Appeal No. UKEAT/0283/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21-22 December 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

HIS HIGHNESS SHEIKH KHALID BIN SAQR AL QASIMI — APPELLANT

MS T ROBINSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES LADDIE (One of Her Majesty's Counsel) Instructed by: BP Collins Solicitors Collins House 32-38 Station Road Gerrards Cross Buckinghamshire SL9 8EL
For the Respondent	MR DAVID STEPHENSON (of Counsel) Instructed by: TMP Solicitors LLP 30th Floor 40 Bank Street Canary Wharf London E14 5NR

SUMMARY

VICTIMISATION DISCRIMINATION - Interim relief

VICTIMISATION DISCRIMINATION - Whistleblowing

VICTIMISATION DISCRIMINATION - Dismissal

JURISDICTIONAL POINTS - Fraud and illegality

Interim relief application - whistleblowing claim - complaint of automatic unfair dismissal under section 103A ***Employment Rights Act 1996*** *- protected disclosures - public interest - illegality*

The Claimant had worked for the Respondent since 2007. In or around 2014, an issue arose as to her employment status for tax and National Insurance purposes and led to a series of communications between the parties and their advisers, in which the Claimant raised a number of matters relating to the way in which the Respondent had approached the employment status and tax liabilities of those working for him in the UK (including the Claimant). These continued over a three year period until ultimately the Respondent dismissed the Claimant by letter of 19 May 2017. The Claimant brought Employment Tribunal proceedings, contending that her dismissal was really because she had made protected disclosures, relying on some eight particular communications. She further applied for interim relief. At the hearing of that application, the ET concluded that the Claimant had a pretty good chance (applying **Taplin v C Shippam Ltd** [1978] ICR 1068 EAT) of succeeding in her claim and made an Order that the contract between the parties should continue until the determination or settlement of the Claimant's complaint of unfair dismissal. The Respondent appealed, arguing that the ET had failed to consider the disclosures relied on separately and to address (so far as disclosures 1, 2 and 8 were concerned) points raised in the ET3 as to whether these were qualifying disclosures (grounds 1-3). He further contended that the ET had erred in its approach to the public interest requirement (grounds 4-5) and in respect of the issue of causation (ground 6) and argued that

the ET had also erred in law in failing to deal with the point raised by the Respondent that the Claimant's contract was void by reason of illegality (ground 7).

Held: *allowing the appeal in part.*

The obligation upon an ET on an interim relief application was necessarily to carry out a summary assessment of the material before it (applying the test laid down in **Taplin v Shippam**) to determine whether the Claimant was *likely to* succeed in her claim. In a whistleblowing case, it would need to take a view as to whether the Claimant was likely to succeed in showing that she had made qualifying disclosures, meeting the requirements laid down by section 43B **Employment Rights Act 1996**. The way in which it needed to approach that exercise would, however, depend upon the particular case. Here (contrary to ground 1) the ET had been entitled to view the communications relied on by the Claimant as linked as part of a chain and to thus take an overall view as to whether she had a pretty good chance of showing she had made protected disclosures and, so far as the matters raised by grounds 2 and 3 were concerned, it had reached a permissible view that she had. Equally, taking the ET's reasons as a whole (and including its references to those parts of the evidential material that had obviously weighed with it), it had been entitled to take the view that it did on the question of causation, that the Claimant was likely to succeed in showing that the reason for her dismissal had been the disclosures she had made (ground 6).

It was, however, not possible to be similarly confident as to the ET's approach to the public interest element of the protected disclosure requirement (grounds 4 and 5). Whether inadequately reasoned or because the ET had applied the wrong test, it was not possible to see that it had asked itself the question as to whether the Claimant had believed, at the relevant time, that her disclosures were in the public interest (**Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837 CA applied) and that (even allowing for the limited nature of the task on an interim relief application) rendered the ET's conclusion in this regard unsafe and the appeal would, therefore, be allowed on grounds 4 and 5. The ET had further erred (ground 7) in

failing to address the illegality point expressly raised by the Respondent and dealt with in submissions. Whilst there was an obligation on the parties (pursuant to the overriding objective) to notify an ET if they considered it might have inadvertently failed to deal with a point, ultimately the failure was that of the ET itself and the appeal would also be allowed on this basis.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter arises out of an interim relief application in a whistleblowing claim. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the London Central Employment Tribunal (Employment Judge Stewart sitting alone on 22 and 30 June 2017; "the ET"), sent to the parties on 26 September 2017. Both parties were then represented by counsel; the Claimant by Mr Stephenson, as now, the Respondent by different counsel.

2. By its Judgment, given orally at the end of the hearing on 30 June 2017, the ET granted the Claimant's application for interim relief, ordering that the contract between the parties should continue until the determination or settlement of the Claimant's claim of unfair dismissal. I should further explain that the second day of the hearing before the ET only finished at around 7.30pm. The hearing had started on 22 June - before the Respondent had filed its ET3 - and continued over to 30 June. The ET3 was filed on 29 June. It appears that during the course of the lunch break on 30 June 2017, then counsel for the Respondent thought of an additional point relating to the Claimant's employment status, which he then raised as part of his submissions. Mr Stephenson, acting for the Claimant, had to deal with that matter without prior notice. When giving the oral Judgment, it is further relevant to note that the Employment Judge realised that the recording equipment was not working and therefore asked the parties to make a note of the Judgment, which they were then asked to send in to the ET so the Employment Judge could perfect the transcript. I am told that the parties were unable to agree a record of the Judgment and so two separate notes were submitted. Around five weeks

A after receiving the perfected Judgment - on its face wrongly stated to have been "reserved" - the Respondent lodged the present appeal.

B 3. Given the nature of the underlying application, the appeal was then expedited for sift. On or about 22 November 2017 The Honourable Mr Justice Soole, considering this matter on the papers, permitted that the appeal should proceed to a Full Hearing, stating:

> **"Whilst I think it very questionable whether the 'pretty good chance' test for an application for interim relief requires the level of detailed analysis of the claims for which the grounds of appeal contend, the grounds are sufficiently arguable to proceed to a Full Hearing. Furthermore the judicial guidance on such applications is relatively limited. Given the potential for irretrievable prejudice, I consider that the appeal should be expedited."**

C

In addition, he made the following observations:

D

> **"Although not raised as a Ground of Appeal, it is not clear to me that the statutory requirement that applications are made by 'an employee' (s.128(1)) can itself be satisfied by the 'pretty good chance' test."**

E 4. That further observation apparently led those acting for the Respondent to reconsider the grounds of appeal, and on 6 December 2017, an application was made to amend the Notice of Appeal to add a ground taking the employment status point Mr Justice Soole had identified (essentially the additional point taken during the second day of the ET hearing by the

F Respondent's then counsel). Given the expedited nature of this hearing, it was left that the application to amend should be dealt with at the outset of the Full Hearing and, having heard submissions on the point, I refused permission for the reasons given in my separate Judgment

G on that application.

<u>The Legal Framework (in Summary)</u>

H 5. The Claimant is pursuing a claim of unfair dismissal before the ET. She alleges that the principal reason for her dismissal was that she made a protected disclosure as defined by

section 43B(1)(b) of the **Employment Rights Act 1996** ("the ERA"). If that is correct, then, by virtue of section 103A **ERA**, the Claimant's dismissal would be regarded as unfair.

6. Pending the determination of her substantive complaint, the Claimant applied to the ET for interim relief; that is permitted by section 128 **ERA**, which relevantly provides:

> **"128.** ***Interim relief pending determination of complaint***
>
> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and -**
>
> > **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in -**
> >
> > > **(i) section … 103A, …**
>
> **may apply to the tribunal for interim relief."**

7. I have not set out more fully the provisions relating to the procedure to be adopted in hearing an application for interim relief or as to the nature of the Order that the ET may make, should such an application be successful. I note, however, that it is apparent, not only from those provisions but from section 103A itself, that the application will have to be brought by an employee; that is, someone employed under a contract of service that has not been rendered void by illegality.

8. By section 129 of the **ERA**, it is further provided by subsection (1):

> **"(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find -**
>
> > **(a) that the reason (or if more than one the principal reason) for dismissal is one of those specified in -**
> >
> > > **(i) section … 103A, …"**

9. The word "likely" for these purposes has been held to mean that it must be shown that the Claimant has a *pretty good chance of succeeding*, not merely that he or she could possibly win (see **Taplin v C Shippam Ltd** [1978] ICR 1068 EAT, decided under the parallel

provisions relating to interim relief applications in dismissal for trade unions reasons, and followed and applied in a number of appellate cases, see, for example, **Dandpat v University of Bath** UKEAT/0408/09, 10 November 2009 unreported; **Ministry of Justice v Sarfraz** [2011] IRLR 562 EAT); that is thus the test to be applied, rather than just a balance of probabilities (see **London City Airport Ltd v Chacko** [2013] IRLR 610 EAT).

10. Recognising that this sets a relatively high bar for a Claimant, the EAT in **Dandpat** observed as follows:

> **"20. … We do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did, in the case of applications for interim relief. If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not [a] consequence that should be imposed lightly".**

11. Where, as here, interim relief is sought in a whistleblowing case under section 103A **ERA**, the Claimant must show that it is likely that the ET will find (1) that she made her disclosure to the employer, (2) that she believed that disclosure tended to show one or more of the things itemised in section 43B(1)(a)-(f), (3) that her belief was reasonable, (4) that the disclosure was made in good faith, and (5) that the disclosure was the principal cause of the dismissal (see **Ministry of Justice v Sarfraz** above).

12. Where reliance is placed on a number of disclosures, it is further required that the ET is satisfied that the conditions set out in section 43B are met in respect of each such disclosure (see **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 EAT at paragraph 19), albeit that a number of communications might need to be considered together to answer the question whether a protected disclosure has been made (see **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540 EAT). It is, further, a requirement in every case that the disclosure is of information and not simply the making of an allegation or

statement of opinion (**Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] ICR 325 EAT), albeit that the distinction is not always an easy one to draw and a disclosure of information may be made alongside the making of an allegation (see **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 EAT).

13. Moreover, as from 25 June 2013, there is a public interest requirement inserted into section 43B by virtue of section 17 of the **Enterprise and Regulatory Reform Act 2013**, so that it is now provided:

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following …"**

14. This requirement was considered by the Court of Appeal in **Chesterton Global Ltd & Anor v Nurmohamed** [2017] IRLR 837, in which it was explained:

> **"27. … the tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
>
> **28. … element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. …**
>
> **29. … the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.**
>
> **30. … while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, … the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase '*in* the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.**
>
> **31. Finally by way of preliminary, although this appeal gives rise to a particular question … I do not think there is much value in trying to provide any general gloss on the phrase 'in the public interest'. Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. … The**

> **relevant context here is legislative history … That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the tribunal …"**

15. More specifically, where the disclosure relates to something that is in the worker's own interest but may also be in the public interest, Underhill LJ observed as follows:

> **"35. … It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase 'in the public interest'; but if there were any doubt about the matter the position is clear from the legislative history. The essence of the '*Parkins v Sodexho* error' which the 2013 Act was intended to correct was that a worker could take advantage of 'whistleblower protection' where the interest involved was personal in character. Such an interest does not change its character simply because it is shared by another person. The advantage of achieving a bright line cannot be obtained by distorting the natural meaning of the statutory language.**
>
> **36. … The statutory criterion of what is 'in the public interest' does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of s.43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers - even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.**
>
> **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. …"**

16. By Rule 95 of Schedule 1 of the **Employment Tribunals (Constitution of Rules of Procedure) Regulations 2013**, it is provided that an ET will not hear oral evidence on an interim relief application unless it directs otherwise. In the present case, the ET did not hear oral evidence but had a number of written statements from both parties.

17. As for the nature of an interim relief hearing and the ET's reasoning required in such a case, in **Dandpat v University of Bath** it was observed as follows:

> **"17. … An application for interim relief is, as we have said, necessarily summary in character. It was in our view enough for the Tribunal to indicate the essential gist of its reasoning. …"**

18. To similar effect in **Parsons v Airplus International Ltd** UKEAT/0023/16, 4 March 2016 unreported, His Honour Judge Shanks observed:

> **"8. On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits."**

The Factual Background

19. The Claimant commenced working for the Respondent on 30 March 2007. She was offered her position by a solicitor working for the Respondent, a Mr Peter Cathcart, who explained to her what the job would involve and that she would be paid £34,000 per annum; something the Claimant said she was assured would be her net take home pay.

20. The Claimant's terms of engagement - signed by her when she started on 30 March 2007 - were set out in a letter sent from Mr Cathcart of 23 March 2007, in which it was stated:

> **"You will be paid a management fee for undertaking this work at the rate of £34,000 per year. You will be responsible for your own tax on that payment.**
>
> **There are no set hours nor is there any set place of work." (ET Judgment, paragraph 11)**

21. As the ET further recorded:

> **"12. The letter also stated that the Claimant was entitled to recover costs and disbursements and, in respect of travel, she is told to keep a log book of her journeys and that a mileage rate will be agreed.**
>
> **13. The letter specified that there to be [sic] a need for the Claimant to open a bank account from which payments can be made and that there would also be a float of £15,000 - the Claimant was to report expenditure to the Respondent and she would be reimbursed. She was also told that she would receive 4 weeks' holiday per year and there is a reference to each side terminating the contract with one month's notice."**

22. The Claimant's job description had been drawn up by her predecessor in the role, Ms Driver, and included the following duties:

> **"15. … dealing with the car and staff, visiting the property once per week, maintaining a log book for mileage, making doctors and dentists appointments, making hair appointments, paying university and college fees, sales and purchase of properties, accounts …"**

Ms Driver also added the following observation:

> **"… be flexible! Any number of varied issues can arise which need attention either for the comfort of the children or in relation to their properties or those of their guards. Each has to be addressed satisfactorily whether this means disposing of accumulated garbage to sourcing new educational facilities etc."**

23. During the period that then followed, it appears that the Claimant worked satisfactorily, notwithstanding various upheavals for the Respondent and his family (not least when the Respondent was detained in the UAE in 2010, being released in late 2010/2011 and then coming to the UK).

24. Thereafter, however, it appears that issues arose regarding the employment status and tax liabilities in respect of the Claimant and others working for the Respondent. It seems that the Claimant may have sought to raise grievances about this with Mr Cathcart in October 2012 and March 2013 but, going into 2014, had understood that the Respondent had appointed the accountants, PricewaterhouseCoopers ("PwC") to deal with his tax and financial affairs. Certainly, when Mr Cathcart, in a meeting with the Claimant in January 2014, asked whether she had any problems with HMRC, it was her case that she explained that she was waiting for the Respondent to regularise the position, something that he had kept promising.

25. For the Respondent on the other hand, it was contended that, at that meeting, the Claimant had spoken to Mr Cathcart of being paid in cash, suggesting, it was argued, that she was a knowing party to a fraud on the Revenue. It was Mr Cathcart's position that, because of his concerns arising from what the Claimant had told him at that meeting, he had said she should seek advice as to her position.

26. In any event, later on in January 2014, when responding to PwC's requests regarding a list of the Respondent's employees (public disclosures 1 and 2), the Claimant felt she needed to get advice on her own position and spoke to a friend, a Mr Stefan Kitchen, who was a retired accountant working for a firm called CTM Ltd. Mr Kitchen made various observations on the Respondent's approach to his PAYE obligations for his employees more generally and advised that the Claimant was an employee and so tax should have been paid on a PAYE basis.

27. The Claimant wrote to Mr Cathcart enclosing Mr Kitchen's advice on 2 June 2014 (protected disclosure 3). That letter resulted in solicitors engaged by the Respondent writing to her on 1 July 2014, robustly refuting Mr Kitchen's analysis and querying how the Claimant could have thought that she was engaged on other than a self-employed basis, given that she had received: "*1/12th of the gross annual management fee … each month by bank transfer … but, at no time … [queried] the lack of deductions for tax or national insurance*" (ET Judgment, paragraph 27). Noting that tax clearly needed to be paid on the Claimant's earnings going forward, it was further stated that future payments would be made less a deduction of a sum equivalent to the tax and National Insurance contributions that the Claimant would be liable to pay to HMRC on a self-employed basis, and those sums would instead be paid into a separate account until the Claimant determined to make the payments due to HMRC.

28. CTM Ltd, acting on the Claimant's behalf, responded to that letter on 9 July 2014 (protected disclosure 4). On 18 July 2014 the Respondent's solicitors contacted HMRC regarding the Claimant, explaining the Respondent's understanding of her status as a self-employed person and his concern regarding her failure to pay tax on the amounts she had received, expressing his willingness to assist HMRC in terms of any further information required regarding payments that had been made.

29. An HMRC officer responded on 10 September 2014, inviting the Respondent to provide further information should he wish the HMRC to provide an opinion as to whether the Claimant was self-employed or not. It is unclear to me whether further information was ever provided on the Respondent's behalf but certainly CTM Ltd - acting for the Claimant - provided information to HMRC to facilitate this exercise.

30. After some delay, the HMRC Officer dealing with this matter responded explaining his conclusion that the Claimant was, after all, engaged under a contract of service and thus an employee of the Respondent and not someone engaged in a self-employed capacity.

31. On 30 October 2015 (protected disclosure 5), the Claimant wrote to Mr Cathcart enclosing a copy of the HMRC opinion and made a number of proposals to achieve statutory compliance. Matters remaining unresolved on 16 February 2016, the Claimant approached ACAS for early conciliation. An ACAS early conciliation certificate was subsequently produced on 16 March 2016.

32. On 21 July 2016 (protected disclosure 6), the Claimant wrote directly to the Respondent referring to earlier cases of other employees where it seemed similar issues may have arisen and informing him of the HMRC opinion and asking that he get directly involved and that his solicitors regularise her contract and put her onto a PAYE basis. That was met with a response from one of the Respondent's sons on 17 November 2016, again asserting the position that the Claimant was self-employed and responsible for her own tax.

33. The Claimant then instructed new solicitors, who wrote to the Respondent on 23 January 2017 (protected disclosure 7), arguing that the Claimant was, and always had been, an

A employee and had asserted various statutory rights in her 13 October letter and requested that the Respondent comply with those rights.

B 34. The Respondent responded by his solicitors on 8 February 2017, refuting that the Claimant was an employee and contending that her former representatives had made entirely one-sided representations to the HMRC on the basis of which the HMRC had given "*an unbalanced and erroneous opinion*".

C

35. By a further letter of 23 March 2017, the Respondent's solicitors referred to various issues regarding the Claimant's mobile phone bill, the household tasks carried out by someone

D else, congestion charges and the Claimant's mileage and concluded:

> **"It therefore appears that, even if our client were not obliged to terminate your client's contract on the ground of illegality involved in continuing to engage her, her role is no longer required. Alternatively, it appears that, in addition to you client's apparent fraud on the Revenue, your client may have been fraudulently claiming petrol expenses over the course of her employment. As such, if she were an employee, she could be fairly dismissed on the grounds of redundancy or misconduct." (ET Judgment, paragraph 56)**

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36. There were then further communications between the parties' solicitors, including the remaining protected disclosure relied on. On 19 May 2017, however, the Respondent wrote

F directly to the Claimant terminating her employment, explaining as follows:

> **"As set out in my solicitors' letter of 23 March 2017, I cannot continue to allow you to work for me while you are failing to account for the tax due on your earnings. I have delayed taking action for some 3 years in the hope that you would sort out the situation, but you have failed to do so.**
>
> **Further, it has become clear over the last few months that your responsibilities have**
>
> G **diminished since the children have grown up such that we no longer require someone to carry out your role. In addition, you have now disparaged Mayed [one of the Respondent's sons] to one of our tenants in an entirely unacceptable and unjustified way.**
>
> **As to your expense claims, I prefer not to investigate these given the other circumstances but I would point out that, if you felt that they were some form of extra salary (an assertion I do not accept), they too are liable for tax.**
>
> **In the circumstances, I have no alternative but to terminate your employment with immediate**
>
> H **effect." (ET Judgment, paragraph 57)**

37. After a further letter from the Claimant's solicitors, again stating her position and also asserting that she had made whistleblowing disclosures, which were the real reason why she was being dismissed, the Claimant commenced her ET proceedings.

38. In her claim, she contended she had made various qualifying disclosures; specifically relying on her contacts with PwC, her 2 June 2014 correspondence with Mr Cathcart, the CTM Ltd communication of 9 July 2014, the communication of the HMRC opinion on 13 October 2015 and 21 July 2015, and her solicitors' communications on 23 January 2017 and subsequently. The Claimant contended that the disclosure of information related to:

> **"27.1. the Respondent's breach of legal obligation to comply with Employment Rights Act 1996 to lawfully treat the Claimant as an employee or worker.**
>
> **27.2. the Respondent's breach of legal obligation to deduct Tax and NICs at source and pay these deductions to HMRC.**
>
> **27.3. the Respondent's breach of legal obligation to comply with Employment Rights Act by failing to send her an itemised pay statement and unlawfully deducting wages."**

The ET's Decision and Reasoning

39. As a preliminary point the ET rejected an argument raised by the then counsel for the Respondent to the effect that as the Claimant was, as the Respondent argued, self-employed, it was not open to her to claim interim relief. Adopting the approach that it was entitled to look at the allegations made in the application for interim relief pending determination of a substantive complaint, if one of the matters in issue was whether the Claimant was an employee, the ET considered it was able to take a view as to the likelihood of the Claimant being able to show she was an employee; that view would be within the overall assessment as to whether or not the Claimant had shown she had a pretty good chance of succeeding in her claim. For the Respondent, counsel had used the metaphor of 'something jumping out of the page' to indicate how obvious a point should be for the purpose of an argument on an interim relief application, pending determination of the complaint. For the summary assessment it was conducting, the

ET considered that employment status jumped out of the page such that it could take the view that the Claimant had pretty good prospects, in the final determination, of showing she *was* an employee, notwithstanding she had signed a document specifically stating she was being paid a management fee and notwithstanding that document provided she would be accountable for her own income tax.

40. As for the whistleblowing complaint, the ET reminded itself that it had to be satisfied that the Claimant had made a qualifying disclosure and that, in her reasonable belief, it was made in the public interest and tended to show that the employer had failed, or was likely to fail, to comply with a legal obligation to which he was subject. The ET was satisfied that there had been disclosures on numerous occasions by the Claimant which alleged that the Respondent had been in breach of or had failed to comply with a legal obligation. The obligation in this case was to deduct tax at source and pay it to HMRC and on the evidence before it, the ET considered:

> **"70. … It does seem that I am entitled to take the view on the face of the evidence before me that she has a view that there has been a failure to pay National Insurance and tax deducted at source and this is in fact in the public interest."**

On the question whether the Claimant had made protected disclosures, the ET was thus satisfied that she stood a pretty good chance of succeeding in her final application.

41. As to whether the protected disclosure had resulted in the dismissal, the ET noted the Respondent's contention that the dispute had in fact been rumbling along for some three years and ultimately, as the dismissal letter made clear, the Respondent considered he could no longer continue to allow the Claimant to work for him whilst she continued to fail to account for tax. The ET did not, however, accept that adequate explanation had been given as to why action was being taken at this particular point. Specifically, it observed that, since July 2014, the

Claimant's money had been diverted into two lots - one of which was in a special account awaiting her instructions as to whether she was prepared to authorise its transfer to HMRC. Given this, the ET opined:

> **"74. … It is difficult to understand why, come March and then May 2017, the continuation of that position becomes intolerable. It seems likely that the terms of that letter will be interpreted as the consequence of individual acts of disclosure and the cumulative acts of disclosure."**

42. The ET thus concluded that the Claimant stood a pretty good chance of success in showing that the reason for her dismissal was because she had made a protected disclosure and was therefore entitled to interim relief.

The Grounds of Appeal

43. The grounds of appeal are set out under the following headings:

1. failure to identify or analyse the separate protected disclosures;
2. failure to address the Respondent's argument that the disclosures were allegations, rather than disclosing information (a point going to disclosures 1, 2 and 8);
3. error of law in considering whether the disclosures tended to show a breach of a legal obligation (again going to disclosures 1, 2 and 8);
4. error of law in addressing the subjective element of the public interest test;
5. error of law in addressing the objective element of the public interest test;
6. causation; and
7. failure to consider illegality.

44. The Claimant resists the appeal, essentially relying on the reasons provided by the ET.

Submissions

The Respondent's Case

45. By way of general observation, the Respondent reminds me of the relatively high bar for interim relief applications. He further notes that the original circumstances of permitting an interim relief application - involving claims where the prohibited reason related to the Claimant's trade union status or activities - were likely to give rise to a generally relatively limited factual enquiry, whereas a whistleblowing claim such as the present required proof of a greater number of factors, each of which the ET was required to consider (at least insofar as they appear to be in dispute) in respect of each of the alleged protected disclosures.

46. That general submission then leads into the first grounds of appeal by which the Respondent contends that the ET failed to identify or analyse the separate protected disclosures relied on. The Claimant had identified eight alleged protected disclosures upon which she relied: four from 2014, one from 2015, one from 2016 and two from 2017. In his ET3, the Respondent had carefully addressed each protected disclosure, taking issue with each but raising different issues in each instance. The ET was under an obligation to consider the disclosures separately because each disclosure had to meet the requirements of section 43B **ERA** (see **Korashi**). That was, further, necessary in order to be clear as to which were the effective protected disclosures, before going on to consider the likelihood of those disclosures being the reason or principal reason for the dismissal. The ET had, however, failed to treat the disclosures separately but had treated unidentified disclosures as a single amorphous mass and had gone on to consider some but not all of the Respondent's submissions, as if they applied with equal force to each of the disclosures relied on. That was an error of law that infected the entirety of the decision, as the ET was consequently unable to analyse whether each disclosure was likely to meet the statutory test.

47. Turning then to the second ground of appeal, specifically the Respondent contended the ET erred in failing to address his argument that the first, second and eighth disclosures were allegations rather than disclosures of information (as to which see **Cavendish Munro** and **Kilraine**). At most, the ET had referred (see paragraph 68) to there having been disclosures on numerous occasions by the Claimant of material "*which alleges that the Respondent has been in breach of/has failed to comply with a legal obligation*". That seemed to support, rather than contradict, the Respondent's case. Had the ET considered the Respondent's arguments on this point, it would have concluded that the first, second and eighth disclosures were not disclosures of information at all.

48. Further, by his third ground of appeal, the Respondent contended that the ET had erred in law in failing to consider whether each of the disclosures relied on tended to show a breach of a legal obligation. In this case, the wrong relied on was a breach of the legal obligation for the purposes of section 43B(1)(b). That required that there must be some disclosure which actually identified, albeit not in its strict legal language, the breach of legal obligation on which the employee was relying (see **Fincham v HM Prison Service** UKEAT/0925/01 at paragraph 33, per Elias J (as he then was)). The Respondent contended that this was not the case so far as disclosures 1, 2 and 8 were concerned.

49. As for the fourth ground of appeal, this related to what the Respondent contended was an error of law by the ET in failing to address his arguments as to the subjective element of the public interest test (see **Chesterton Global**). The Respondent had contended that the subjective public interest test was not satisfied in relation to any of the alleged protected disclosures relied on by the Claimant, i.e. that she was not likely to show that she had an actual belief that her alleged protected disclosures were in the public interest. The ET had addressed the public

interest test as a whole (paragraphs 70 to 72); it was unclear whether it had reached any conclusion at all on the subjective element, but even if it had (in the Claimant's favour), that had failed to address the Respondent's argument that the Claimant's sole interest was in ensuring that she was not responsible for payment of tax and National Insurance. Accepting for the purposes of the interim relief application, the ET was not obliged to set out an analysis of each protected disclosure in detail, it was required to set out in broad terms why it regarded the Claimant was likely to succeed on this issue at trial.

50. Turning next to the objective element of the public interest test (**Chesterton**) and ground 5 of the appeal - if the Claimant had believed that her disclosures or any of them were in the public interest - the question was whether that belief was reasonable. The ET had, however, mischaracterised the Claimant's disclosures as relating to an alleged failure to deduct tax or National Insurance, whereas the correct position was that she was actually expressing concern about her own employment and tax status. Even if that were not correct, the ET had simply failed to conduct any analysis of why the Claimant's alleged belief was reasonable. Although the ET did not have the benefit of the Court of Appeal's guidance in **Chesterton**, its Judgment was still to be considered against the standards of the law as it has subsequently developed.

51. Separately, the Respondent contends - ground 6 - that the ET erred in law in reaching a perverse conclusion on the question of causation. The ET's reasoning appeared to be limited to the fact that there was no good reason why the Respondent dismissed when he did, but there was nothing sinister in the Respondent saying 'enough was enough'. The ET had further ignored the evidence demonstrating that the Respondent was not the slightest bit bothered by the Claimant's articulation of the dispute, but was excised, and increasingly so, by her non-payment of tax, hence it was the Respondent not the Claimant who first contacted the HMRC.

Further, in considering the reason for termination, the ET ought to have conducted a particularly close scrutiny of the later disclosures relied on by the Claimant, given that the eighth was particularly weak and it would have been far less likely to conclude that she would be likely to succeed in her claim under section 103A.

52. By his seventh ground of appeal, the Respondent contended that the ET had simply failed to consider illegality, it having been the Respondent's case that insofar as there was a contract of employment that had been illegally performed by the Claimant. This had been a matter rehearsed in submissions on both sides that the ET had simply failed to deal with it at all.

The Claimant's Case

53. On behalf of the Claimant, it was submitted in general terms that: (1) the pretty good chance test did not require the level of detailed analysis of the Claimant's claims that the grounds of appeal contended; (2) the Respondent had not lost the opportunity to argue these points - that was still open to him at the substantive hearing; (3) the appeal essentially constituted a perversity challenge. Moreover, the Claimant reminds me that:

> **"… The reading of an ET decision must not … be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

See **London Borough of Brent v Fuller** [2011] IRLR 414 CA, per Mummery LJ at paragraph 31.

54. More specifically, an application for interim relief was, of its nature, summary. Parliament had intended that an employee should be able to obtain an order under section 128 **ERA** without the ET necessarily making detailed findings of fact that might trespass upon the

fact-finding exercise of the Tribunal charged with determining the substantive complaints. That was important to bear in mind when considering the first and the third grounds of appeal: recognising the broad-brush approach the ET had had to adopt, the Respondent had not pursued any positive case on the protected disclosure point, save on public interest grounds. Although the ET3 provided a detailed response to each of the protected disclosures, it was also to be recalled that had only been lodged on the day before the second day of the ET hearing. Allowing that the first communication relied on would not, by itself, constitute a protected disclosure, it was submitted that the ET had been entitled in this case to view the disclosures as a whole, being all part of a chain of communications on the part of the Claimant.

55. On the public interest aspect of the protected disclosures, and turning to ground 4 of the appeal and the subjective element, the question was whether it appeared to the ET that the Claimant was likely to succeed with her complaint. The point in issue was not whether the disclosure was in the public interest but whether the Claimant reasonably believed that it was at the time of making it. Her disclosure could take the form of a number of communications taken cumulatively (see per Slade J in **Norbrook**, paragraphs 22 and 27). It was the Claimant's case before the ET that the nature of her disclosures had been in the wider public interest, there being a public interest in the receipt of tax revenues. The ET was satisfied that she was likely to succeed in showing that to be the case; it was not required to do more.

56. As for ground 5 - the objective of element of public interest test - the ET had identified the Respondent's argument (see paragraph 69), but permissibly concluded that the Claimant was likely to establish that the disclosure was in the wider public interest (paragraph 71).

57. As for ground 6 and causation, the ET had asked the correct question (paragraph 73) before considering the Respondent's evidence as to why the Claimant was dismissed. On this summary assessment, the ET rejected that evidence, giving its reasons at paragraphs 73 to 74, and concluding that the Claimant stood a pretty good chance in establishing that the reason for the dismissal was because she had made a protected disclosure. That was sufficient and met the requirement in **Dandpat** to indicate the essential gist of the ET's reasoning. The Respondent was engaged in a pernickety critique of the ET's reasoning that was simply inappropriate on an interim relief application.

58. On ground 7 and the failure to consider illegality, in his skeleton argument Mr Stephenson, for the Claimant, had argued that the ET was only required to determine the issue of reason on an interim relief application (i.e. whether, on hearing the application, it appeared to the ET that is was likely that, on determining the substantive complaint, the Tribunal would find that the reason, or principal reason, for the dismissal was one of those specified in section 103A). It seemed to me that this argument raised potentially difficult questions as to the approach an ET was to take when faced with a case where, as here, issues such as employment status and the illegality were very much in play. The suggestion seemed to be that these should simply be assumed in the Claimant's favour on the interim relief application although that, it seemed, might give rise to a potential injustice if the application was successful, but it was subsequently found, for example, that the contract had been void for illegality. Putting that difficulty to Mr Stephenson in oral argument, he retreated from the high ground of this argument and allowed that these points - if in issue - would indeed need to be considered by the ET alongside the reason question, with the same test applied to all. That being so, Mr Stephenson acknowledged that it would be an error of law for an ET to fail to deal with a point of this nature raised by the Respondent (as here), albeit that he contended that the Respondent

ought properly to have drawn it to the Employment Judge's attention after the oral Judgment had been given. In any event, he contended that the ET's finding that the Claimant's employee status jumped out of the page effectively meant it must also have found that the Respondent was responsible for deducting tax and National Insurance at source and thus the illegality issue did not arise. Even if that were wrong, then this was a matter that was suitable for the **Burns/Barke** procedure.

Discussion and Conclusions

59. I start by reminding myself of the exercise that the ET had to undertake on this application. By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied.

60. The nature of interim relief also informs the approach the EAT has to take. An ET is charged with this summary assessment, precisely because it is best qualified to carry out this role; an Employment Judge will have the experience of having heard many similar cases at Full

Hearing and will thus be able to bring that experience to bear in determining what is likely to be the outcome of the case thus presented on a summary basis. It is right, therefore, that the EAT should be reluctant to interfere and, in my judgment, should only do so if satisfied that the ET erred in law or reached a decision that might properly be characterised as perverse or took into account an irrelevant factor or failed to have regard to the relevant.

61. Adopting that approach in the present case, I am satisfied that there is nothing in the first three grounds of appeal. While the ET3 carefully distinguishes between each of the protected disclosures and raises distinct points - in particular in respect of disclosures 1, 2 and 8 (and acknowledging that Mr Stephenson accepted that the first communication relied on could not, of itself, properly be described as a protected disclosure) - at this stage, the ET was entitled to take a more broad-brush view. It was, further, apparent that the Claimant was saying that the communications had to be seen as part of a chain, over the years in question, in which she was raising concerns about the Respondent's way of dealing with the employment and tax status and affairs of his staff, including the Claimant herself. Indeed, one way of viewing the communications is that the Claimant started raising matters as part of her role with the Respondent, seeking to work with the Respondent's advisors regarding the position generally, and then became increasingly focused on her own situation. Given the way the Claimant was putting her case, I can see why the ET did not, on the interim relief application, separately set out and address each of the section 43B questions in respect of each of the communications. There was a way in which they could be viewed as a whole and the ET permissibly approached its task in its way. Furthermore, that was, it is fair to say, not far removed from the approach adopted by the Respondent's then counsel, whose written submissions - revised between the two days of the ET hearing, and so presumably at the same time as the ET3 was being drafted - did not take the points raised by grounds 2 and 3 of the appeal.

62. In argument, Mr Laddie QC accepted that an ET might not need to go through every pleaded point on an interim relief application but contended it was still necessary for it to go through each of the protected disclosures relied on in a whistleblowing case such as this, ensuring it was satisfied as to each of the requirements of section 43B.

63. I think, however, that will depend on the particular circumstances of the case. Here it was open to the ET to see these as a chain of communications and to assess whether they met the requirements of section 43B overall. It was, moreover, entitled to focus on the points taken by the parties at the hearing and thus not to pick up each point of detail in the ET3 (which might ultimately depend on whether the protected disclosures were viewed separately or linked in any event, on which point the ET needed to be careful not to tie the hands of the Tribunal at the Full Merits Hearing). In the circumstances, I am satisfied there was no error in the ET's approach to the question of qualifying disclosures, at least as raised by grounds 1 to 3 of this appeal.

64. I turn then to the public interest requirement, a matter that was raised by the Respondent's counsel below and was very much in issue between the parties. The ET had to be satisfied that the Claimant had a pretty good chance of/was likely to succeed in showing she had believed, at the time she made her disclosures, that these were in the public interest, whether or not that was her actual motivation for making the disclosures; the ET also had to be satisfied that her belief was likely to be shown to be reasonable.

65. Having been taken through each of the disclosures - they are all in writing which makes the task somewhat easier - I can appreciate the conflicting perspectives in this case. For the Respondent it is said that the focus was (understandably, given the potential tax liability the Claimant might face if she were wrong about her employment status) all about the Claimant's

own position; it could not be said that these evidenced a belief that the Claimant was disclosing matters that were in the public - as opposed to her own - interest. For the Claimant, on the other hand, it is said that her communications showed that her case was part and parcel of a broader problem with the way in which the Respondent's staff were treated for tax purposes. In any event, she argues there was a general public interest in the proper accounting of tax receipts.

66. To the extent the Respondent argues it would be perverse to find the Claimant was likely to succeed in establishing she had a reasonable belief that her disclosures were in the public interest (a way of putting the case that seemed to emerge in argument), I disagree: that would be a permissible view of the material by an ET in this case. The real question, however, is whether this ET reached its view on this point applying the correct legal test and I am not sure that it did. Although the ET set out the statutory test at paragraph 69, the conclusion it reaches at paragraph 70 does not demonstrate engagement with the question whether the Claimant held the relevant belief at the relevant time.

67. In saying this, I recognise that firstly, the Judgment had to be reconstructed from the parties' notes of the oral explanation given late in the evening of the second day of the hearing (albeit the ET had the opportunity to finesse its Written Reasons, using the Employment Judge's own notes and those taken by the parties). Secondly, the ET did not have the benefit of the Court of Appeal's guidance in **Chesterton** when it reached its decision. Thirdly, it would generally be inappropriate to pick up on the use of tense in one word - 'has' rather than 'had' - when dealing with a Judgment given on an interim relief application. I was, therefore, troubled as to whether my criticisms of the ET's reasoning amounted to taking an overly pernickety view of the Judgment in the particular circumstances of this case. Stepping back, and considering the reasoning taken as a whole, however, I remained unable to see that it had

clearly addressed the question of the Claimant's belief at the relevant time. Expecting this to be apparent from the reasoning does not set an unreasonably high standard; ultimately, those reading the Judgment need to be able see what the ET found to be the Claimant's belief at the time and whether it considered that reasonable; that cannot be done in this instance.

68. It may be that the problem is simply one of explanation, or it might be that the ET asked itself the wrong question; in either respect, this renders the decision unsafe. The ET needed to be clear as to what it was finding was the Claimant's belief at the relevant time and then consider whether that was reasonable. The reasoning does not demonstrate that it approached this task correctly and that means that ground 4 of the appeal must be allowed as must - because the different stages of the exercise are necessarily related - ground 5.

69. The next point taken - ground 6 - relates to the ET's view on the reason question. Here, the Respondent's case - very much based on the wording of the dismissal letter but also on the witness statements provided - was that this was an unsatisfactory situation that had been rumbling on for three years and the time had come when the Respondent did not feel he could let it continue; he was not prepared to be party to what he viewed to be the Claimant's continuing fraud on the Revenue. The ET did not accept that explanation; it did not see why the decision had been reached at that time. Given that the Respondent had taken steps to pay the potential sums due in tax into a separate account, it seems to me that the ET was entitled, on this summary assessment, to question the Respondent's explanation for the timing. The more difficult question is why it reached the conclusion that it was likely that the finding would then be that the dismissal was due to the Claimant's protected disclosures. That was not inevitably the result if the Respondent's explanation for the timing was rejected and the ET's analysis is not immediately apparent from paragraphs 73 to 74.

70. That said, as Mr Stephenson has observed, the ET had reminded itself of the correct question (see paragraph 73) before going on to consider the Respondent's evidence as to why the Claimant was dismissed, which it rejected. Seeing these conclusions in the light of the ET's earlier findings, as to the interactions between the parties and the nature of the communications made to the Claimant and her advisors and to the HMRC, and thus taking the decision in the round, I consider it is apparent why the ET took the view that it did. This was not simply a case where the evidence showed (as Mr Laddie QC submitted) that the Respondent was seeking to regularise the position and was unconcerned by the Claimant's raising of these matters (being concerned only that there was compliance with the relevant tax provisions). There was evidence, as detailed by the ET, which supported the view that the Respondent was only content to regularise the position in one way (that is, with the Claimant meeting the outstanding tax liabilities - hence, for example, the way in which contact was made with HMRC) and thus supporting the view that the Respondent's concerns were not limited to the non-payment of tax and he was not simply adopting a neutral stance regarding the Claimant's articulation of her points. Whether or not these matters might ultimately be found to have informed the reason for the dismissal I cannot say, but I can see - taking the ET's reasoning overall - that these were part of the relevant background, as found by the ET on this summary assessment, and paragraph 74 has to be seen against that bigger picture. Doing so, I consider sufficient has been done to explain and justify the conclusion reached.

71. That leaves the last ground of appeal - ground 7 - which relates to the ET's failure to address the issue of illegality. This was an issue expressly raised before the ET and was plainly keenly in dispute. The ET was obliged to deal with the point but failed to do so. I do not accept, as Mr Stephenson suggested, that by addressing the question of employment status, the ET can be taken to have determined the illegality point in the Claimant's favour. And, as Mr

A Stephenson acknowledged in argument, by failing to deal with the matter thus raised the ET erred in law.

B 72. Had this been the only point raised it would have been open to question as to whether an appeal was the appropriate way of dealing with the issue. Given the requirement under the overriding objective to assist the Tribunal, when it became apparent (however late in the evening) that the Employment Judge had overlooked this point in his Judgment, there was an C obligation upon the legal representatives to say something. The failure to do so is all the more incomprehensible here as the parties knew the Judge was dependent upon them to finalise the Judgment and yet neither side even raised the omission when sending their notes in for this D purpose. There was, further, no application for reconsideration or even for a **Burns/Barke** reference in the Notice of Appeal; steps that could also have been considered in this case. All that said, ultimately I have allowed the appeal on the public interest grounds and also allow it on ground 7 because the ET erred in law in failing to deal with a point that was plainly in issue E before it.

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