does not prove any other reason; but one would expect such a provision to be clearly spelt out. Further, if s.48(2) were construed as having such a deeming effect the result would appear to be that an employer who could not prove his "ground" could be liable to a series of claims under each of the anti-victimisation provisions of Part V: that would no doubt be highly unlikely to happen in practice, but even the theoretical possibility casts doubt on the correctness of the approach. Against that background, Mr Patten submits that all that s.48(2) does is to make it clear to employers that they have to be prepared in the Tribunal to say why they acted in the respect complained of, with the result that if they fail to do so they may find inferences drawn against them (though only if such inferences are justified by the facts as a whole).**
>
> **21. We find Mr Patten's submission persuasive, but we do not believe that on this appeal we are obliged to resolve the question of the effect of s.48(2). After being briefly referred to in paragraph 1 of the Reasons, it played no part in the Tribunal's expressed reasoning. Any use to which it might legitimately have been put in support of Mr Knight's case was superseded by the misdirection which we have identified above. Prudent Tribunals in dealing with victimisation claims will no doubt prefer, wherever possible, to make positive findings as to the grounds on which the employer acted rather than to rely on s.48(2) until its effect has been authoritatively established."**

79. Whilst no final determination was made by the Judge in that case as to the proper approach, I consider that the EAT's guidance that prudent Employment Tribunals should make positive findings on why things happened is helpful.

A

80. In my judgment, in the present case, the Tribunal's failure to refer expressly to the burden of proof under section 48(2) of the **Act** did not give rise to any error of law. I say that for the following reasons:

B

(a) As stated above, the Claimant has not identified any particular error of law or error of outcome other than failure to refer to the burden of proof. It seems to me that the mere failure to refer to a particular statutory provision when there is no suggestion that the Tribunal applied that provision incorrectly, should not on its own give rise to an error of law;

C

(b) The Tribunal's approach in this case was entirely consistent with the guidance suggested in **Harrow v Knight**. That is to say it made positive findings as to *why* the Claimant was treated in the way that he alleged. It is clear from a reading of the Tribunal's Judgment that the Tribunal assessed the reasons given by the Respondent for the treatment and accepted those reasons;

D

E

(c) The Tribunal's approach was also consistent with the approach accepted as correct by President Simler in the **Osipov** case. That approach places the burden of proof on the Claimant in the first instance to show that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure; then by virtue of 48 (2) the Respondent must be prepared to show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them. In the present case the Respondent showed why the detrimental treatment was done and the Tribunal accepted those reasons.

F

G

H

(ii) ***Fecitt***

81. The Claimant's main contention here is that the Tribunal should have referred to the words "on the grounds that" rather than "the reason for". The former words appear in the statute at section 47B. Ms Mulcahy QC submits that the use of the definite article in "the reason" suggests that the Tribunal considered that there could be only one possible reason for the treatment alleged whereas the words in the statute, "on the ground that", envisage that there can be more than one reason or material influence. I consider this argument to be misconceived. There is nothing to suggest that by using the formulation of "the reason", the Tribunal was engaging in a different analytical exercise to that which would be required by the words "on the ground that". Both formulations, it seems to me, allow for the conclusion that there were multiple reasons or multiple grounds for particular treatment. It will be a question of fact for the Tribunal to determine whether there was more than one reason or ground for the treatment, and if so, whether one of those was the fact that the Claimant had made a protected disclosure.

82. It is apparent from a reading of the Judgment that the Tribunal did not, in any event, confine itself to the formulation "the reason for". It can be seen from paragraphs 177 and 181 of the Judgment that the Tribunal also used the formulations "on the grounds of" and "because". All of these formulations were used interchangeably, and were used in order to determine the answer to the question, "Why did this treatment occur?"

83. It is suggested by Ms Mulcahy QC that it should be inferred from the words used that the Tribunal had closed its mind to the possibility of the protected disclosure having a material influence on the treatment alleged. I do not accept that submission for two reasons:

(a) Both counsel made reference to the **Fecitt** case in submissions. The Tribunal has expressly referred to the fact that it had had regard to those submissions. The mere fact that no reference is made to that case does not necessarily mean that it was not taken into account;

(b) This Appeal Tribunal should caution itself against taking too technical an approach to the Tribunal's Reasons. As stated in the **Osipov** case already mentioned:

> **"87. Although I regard the use of wrong language as unfortunate and accept that it can in some cases betray a misdirection or misapplication of law, it is necessary to look at the substance of the conclusions reached by the Tribunal in their full context to determine whether such an error has occurred, and wrong simply to assume that the use of wrong language is indicative of error. Further, I bear in mind the often expressed observation, repeated by Lord Hope in *Hewage v Grampian Health Board* [2012] ICR 1054 at paragraph 26: "… that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis"."**

In this case, one does not need to take "a generous approach" because it is obvious from a proper reading of the Judgment that the Tribunal had not closed its mind to the possibility of there being more than one reason for the treatment. Thus, one sees that at paragraph 167 of the Judgment, the Tribunal found that "*There is nothing to suggest that the cause of that investigation was the disclosures in relation to APT*". Needless to say, had the Tribunal found that there was "something" to give rise to that suggestion then it would have said so. Similarly, at paragraph 169, the Tribunal concluded that it was "*not satisfied that the making of protected disclosures had anything to do with the award of the interim Verseon bonus*". The underlined words would not have been used if the Tribunal had closed its mind to the possibility of the disclosures having had *some* influence on the decision as to bonus.

84. Once again, the Claimant has raised a point which appears to be almost entirely academic. The best that the Claimant could say is that if the Tribunal had expressly referred to the correct test, i.e. whether a protected disclosure had a material influence, "it might well have reached a different view". However, no suggestion is made as to what that different view might have been or in relation to which of the many issues the Tribunal had to decide.

(iii) Chain of Command

85. Ms Mulcahy QC's argument here is that the Tribunal failed to consider whether there was a "chain of command" such that any decisions made were materially influenced by protected disclosures. Reliance is placed upon the decision of **Western Union Payment Services UK Ltd v Anastasiou** (UKEAT/0135/13, 21 February 2014, unreported), where HHJ Eady QC said as follows:

> **"74. Allowing that the relevant statutory framework places the burden of proving the reason for any detriments found on the employer (s.48(2) ERA), the question the ET had to grapple with was whether the protected disclosure had *materially influenced* the employer's treatment of the Claimant in this case (per Elias LJ in *Fecitt*). We can see that - hypothetically - there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced her treatment of the complainant. In such cases, however, it would still be necessary for the ET to explain how it had arrived at the conclusion that this is what had happened."**

86. The remarks of HHJ Eady QC above were clearly obiter given the reference to the chain of command scenario being "hypothetical". It is in any event not clear how a decision-maker, who did not have personal knowledge of the protected disclosure, could be said to have been materially influenced by it to make the decision under challenge. If a decision-maker in that position were to be fixed with liability it would have to be as a result of importing the knowledge and motivation of another to that decision-maker. However, it seems to me that such importation is not permissible in considering the reason why the decision-maker acted as he or she did. The decision of the Court of Appeal in **CLFIS (UK)**

Ltd v Reynolds [2015] IRLR 562, dealt with this issue in the context of age discrimination claims:

> **"14. I should spell out the effect of those provisions (which are substantially identical to their cognates in the other pre-2010 discrimination legislation and in the 2010 Act). There is a full analysis by Sedley LJ in *Gilbank v Miles* [2006] EWCA Civ 543, [2006] IRLR 538, at paragraphs 44-51 (p.544). But, in short, the primary liability for discrimination is placed by reg. 7 on the employer, who will be liable for the acts of his employees acting in the course of their employment (reg. 25(1)), subject to the 'reasonable steps' defence in reg. 25(3). However, the individual employee who does the actual act of discrimination is also liable on the basis that he has 'aided' his employer to do the act in question, and that is so even where the employer has escaped liability by reason of the reasonable steps defence - reg. 26(1) and (2). Thus, although the route adopted is different, the end result is substantially the same as in the case of vicarious liability for a common law tort: both employer and employee are liable for the act complained of, and the claimant has the choice of proceeding against either or both. It is probably most common for a claimant to proceed only against the employer, but it is not at all uncommon for one or more of the alleged individual discriminators to be joined as well; and occasionally (eg where the employer is insolvent) such an individual may be the only respondent or may find himself solely liable because the employer has successfully invoked the reasonable steps defence (as happened in the well-known case of *Yeboah v Crofton* [2002] IRLR 634 CA).**
>
> **…**
>
> **34. We are accordingly concerned not with joint decision-making but with a different situation, namely one where an act which is detrimental to a claimant is done by an employee who is innocent of any discriminatory motivation but who has been influenced by information supplied, or views expressed, by another employee whose motivation is, or is said to have been, discriminatory. I will refer to this as a case of 'tainted information' (treating 'information' widely so as to cover also the expression of views). I agree with Singh J that tainted information cases may arise in a variety of different ways, but I will for the purpose of discussion take as an example a case of the kind with which we are concerned here - that is, one where a manager has decided to dismiss an employee on the basis of an adverse report about her from another employee who is motivated by her age. I will refer to the employer as E, the claimant as C, the decision-maker as X and the informant as Y.**
>
> **35. I agree with Singh J that it would plainly be unjust if in such a situation C had no remedy against E; and that was in fact common ground before us. But the parties differed as to the legal basis on which a remedy should be available. Mr Pitt-Payne's submission was that Y's discriminatory motivation could be treated as the ground, or part of the ground, for C's dismissal, albeit that the actual decision-maker was X; and it seems, though his reasoning was not perhaps quite explicit, that that was also the approach of Singh J. I will refer to this as 'the composite approach', because it involves bringing together X's act with Y's motivation. Mr Tatton-Brown submitted that that was illegitimate and that the right approach was to treat Y's report as a discrete discriminatory act, for which E was liable (provided it was done in the course of Y's employment, and subject to the 'reasonable steps' defence) by virtue of reg. 25, with C being able to recover for the losses caused by her dismissal as a consequence of that act rather than because the dismissal itself was unlawful. I will refer to this as 'the separate acts approach'. Mr Pitt-Payne accepted that that was a possible analysis, but he submitted that it was unnecessary and over-complicated and that if it were the only route that would have various unsatisfactory consequences to which I will return below.**
>
> **36. In my view the composite approach is unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of**

both. But the trouble is that, because of the way the Regulations work, rendering E liable would make X liable too: see the analysis at paragraph 13 above. To spell it out:

> **(a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and - assuming we are applying the composite approach - that act was influenced by Y's discriminatorily-motivated report.**
>
> **(b) X would be an employee for whose discriminatory act E was liable under reg. 25 and would accordingly be deemed by reg. 26(2) to have aided the doing of that act and would be personally liable.**

It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

37. I do not believe that that conclusion is undermined by either of the authorities referred to by Singh J (see paragraphs 24 and 25 above). The passage from Lord Nicholls' speech in *Nagarajan* was not directed at the present question at all. As for *Igen v Wong*, in my view the burden of proof provisions do not advance the argument on this particular point. What they are concerned with is how the claimant can prove the elements of his or her claim, but they have no bearing on what those elements are. (I have something more to say about the burden of proof provisions in a different context at paragraph 51 below.)

38. I would add, in the light of Singh J's reference to *Nagarajan*, that there is in fact a later passage in Lord Nicholls' speech which comes somewhat closer to the issue with which we are concerned. Mr Nagarajan's claim was brought under s.4(1)(a) of the Race Relations Act 1976, which rendered it unlawful for a person to discriminate 'in the arrangements he makes' for (to paraphrase) recruiting new employees. His case was that he had not been offered a job because the interviewing panel was influenced by the fact that he had previously brought a discrimination claim against an associated company of LRT. One of the issues was whether the panel members could be said to have 'made the arrangements' for determining whether the applicant should be recruited. That to some extent depended on the meaning of that particular phrase, but Lord Nicholls' analysis went wider. He referred not only to s.4 but also to s.32, which was the equivalent of reg. 25 of the 2006 Regulations. He said, at paragraph 23:

> **'When these provisions are put together, the effect is that on a complaint against an employer under s.4(1)(a) it matters not that different employees were involved at different stages, one employee acting in a racially discriminatory or victimising fashion and the other not. The acts of both are treated as done by the respondent employer. So if the employee who operated the employer's interviewing arrangements did so in a discriminatory manner, either racially or by way of victimisation, s.4(1)(a) is satisfied even though the employee who set up the arrangements acted in a wholly non-discriminatory fashion. The effect of treating the acts of the discriminatory employee as the acts of the employer is that *the employer* unlawfully discriminated in the arrangements *he* made for the purpose of determining who should be offered employment by him. Hence in the *Brennan v J H Dewhurst Ltd* [1983] IRLR 357 case, the employer unlawfully discriminated against women by reason of the discriminatory way the branch manager Mr French conducted interviews as part of the arrangements made without any discriminatory intent by the district manager, Mr Billing.'**

That is not on all fours with the present case, because the language of the relevant provision is different. But it is nevertheless noteworthy that Lord Nicholls held the employer liable on the basis of its responsibility for the acts of the specific individuals who had a discriminatory motivation rather than by creating some notional composite responsibility.

39. By contrast, the separate acts approach conforms entirely to the scheme of the legislation. To spell it out:

> **(1) By making an adverse report about C, Y subjects her to a detriment within the meaning of reg. 7(2)(d).**
>
> **(2) If in making the report Y was motivated by C's age his act constitutes discrimination within the meaning of reg. 3(1)(a).**

> **(3) If that discriminatory act was done in the course of Y's employment, as in practice it would be, then by virtue of reg. 25(1) it would be treated as E's act; and accordingly E would be liable (unless he could rely on the 'reasonable steps' defence).**
>
> **(4) Y would also be liable for his own act by virtue of reg. 26(1) and (2).**
>
> **(5) The losses caused to C by her dismissal could be claimed for as part of the compensation for Y's discriminatory act, since they would have been caused or contributed to by that act and would not (at least normally) be too remote.**
>
> **…**
>
> **46. I accordingly believe that the correct approach in a tainted information case is to treat the conduct of the person supplying the information as a separate act from that of the person who acts on it.**
>
> **…**
>
> **48. I have felt obliged to consider at such length the choice between the composite approach and the separate acts approach partly in order to feel firm analytical ground beneath my feet, but also because it is of some general importance and was the subject of extensive submissions from counsel. However it does not in fact seem to me to be decisive of the issue with which we were concerned. On either approach the motivation of those whose input influenced Mr Gilmour's decision was potentially relevant to the claim. But in my view it was only actually relevant, and the tribunal was only obliged to consider it, if the claimant in fact sought to rely on it. It cannot be an error of law for an employment tribunal not to address a case which was not advanced before it."**

87. It can be seen therefore that it is considered quite unjust for the decision-maker to be liable in circumstances where he personally was innocent of any discriminatory motivation. That is why the composite approach to liability, whereby the motivation of another is brought together with the act of the decision-maker, was considered by the Court of Appeal to be unacceptable in principle. Instead, where a Claimant seeks to rely upon the motivation of a person other than the decision-maker, the Claimant must rely on the "separate acts" approach, which involves treating the actions of the person motivated by a prohibited characteristic as a separate act of discrimination.

88. Ms Mulcahy QC submits that the fact that the **CLFIS** case was decided under the **Age Discrimination Regulations** means that one cannot apply the same reasoning to a whistleblowing detriment case. She further submits that **CLFIS** can be distinguished because, in the present case, the Claimant expressly sought to rely upon the motivation of the

GCT 3 as well as other decision-makers such as Mr Cooper and Mr Chilton. She also relies upon the case of **Royal Mail Group v Jhuti** [2017] EWCA Civ 1632 in which it was held that where a "manipulator" was a "manager with some responsibility" for dismissal, though not the actual decision-maker, there was a strong case for attributing his motivation and knowledge to the employer. It was submitted that there is no reason in principle why that should not also apply to cases of whistleblowing detriment.

89. I do not accept Ms Mulcahy's submission that **CLFIS** is distinguishable. The provisions of section 47B(1A), (1B), (1C) and (1D) are indeed very similar to the provisions considered in **CLFIS** in relation to vicarious liability. Under section 47B, another worker can be liable for subjecting a Claimant to a detriment on the ground that the Claimant has made a protected disclosure. By virtue of section 47B(1B) the acts of that worker are treated as also done by the employer, irrespective of whether it was done with the employer's knowledge or approval. However, the employer can rely upon the reasonable steps defence to avoid liability. It was the fact that the decision-maker could be personally liable (as well as the employer being vicariously so) that led to the Court of Appeal in **CLFIS** concluding that it would be unjust to attribute the discriminatory motivation of another to that decision-maker. I agree with Mr Forshaw that the similar scheme of vicarious liability under section 47B means that a similar approach should be taken in cases of detriment on the grounds of protected disclosure; that is to say the knowledge and motivation of another should not be attributed to the innocent decision-maker.

90. I also do not agree that **CLFIS** can be distinguished on the basis that the Claimant expressly sought to rely on the motivation of others. The criticism made of the Tribunal is that it failed to consider the "chain of command" argument. However, not only is there

A nothing in the pleaded case to support this argument, there was nothing in the Claimant's closing submissions to suggest that the Tribunal should be considering the motivation of others. Whilst the **Western Union** decision was referred to in those submissions, that was for an entirely different purpose than the chain of command argument now relied upon. This B was not, therefore, a point taken before the Tribunal. However, even if the motivation of others had expressly been relied upon, the Claimant could only rely upon that motivation in support of a claim that there was a separate act of discrimination by those others (see **CLFIS** C above) or where it is said that the GCT 3 were joint decision-makers with Mr Cooper. Whilst the pleaded case did make reference to a general prior acts or separate acts claim in the alternative (see paragraph 57 of the Details of Complaint), no specific prior acts were D expressly pleaded and the List of Agreed Issues did not contain any. For example, the Tribunal was not asked to determine whether the provision of information to Mr Cooper by the GCT 3 was itself a detriment by reason of having made a disclosure.

E

91. In fact, the Claimant's case in this regard is somewhat confused. The case seems to have been pursued on several different bases:

(a) There is the 'chain of command' or 'motivation of others' case, pursued F effectively for the first time in the Claimant's skeleton argument for this hearing at paragraph 58(c). However, in oral submissions, Ms Mulcahy QC suggested that this was not a chain of command case after all;

G (b) There is the prior or separate acts case, which did not in fact give rise to any agreed issues to be determined; and

(c) There is the collusion case, namely that the GCT 3 colluded together with Mr Cooper to make the decision. This appears to be a claim that the decisions to H

investigate and suspend were effectively made by the GCT 3 jointly with Mr Cooper.

92. The collusion case fails on the facts. In the face of the Tribunal's clear findings of fact that the decision-maker in respect of the decision to investigate and then to suspend was Mr Cooper, the Claimant could succeed only if it was shown that that finding was perverse. However, notwithstanding the fact that there are more than a hundred challenges to the Tribunal's findings of fact, one does not find anywhere any express contention that this finding about Mr Cooper was perverse. The highest that Ms Mulcahy QC puts her challenge is that the Tribunal failed to consider the collusion case and thereby failed to consider the mental processes of all the decision-makers involved. For reasons already set out under ground 1, I do not agree that the Tribunal failed to consider the collusion case. Its finding that Mr Cooper was the decision-maker, notwithstanding the fact that he had received information from members of the GCT 3, suggests that, in so far as this case was put (despite not having been pleaded), it was rejected by the Tribunal.

93. The case of **Royal Mail Group v Jhuti** does not assist the Claimant for the simple reason that that was a dismissal case and not one relying upon detriment. One can attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case in some circumstances. That is because the liability for the dismissal lies only with the employer, and the injustice which concerned the Court of Appeal in **CLFIS** does not arise.

(c) Failure to Give Reasons

94. The remainder of this ground of appeal relies on 18 separate claims that the Tribunal failed to give reasons for certain of its findings of fact. This is a theme running through all of

A the grounds of appeal. Whilst it is considered under this ground, the analysis below applies to all of those grounds in which a "reasons" point is taken.

B 95. The Claimant appears to consider that it was incumbent upon the Tribunal, before reaching any conclusion of fact, to address every single piece of evidence relating to that fact and to give reasons as to why such evidence was or was not accepted. That is not what this Tribunal was required to do. The law in relation to reasons is well-established.

C

96. The starting point on any reasons challenge is Rule 62(5) of the **Employment Tribunal Rules 2013**:

D

> **"(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"**

97. The key authorities setting out the duty of Employment Tribunals in giving reasons

E are **Meek v City of Birmingham District Council** [1987] IRLR 250 and **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409.

F 98. In **Meek** (at page 251) Bingham LJ stated that ET reasons should:

> **"8. … contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; …"**

G

99. In his judgment, Bingham LJ relied on a *dictum* of Donaldson LJ in **Union of Construction, Allied Trades & Technicians v Brain** [1981] ICR 542 (page 551):

H

> **"… [Employment] Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. … their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case**

> **may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon such analysis. This, to my mind, is to misuse the purpose for which reasons are given."**

100. In **English** Lord Philips MR found (at paragraphs 18 to 22) that the duty to give reasons was a duty to give sufficient reasons so that the parties could understand why they had won or lost and so that the Appellate Tribunal/Court could understand why the Judge had reached the decision which s/he had reached. Lord Philips said:

> **"19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.**
>
> **…**
>
> **21. When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."**

101. In **High Table Ltd v Horst** [1998] ICR 409, Peter Gibson LJ stated (page 420) that:

> **"… in considering whether the reasons given by an industrial tribunal comply with its statutory obligation, it is very important to keep in mind the issues which the industrial tribunal was dealing with. It has, of course, to reach conclusions on the issues which the statute raises, viz. in the present case, have the employers established that the reason for the dismissals was redundancy and, if so, did they act reasonably in treating the redundancy as a sufficient reason for dismissing the employees? But, whilst it must consider all that is relevant, it need only deal with the points which were seen to be in controversy relating to those issues, and then only with the principal important controversial points …"**

102. Similarly, in **Miriki v General Council of the Bar** [2002] ICR 505, Peter Gibson LJ stated:

> **"46. … Each case must be decided in the light of its own particular circumstances. It cannot be right that in every case the tribunal must make express findings on every piece of circumstantial evidence, however peripheral, merely because the applicant chooses to make it the subject of complaint."**

103. In my judgment, the Tribunal's reasons amply satisfied these requirements. One does not find anywhere in the Claimant's challenge any suggestion that a finding of fact was reached in the absence of any evidence capable of supporting that fact. Moreover, many of the Claimant's criticisms arise out of the suggestion that the Tribunal failed to consider the collusion case, the submission being that had it done so, and had it viewed the facts through the "prism" of collusion, different conclusions would have been reached. An example of this submission arises in paragraph 70(a) of the Claimant's skeleton argument. This provides:

> **"70. Paragraph 59 of the [grounds of appeal] deals with paragraph 166 of the Judgment [CB/1/59] and the Tribunal's findings on the first detriment, i.e. the attempted recruitment of a new analyst to replace [the Claimant] in August 2015. In relation to this the Tribunal failed to give reasons as to why:**
>
> > **a) Notwithstanding that the three leaders of the GCT had worked closely together for more than 20 years and involved each other in every decision concerning the team, it determined that there was no evidence that Kerr knew of the APT protected disclosures in early August 2015, particularly when it accepted that JWA was so aware from 29 June 2015."**

104. The Claimant then proceeds to deal with the Respondent's answer to this challenge as follows:

> **"71. In relations [sic] to [the Respondent's] Answer concerning paragraph 59 of the [grounds of appeal], at paragraph 34 of the Answer [CB/3/124]:**
>
> > **a) [The Respondent] states, at paragraph 34(a), that the finding about Kerr was open to the Tribunal and that the Tribunal was not required to give further reasons. But that is not correct. The closeness of the members of the GCT3 was central to [the Claimant's] case (although ignored by the Tribunal). It was incumbent on the Tribunal to consider the evidence in the round and to explain its conclusion".**

105. The suggestion made by the Claimant here is that the Tribunal ought to have inferred that Mr Kerr knew of the APT protected disclosures from the fact that he had worked closely with the GCT for over 20 years and that they had "involved each other" in every decision concerning the team. The first point to note is that there was no evidence whatsoever that there was such involvement in *every* decision concerning the team. None of the GCT 3 made such an assertion, and I was not taken to any passage in the transcript which might suggest

A that the GCT 3 or any of them had accepted that proposition in cross-examination. In any case, it is fallacious to suggest that just because three people work closely together over many years they must thereby be treated as having knowledge of something that one of them is shown to know. Many of the challenges to the Tribunal's findings of fact are based on this same fallacious logic.

106. The Claimant also takes several points which can only be described as "nit-picking" or taking a "fine-toothed comb" to the Decision. An example of this is provided in paragraphs 74 and 75 of the skeleton argument, which provide:

> **"74. …**
>
> > **b) Further or alternatively, the last line of paragraph 168 makes no sense:[the Claimant's] case was not that an investigation was held because protected disclosures were made (which it manifestly was, since there would be no need for an investigation if he had not brought a grievance) but that the investigation was inadequate. The Tribunal gives no reason for this extremely odd finding.**
>
> **75. In relation to [the Respondent's] Answer concerning paragraph 61 of the [grounds of appeal], at paragraph 35(b) of the Answer [CB/3/124-125], [the Respondent] states it was obvious that the Tribunal intended to say, in the last line of paragraph 168, that no step taken or not undertaken in the investigation was because of the making of protected disclosures. But this is not what is recorded in the Judgment, and there is no way of knowing quite what the Tribunal was attempting to say, notwithstanding [the Respondent's] attempt to suggest otherwise".**

107. Quite where that challenge takes the Claimant it is difficult to say. The Tribunal had clearly recorded that it did not consider the investigation to be inadequate in any way. In the light of that finding, it is obvious that the final sentence of paragraph 168 was intended to mean that even if the investigation had been inadequate (which it was not) that was not because of the protected disclosures. The Claimant's approach to the Tribunal's Decision is precisely the kind of "fine-toothed comb" approach deprecated by the authorities. Another example of the Claimant's flawed approach appears in paragraph 81 of the skeleton argument where it is said that the Tribunal's conclusion that it was entirely reasonable to provide a script to clients in the light of the considerable media attention, "*including an article in the*

Sunday Times", which the Phase V Report was receiving was perverse. The Claimant says this is perverse because the Sunday Times article to which the Tribunal refers had not been published as at the date the script for clients was produced. This seems to me to ignore the fact that the Tribunal is clearly referring to the Sunday Times article as an *example* of press attention. Moreover, it was not in dispute that there was considerable press attention and that the Phase V Report was available online. In those circumstances, it is wholly unwarranted to focus on the reference to the Sunday Times article and to suggest that that somehow undermines the Tribunal's finding.

(d) Bonus

108. It is suggested that the Tribunal erred in relation to its conclusion about the bonus. The Claimant's claim was that he suffered a detriment by being paid a bonus which was less than that which was expected. The Tribunal found that this was not a detriment given that the bonus for this transaction was the highest of any person who had worked on it. That conclusion was one that it was entitled to reach on the evidence. It can hardly be said to be perverse.

(e) Detriments: Due Diligence and Array Genomics

109. Having dealt with all the detriments said to have been on the grounds of the protected disclosures in respect of APT, the Tribunal stated as follows:

> **"178. The Tribunal has repeated this process for the disclosures relating to due diligence. Four disclosures of information are relied upon namely on 10 June 2015 to Paul Hodges, on 18 June 2015 to Jim Durkin, on 29 June 2015 to Jim Durkin and Jeremy Warner Allen and on 3 September 2015 to Julie Gray. These duplicate the qualifying disclosures in the APT matter and we have already found that these four matters do amount to qualifying and protected disclosures.**
>
> **179. The detriments relied upon are at issues 10(a)-(j).**
>
> **180. In relation to detriments at issues 10(a)-(h), we have already set out at paragraphs 166 to 174 above. We have considered whether there is anything from which we can find that these matters occurred because Dr Malik made protected disclosures in respect of due**

diligence but the position is the same as with APT. For the same reasons as with APT the last two detriments, (i) and (j) have not been pursued.

181. In these circumstances the Tribunal is satisfied that Dr Malik was not subjected to a detriment because he made protected disclosures relating to due diligence."

110. The Claimant says that it was wrong for the Tribunal to repeat its findings as to the APT disclosures in relation to the due diligence disclosures and to determine that the latter duplicated the former. It is suggested that the Tribunal ought to have undertaken a separate consideration of the due diligence disclosures given that it was not in dispute that Mr Cooper did know about these.

111. I do not accept the Claimant's argument. The Tribunal had already carefully considered each of the detriments in turn and rejected the Claimant's case. The Tribunal expressly states that it repeated that process for the due diligence disclosures and reached the same conclusion. Whilst it could have set out each stage of its analysis again, there is no error of law in adopting a shorthand approach given that the same detriments were being relied upon in respect of both the APT and the due diligence disclosures.

112. It is right that at paragraph 166 of the Reasons, the Tribunal refers to the fact that there was no evidence that Mr Kerr knew of any of the alleged protected APT disclosures. That might suggest that the extent of Mr Kerr's knowledge was relevant to causation. However, the Tribunal's analysis in respect of causation, contained in the latter half of paragraph 166 (commencing with the word, "However …") sets out positive findings of fact as to why the Respondent took the steps alleged to amount to a detriment. It was clear that the reason GCT were recruiting a new Analyst was because they thought there was a continued need for such an Analyst within GCT and because they did not want "leakages" to other teams. The Tribunal finally concluded that "*The steps to recruit a new analyst were not*

because Dr Malik made protected disclosures". That was a finding of fact that was open to the Tribunal. That finding would apply in respect of other disclosures just as much as it did to the APT disclosures.

113. Ms Mulcahy QC submits that the Tribunal's shorthand approach was incorrect and that it was obliged to give proper consideration to the due diligence and Array Genomics disclosures as they might have been the cause of the detriments relied upon even if the APT disclosures were not. She submits in particular that the fact that the analysis of the APT disclosures is imbued with the question of knowledge of those disclosures meant that one cannot simply transpose that analysis to the other disclosures.

114. Of course, had the Tribunal found that the APT disclosures had played a part in the decision to recruit a new Analyst for the GCT, it would have been incumbent upon the Tribunal to consider whether the same could be said of other disclosures. However, that was not what it found. Instead, in respect of each of the detriments the Tribunal made positive findings as to the reason why the decision-maker in each case acted as he did. Furthermore, the Tribunal expressly concluded that the detriments were not by reason of the disclosures. That left no scope for concluding that any of the disclosures played a part.

(f) Misapplication of the law concerning dismissal / section 103A

115. The Claimant argues that the Tribunal erred in failing to consider the correct test as to the reason for the dismissal, namely whether the protected disclosures were the sole or principal reason for the dismissal within the meaning of section 103A of the **Act**. In my judgment this point goes nowhere. The Tribunal rejected the claim of repudiatory breach of contract. As such, there could not be any constructive dismissal, and there was no need for

A the Tribunal to go on to consider what the reason for dismissal might have been. This is yet another attack on the Tribunal's Judgment which appears somewhat academic.

B 116. It follows that ground 3 of the reformulated grounds of appeal also fails.

Ground 4 - Victimisation

C 117. It is important to recognise at the outset that the detriments relied upon here were the same as those under the whistleblowing claim. Thus, the List of Issues identified the detriments under the victimisation head as:

D (a) the investigation into the Claimant's relationship with NWB;

(b) the failure to uphold the grievance having carried out an inadequate investigation;

E (c) the award of a bonus which was less than he had been led to believe he would be paid;

(d) the Claimant's suspension on 4 November 2015; and

(e) the contacting of the Claimant's clients.

F 118. Of these, the Tribunal found that the second, third and fifth matters were not shown to be detriments at all. In respect of the first and fourth matters, the Tribunal found that these were detriments. However, it went on to make positive findings as to the reason why the

G Respondent acted as it did in each case and it rejected the claim that they had anything to do with the Claimant having made protected disclosures. Paragraph 212 of the Tribunal's Reasons states that:

> **"212. Dr Malik relies on five detriments. These are the same detriments as the second to the sixth detriments in the claim of detriment for making protected disclosures. We have already found the reasons for the second, third and fifth disclosures at paragraphs 167, 168 and 170 above respectively. In relation to the fourth detriment, we have noted at**

H

paragraph 169 above that Dr Malik could not explain to us why the award of his bonus amounted to a detriment. Finally, in relation to the sixth detriment, we have noted at paragraph 171 above that Dr Malik has not proved that he was subjected to this detriment. There is nothing from which the Tribunal may infer that any of the alleged detriments were because of the protected acts. In addition, there is nothing to suggest that the actions of the Respondents were in any way motivated by the complaints made by Dr Malik on 27 August or 22 September 2015."

119. It is quite clear from that paragraph that in assessing the reason why the alleged detriments had occurred the Tribunal was referring back to its analysis in respect of the same detriments under the whistleblowing complaint. Having found that there were reasons for the Respondent acting in the way that it did which had nothing to do with disclosure, it was open to the Tribunal to conclude as it did in the penultimate sentence in paragraph 212 that there was nothing from which the Tribunal could infer that any of the alleged detriments were because of the protected acts.

120. The Claimant's principal challenge in respect of the victimisation findings was in respect of the Tribunal's approach to the protected acts. However, even if the Tribunal had erred in respect of those protected acts - a possibility which the Tribunal itself considered: see paragraph 211 of the Reasons - its findings as to causation render that challenge academic.

121. That said, I shall go on to consider briefly the specific complaints made:

(a) The first complaint is that the Tribunal failed to apply the burden of proof provisions under section 136 of the **Act**. Section 136 is expressly referred to at paragraph 204 of the Reasons. However, this was a case where the Tribunal was able to make positive findings of fact as to the reason why certain acts were done. In those circumstances, the burden of proof provisions assume less importance than they might otherwise do: see **Hewage** at [32]. Accordingly,

the absence of any further reference to the burden of proof does not undermine the Tribunal's decision.

(b) The second complaint is that the Tribunal failed to consider the effect of a complaint at a grievance meeting which was found to be a protected act but which was then ignored. The Claimant identifies the "ignored" protected act as that done at the meeting on 27 August 2015. However, that act was not ignored and was expressly referred to in paragraph 212 of the Reasons. It is true that the final sentence in paragraph 210, which states that the Tribunal was not satisfied that "*they do constitute protected acts*" (emphasis added) could be a reference to all of the protected acts alleged. That would render the Tribunal's conclusion inconsistent with the apparently clear earlier finding at paragraph 207 that the remark made at the meeting on 27 August 2015 was a protected act. (I note here that I reject Mr Forshaw's submission that the Tribunal must have intended to say that this was not a protected act. The only reasonable reading of paragraph 207 is that the Tribunal found there was a protected act.) To that extent it appears that the Claimant is correct that, having found there was a protected act, the Tribunal concluded otherwise at the end of paragraph 210. However, that internal inconsistency does not, in my judgment, undermine the Tribunal's conclusions as to causation in paragraph 212. That is for the simple reason that that analysis was predicated on the basis that the Tribunal was wrong and that there *were* protected acts; hence the Tribunal's reference in paragraph 211 to a consideration of "*whether the detriments relied upon could flow from them*", the "them" being a reference to all of the alleged protected acts.

(c) The third complaint is that the Tribunal wrongly stated the requirements for victimisation. This is a challenge to the first sentence of paragraph 210 of the Reasons in which the Tribunal states that the Claimant must "*demonstrate a reasonable belief*" that the allegations amounted to discrimination on the grounds of race or religion. I accept Ms Mulcahy's argument that the reference to reasonable belief is incorrect. There is no reasonable belief requirement in section 27 of the **Equality Act 2010 ("the 2010 Act")**. Section 27(3) provides that the giving of false evidence or information or the making of a false allegation, is not a protected act if the evidence or information is given, or the allegations are made, in bad faith. Mr Forshaw argued that the Tribunal's conclusions in paragraph 210 are synonymous with a finding of bad faith, notwithstanding the absence of any reference to bad faith in the reasoning. I reject that argument. As well as stating the test in respect of false allegations incorrectly, the Tribunal appears to have found only that Dr Malik "*got the wrong end of the stick*" and recorded many conversations covertly. That, in my judgment does not go nearly far enough to show that the Claimant was acting in bad faith. The Tribunal's finding in the penultimate sentence of paragraph 210 that his allegations were found not to be proven after investigation does not take the matter any further. That finding was merely capable of showing that the allegations were false, not that they were made in bad faith. It follows that the Tribunal did err in relation to both the test in section 27(3) of the **2010 Act** and its application to the facts of this case. However, for the reasons already set out, that error does not undermine the Tribunal's critical conclusion as to causation in paragraph 212;

(d) The fourth matter relied upon is that the Tribunal appears to have proceeded on the basis that the Claimant had acted in bad faith. This is already dealt with in the preceding paragraph;

(e) Finally, it is said that it was perverse for the Tribunal to conclude that there was nothing to suggest that the Respondent was motivated by the Claimant's allegations of race and religious discrimination in circumstances where a large part of his case was that the GCT - who were the subject of the Claimant's grievances, including discrimination - forced him out as a result. I reject this argument. The Tribunal was entitled to make the finding of fact that it did as to motivation in respect of the alleged detriments. The Tribunal had expressly noted the alleged hostility to which the Claimant was subject. It had noted Mr Warner Allen's reaction to the allegations in respect of race and religion as being "distasteful and unbelievable" and Mr Kerr's reaction that he was "unhappy" about such comments being associated with his name. It cannot be said that the Tribunal was not aware of the case that was being put in respect of victimisation or that the GCT 3 and Mr Cooper knew about the contents of the grievance. Notwithstanding that case the Tribunal made a clear finding that the detriments had nothing to do with those protected acts. That finding was not perverse.

122. Ground 4 therefore also fails.

Ground 5 - Constructive Dismissal

123. The Claimant complains that the Tribunal, having found that the commencement of a recruitment exercise for a replacement Analyst in August 2015 was potentially a repudiatory

breach, erred in law in finding that the Claimant had affirmed the contract by continuing to work. It is right to note that the Tribunal did not make any final determination that the recruitment exercise did in fact amount to a repudiatory breach. The Tribunal in fact concluded that the Claimant had not demonstrated any repudiatory breach "*with the possible exception of the steps to recruit an analyst*" (emphasis added). The second point to note is that the Claimant is incorrect to suggest that the Tribunal found there to be an affirmation simply on the basis of continuing to work; the Tribunal also referred on two occasions to the fact that the Claimant had not taken any action in respect of the commencement of the recruitment exercise. The relevant passages in the Reasons are as follows:

> **"195. The third alleged breach is:**
>
> > ***That steps have been taken through to the analyst into GCT in August 2015 while he was on holiday, despite express representations from Paul Hodges that this would not occur."***
>
> **"201. The Claimant has not demonstrated any repudiatory breach, with the possible exception of the steps to recruit an analyst. He failed to act on the steps taken to recruit an analyst and therefore affirmed any breach that there might have been. Dr Malik did not resign until 8 December 2015. The Tribunal is not satisfied that there was a constructive dismissal."**

124. The Claimant contends that there was an error of law in that the mere fact of continuing to work does not constitute affirmation. Reliance is placed on the well-known case of **W E Cox Toner (International) Ltd v Crook** [1981] IRLR 443. Ms Mulcahy QC developed this argument orally by suggesting that following the discovery of the attempt to recruit a replacement, the Claimant had instituted a grievance, the outcome of which was only communicated to him on 20 October 2015. Thereafter, as from 12 November 2015 until his resignation on 8 December 2015, he was off sick. It is said that at no time since the recruitment exercise came to light did he cease to object, and on that basis, he cannot be said to have affirmed.

125. The law in relation to affirmation is well established:

(a) In the face of a repudiatory breach of contract an employee can resign and claim constructive dismissal, but is not bound to do so. S/he may elect to affirm the contract of employment;

(b) Generally, continuing to work in the face of a breach of the contract of employment (certainly for any length of time) will be regarded as affirming the contract. In **Western Excavating v Sharp** [1978] IRLR 27 (at page 29) Lord Denning MR stated:

> **"15. … he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."**

Similarly, in **Bashir v Brillo Manufacturing Co Ltd** [1979] IRLR 295, Slynn J stated (at paragraph 16) referring to the passage above:

> **"16. … It seems to us that when the Master of the Rolls is talking about the employee continuing for any length of time without leaving he is referring to a situation where the employee actually does the job for a period of time without leaving, or if he does some other act which can be said to affirm the contract as varied. …"**

(c) In **W E Cox Toner (International) Ltd v Crook** [1981] IRLR 443 itself, the EAT considered the case of a senior employee who had been subjected to censure by his employer in July 1979 on the basis of certain allegations. He refuted the allegations and required them to be withdrawn. In February 1980 the employer made it plain that the allegations would not be withdrawn. A month later the employee resigned. The EAT considered that:

i. as a matter of law, affirmation may be express or implied (paragraph 13);

ii. an innocent party who calls upon the other party to perform the contract of employment will be taken to have affirmed it (paragraph 13);

iii. an innocent party who does acts which are only consistent with the continued operation of the contract will be taken to have affirmed it (paragraph 13);

iv. however:

> **"13. … if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation."**

(d) In **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121, the employer had suggested before the employment Tribunal and the EAT that it had 'cured' any breach of the implied term of mutual trust and confidence which had occurred prior to the resignation of the employee. The Court of Appeal did not accept that a breach of contract could be 'cured' so as to deprive an employee of the opportunity to repudiate the contract in response. However, at paragraph 44 of the judgment, Sedley LJ observed:

> **"44. Albeit with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that were capable of extension to other contracts, and for reasons I have given I do not consider that we would be justified in doing this. That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends. …"**

126. It is clear from the authorities above that an employee who seeks to accept a repudiatory breach must not delay, particularly where the repudiating party has offered to make suitable amends; or do any act which can only be consistent with the continued operation of the contract (unless it is made clear that this is done under protest or by reserving his rights).

127. The facts in the present case show that shortly after the Claimant had raised his objection to the recruitment exercise, that exercise was put on hold. It does not appear from the Tribunal's findings that the exercise was ever revived prior to his resignation. The grievance outcome letter dated 20 October 2015 (referred to at paragraph 110 of the Reasons) provided:

> **"I will be recommending that discussions should commence in earnest between Paul Hodges and the Growth Companies Team Leaders as to how the change a reporting line and working practice and if there is likely to be an impact on your [role] that you are consulted on this."**

128. That was clearly a reference to the Claimant's proposed change from GCT to the IPO Team. The Respondent had therefore not only put the recruitment exercise on hold but was also assuring the Claimant that he would be consulted in respect of any impact on his role that could arise from the change. The Claimant continued to work until 4 November 2015 when he was suspended. The Claimant was taken ill shortly thereafter and he resigned on 8 December 2015. He was paid up until that date.

129. In my judgment, on the basis of these facts, the Tribunal was perfectly entitled to conclude that the Claimant had failed to act on the steps taken to recruit an Analyst and had thereby affirmed any breach there might have been:

(a) There was, on any view, substantial delay - some 3½ months - between the Claimant first becoming aware of the potential repudiatory breach and his resignation;

(b) He continued to attend work for much of that period. If he is not to be taken to have affirmed the contract it would have had to have been made clear from the outset that he was only doing so under protest and/or having reserved his

rights. The grievance, which was primarily about other matters, did not satisfy that requirement;

(c) It is significant that the recruitment exercise was put on hold very shortly after the Claimant raised the matter. That fact and the offer of further consultation at the end of the grievance process (both being matters which the Tribunal had in mind) certainly indicate that the employer was seeking to make amends. There is no suggestion that the recruitment exercise would continue irrespective of any concerns that the Claimant had;

(d) This is, therefore, precisely the kind of scenario where the Tribunal can take a robust approach to affirmation: **Buckland v University of Bournemouth** at [44]. That is what the Tribunal rightly did.

130. Mr Forshaw further submits that the recruitment exercise could not amount to a repudiatory breach in any event because there was reasonable and proper cause for initiating it. There is considerable force in this argument. But as the Tribunal reached its conclusion on the basis of affirmation, and which conclusion I find free from error, there is no need to reach a determination on it.

Other Grounds of Appeal

131. This was a residual category of appeal. No fewer than 57 paragraphs of Ms Mulcahy's skeleton argument were devoted to this ground alone. However, she, correctly in my view, did not develop the vast majority of them in oral submissions. That was correct because these paragraphs do not disclose any arguable point of law. A more robust sifting exercise in respect of this appeal might have weeded out these unmeritorious and extraneous grounds.

132. I was taken to just two of the 57 paragraphs. The first was paragraph 119 where the Claimant challenges the Tribunal's conclusion that it had received no satisfactory answer from the Claimant as to why he recorded so many conversations and meetings. The Claimant argues that he did provide a reason. That had something to do with an incident with a colleague in late 2013 as a result of which the Claimant decided to protect himself in case he was put in a similar position of being forced to work on matters which were not appropriate. However, all that this establishes is that the Claimant put forward a reason for making recordings. The Tribunal was still perfectly entitled to regard that reason as unsatisfactory. Whilst it is correct that the Tribunal did not explain why it might have thought so, it did not need to do so given that the making of recordings was not a critical issue in the case. It may be said that, on the face of it, the explanation being proffered even now does not strike one as being particularly convincing or even credible. However, it is not for this Court to make any findings on such matters at this stage.

133. I was also referred to paragraph 128. This is said to contain a further example of Mr Cooper knowing about due diligence disclosures. This seems to be further allegation that the Tribunal did not record a piece of evidence that was before it. For reasons already set out, the Tribunal was not obliged to record every piece of evidence and there is nothing to suggest that this particular item was somehow critical, particularly as the Tribunal found that the relevant protected disclosures were made.

Conclusion in Respect of the Main Appeal

134. For reasons set out above, all of the grounds of appeal fail and the main appeal is dismissed.

Reconsideration Appeal and the Application to Adduce Evidence

135. The background to the reconsideration appeal is set out above at paragraphs 32 and 34 above.

136. On 5 January 2017, by which stage the Judgment had been promulgated, the Claimant's solicitors applied for a reconsideration of the Judgment on the basis that the Claimant wished to "*regularise the position concerning an application made by the Claimant prior to judgment, which application was not determined by the Employment Tribunal*". The application noted that the finding at paragraph 40 of the Judgment that Mr Nally did not believe that a meeting between himself, the Claimant and Mr Hodges had happened was inconsistent with the transcript which showed that such a meeting did take place. The Claimant had relied upon a meeting with Mr Nally as providing the occasion for a further disclosure in relation to APT. Accordingly the Tribunal was asked to reconsider that part of its Judgment pursuant to Rule 71 of the **Employment Tribunal Rules** and to vary its Judgment to reflect the material now disclosed in the transcript. The Respondent registered its objection to this application.

137. On 3 February 2017, the Tribunal refused the application to reconsider the Judgment on the basis that there was no reasonable prospect of the original decision being varied or revoked. The Tribunal explained that when the transcripts were first sent to the Tribunal it had already made its decision and the Tribunal considered it was not appropriate to consider the material at that stage. The Tribunal proceeded to consider whether the **Ladd v Marshall** test was satisfied. The Tribunal found that there was no satisfactory explanation as to why this evidence could not have been obtained with reasonable diligence for use at the trial. Furthermore, the Tribunal said that in any event it could not be said that the evidence would

have had an important influence on the outcome given that the Tribunal had already found that protected disclosures had been made in relation to the APT issue.

138. The Claimant now seeks to appeal against the Reconsideration Judgment and invites the EAT to substitute its own decision for that of the Tribunal and to determine that the transcript evidence should have been admitted. Alternatively, the Claimant applies to the EAT directly for the transcript evidence to be admitted as new evidence for the purposes of the main appeal.

139. The reconsideration appeal is brought on four grounds, namely that the Tribunal erred in that:

(a) It failed to respond to the Claimant's letter of 8 December 2016 prior to promulgating the Judgment;

(b) If the Tribunal had already reached its decision by that stage, it failed to exercise its discretion to "recall" its Judgment as permitted by **In re L and B (Children)** [2013] UKSC 8 and **Hanks v Ace High Productions Ltd** [1978] ICR 1155;

(c) It applied the **Ladd v Marshall** test when in fact it should have applied the principles in the decisions of **L and B** and **Hanks**;

(d) Even if the test in **Ladd v Marshall** was the correct one, it failed to apply that test correctly.

140. Each of these grounds is considered in turn:

Failure to respond prior to promulgation

141. This ground raises no arguable point of law. The Claimant submits that it was incumbent upon the Tribunal to consider the new material at that stage, but does not explain why. The Tribunal had, as it explained, already reached a decision after completing its deliberations several weeks prior to the Claimant's letter. That letter contained no specific application to adduce the evidence at this late stage, nor did it attempt to explain the basis on which the Tribunal was said to be obliged to consider this new material.

Failure to exercise power of "recall"

142. The Claimant's letter of 8 December 2016 did not refer to this power of recall or to the authorities now relied upon. The Tribunal cannot, therefore, be criticised for failing to exercise a discretion which it had not expressly been invited to exercise. In any event, the issue at this stage was whether or not the Claimant should be permitted to adduce new evidence. The decisions in **L and B** and **Hanks** do not specifically address that question; rather they deal with the Court's power to change its mind. In **Hanks**, the EAT held that there was an inherent power to alter a Judgment until it had been entered or drawn up, but that it was a power that should be used sparingly and only in cases of simple errors or omissions. The Claimant in this case had not even established an entitlement to adduce the fresh evidence, and any reconsideration that he sought based on that evidence would not fall into the category of a "simple error" or "omission" which could be remedied by the Tribunal. Whilst the judgment of the Supreme Court in **L and B** indicates that a Judge was not bound to look for exceptional circumstances in exercising the jurisdiction to change her mind, the discretion had to be exercised judicially and not capriciously. There was nothing capricious, to my mind, in the Tribunal in this case not reopening its decision to consider new evidence when the basis for admitting that evidence had not been properly set out or established.

*Application of **Ladd v Marshall** instead of **L and B** and **Hanks***

143. The decisions in **L and B** and **Hanks** are irrelevant once the Judgment is perfected; those decisions are concerned with the power to reverse or alter a decision prior to it being drawn up and perfected. The Tribunal applied **Ladd v Marshall** when dealing with the reconsideration application. By that stage, its Judgment and Reasons had been promulgated. Accordingly, the Tribunal was correct to treat the application as being one to introduce new evidence and in applying guidance in **Ladd v Marshall**.

*Failure to apply **Ladd v Marshall** correctly*

144. The Claimant submits that even if the **Ladd v Marshall** test applied, the Tribunal erred in not accepting that the test had been met. I see no merit in this submission:

145. The well-known guidance in **Ladd v Marshall** is as follows:

> **"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."**

146. The Claimant's application acknowledges that the recordings were in his control and/or possession in that they were on an old laptop which was given to his young son. It was incumbent upon the Claimant to exercise reasonable diligence in adducing evidence relevant to his case. He provided no real explanation as to why he could not have obtained these recordings and disclosed them prior to trial. The sequence of events suggests nothing more than that the Claimant had forgotten about the material that might be stored on his old laptop. Forgetting about something does not amount to the application of reasonable

diligence. It is patently clear that the material could have been obtained before trial with reasonable diligence.

147. In any event, as the Tribunal concluded, the new evidence could not have any impact on the outcome because the Tribunal had already found that protected disclosures were made in relation to the APT issue. The evidence established little more than that there was a further APT disclosure.

148. For all of these reasons, the reconsideration appeal is dismissed.

Application to Adduce Evidence Before the EAT

149. Mr Forshaw submits that the effect of upholding the Reconsideration Judgment is to render the fresh evidence issue *res judicata*. Whether or not that is the case, the matter can be dealt with very shortly on the basis that the **Ladd v Marshall** test for adducing new evidence at this stage is clearly not satisfied. The recordings and transcripts do not satisfy the test for the reasons set out in the previous section.

150. Ms Mulcahy QC sought to rely upon some further evidence at this hearing, namely a text sent by Mr Woodford to the Claimant on 29 October 2015. It is said that the expert tasked with extracting messages from the Claimant's mobile phone had omitted to include this particular text. As such it is said the text could not have been obtained with reasonable diligence, is important and is credible, and should for those reasons be admitted. I do not agree. The evidence does not satisfy the first two limbs of the **Ladd v Marshall** test. Firstly, it clearly could have obtained before trial with reasonable diligence. The message was available on the Claimant's mobile phone and could have been extracted along with all the

A others. The fact that the Claimant's expert for some reason failed to include this message in the disclosure does not mean that it could not have been obtained. Secondly, the text (which was not even seen by the Respondent at the time) would not have had any influence on the result of the case. At best, it shows that Mr Woodford did not think much of the Phase V Report. But a third party's opinion of the Phase V Report is of limited, if any, relevance; the Report raised matters of obvious concern about the Claimant's conduct which warranted further investigation.

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151. Accordingly, I refuse the application to adduce fresh evidence. Neither the transcripts of the "lost" recordings nor the Woodford text message were taken into account in determining the main appeal.

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