Appeal No. UKEAT/0178/16/LA
UKEAT/0179/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17-18 October 2017
Judgment handed down on 8 March 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

UKEAT/0178/16/LA

DR M PATEL — APPELLANT

SURREY COUNTY COUNCIL — RESPONDENT

UKEAT/0179/16/LA

MRS K METCALF — APPELLANT

(1) SURREY COUNTY COUNCIL
(2) DR M PATEL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Dr M Patel	MS SALLY ROBERTSON (of Counsel) Direct Public Access
For Mrs K Metcalf	MS CAROLINE MUSGRAVE (of Counsel) Instructed by: Royal College of Nursing Legal Services Department 20 Cavendish Square London W1G 0RN
For Surrey County Council	MR PETER DOUGHTY (of Counsel) Instructed by: Surrey County Council Legal Services County Hall Penrhyn Road Kingston-upon-Thames Surrey KT1 2DN

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

VICTIMISATION DISCRIMINATION - Dismissal

UNFAIR DISMISSAL - Constructive dismissal

The Employment Tribunal erred in their approach to whether admitted detriments were done on the grounds of admitted protected disclosures within the meaning of section 47B of the **Employment Rights Act 1996**. They failed to apply the approach explained in **Fecitt v NHS Manchester** [2012] IRLR 64 of deciding whether the protected disclosure materially influenced the related detriment. Further the Employment Tribunal erred in adopting a 'rolled up' approach to the disclosures and failed to make findings of fact in relation to each. They failed to adopt a structured approach to deciding the claims as recommended in **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416. They did not relate each disclosure by date and content to each detriment by date and content. Further they erred in observing that no comparators had been advanced when none were needed. These errors also affected their decisions to dismiss the constructive and automatically unfair dismissal claims. Claims remitted to a differently constituted Employment Tribunal.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Dr Patel and Mrs Metcalf appeal from dismissal, by a majority in respect of some of these, of their claims of whistleblowing detriment and unfair dismissal against their employer, Surrey County Council, by an Employment Tribunal, Employment Judge Hyde and members ("the ET") in a Judgment sent to the parties on 2 March 2016 ("the Judgment"). The parties will be referred to as they were before the ET: Dr Patel, the First Claimant, Mrs Metcalf, the Second Claimant and Surrey County Council, the Respondent. Ms Musgrave represented both Claimants before the ET. She represented Mrs Metcalf before the Employment Appeal Tribunal ("EAT"), before whom Dr Patel was represented by Ms Robertson. Mr Doughty represented the Respondent before the ET and the EAT.

2. The hearing before the ET occupied fourteen days with two reading days and six days deliberation in chambers. The ET had in excess of 2,200 pages of documents before them. In addition to their evidence, the Claimants called two witnesses. Seven witnesses gave evidence for the Respondent. The Judgment runs to 110 pages and 597 paragraphs.

3. Counsel for the Claimants produced for the ET a comprehensive Schedule of alleged protected disclosures made by the First and Second Claimants, giving the dates of the disclosure, by whom and to whom it was made. The alleged disclosures were headed: 1. Poor Clinical Governance of the Occupational Health Service and Concerns of Statutory Obligations Breaches, 2. Management of OH (Occupational Health) Department by Ms Brammer, 3. Bullying/harassment/victimisation by Ms Brammer due to raising protected disclosures. The Schedule then showed under the name of each Claimant the detriment alleged to have been suffered giving the date of each alleged detriment. The paragraphs in the ET1 relating to each

allegation were shown on the Schedule. The Respondent's counsel produced a colour coded Schedule for the EAT showing the dates of the various events relied upon as disclosures and detriments dividing them into the following periods: pre 21 August 2013, 21 August to 6 September 2013, 7 to 30 September 2013 and 1 October 2013.

The Relevant Facts in Outline

4. The ET set out what were described as "Outline factual background" in 455 paragraphs from paragraphs 39 to 494. An overview only will be given in this section of the Judgment, turning to more detailed consideration of the findings of fact as necessary when considering the grounds of appeal. The claims by Dr Patel and Mrs Metcalf were heard together as were their appeals. The two appeals share many common features but some of the grounds of appeal are particular to each Claimant.

5. The Claimants were employed in the Occupational Health Department ("OH Department") of Surrey Fire and Rescue Service ("SFRS") for which the Respondent was responsible. The First Claimant was employed by the Respondent in the OH Department as a Consultant Occupational Physician from 3 June 2013 until her dismissal on 1 March 2014. The Second Claimant was employed by the Respondent as an Occupational Health Nurse from 10 June 2013 until her resignation on 10 January 2014.

6. The SFRS OH team provided specialist support for fire crews including health surveillance and fitness testing. It was a nurse led team headed by an OH Manager, Geraldine Brammer. Geraldine Brammer was a Registered General Nurse and qualified as an OH Practitioner in 1999. She had been in post for 14 years. Ms Brammer's line manager was Ms

Liz Mills who was the SFRS Chief of Staff. Her line manager was Russell Pearson, Chief Fire Officer ("CFO").

7. The responsibilities of the First Claimant included contributing to the continual development of the OH Services within SFRS, to include advice and development of policy and preparation of reports for the Fire Authority on health issues and to advise on the implementation of legal requirements, regulations and codes of practice. The responsibilities of the Second Claimant included providing advice and support to line managers on OH policy and procedure on cases, to undertake health surveillance and medical examinations, and to undertake risk assessments relating to health matters affecting the staff to ensure that all possible health solutions were explored.

8. The ET recorded at paragraph 58 that the Respondent accepted that there were issues which needed to be addressed in respect of the OH Department including some serious matters relating to statutory breaches.

9. The Respondent admitted that both Claimants raised serious concerns under the three tabulated headings in the Schedule of Disclosures. The Respondent accepted that all but 9 of 47 disclosures relied upon by the Claimants had been made and were protected disclosures. The ET observed that there were no categories of protected disclosures which did not fall to be taken into account.

10. From very early on in their employment the Claimants expressed serious concerns about practices and procedures in the OH Department. The Claimants specified the dates and content of each disclosure. The seriousness of the concerns expressed is illustrated by the categories

under which the disclosures fell. These included: lack of a proper framework and policy for health surveillance, lack of adequate dermatitis and hearing surveillance, poor management of Hazmat incidents and management of employees exposed to hazardous agents, lack of policies and procedures for medical risk assessments to ensure Fire Fighter fitness for duty. There was an absence of proper medical benchmarks, lack of night worker surveillance, failure to maintain medical records securely and confidentially, failure to log health surveillance activity and recall process. There was only informal management of OH referrals and OH policies were outdated. There was lack of clarity regarding six-monthly breathing apparatus medicals/procedures, and the spirometer had not been calibrated by staff locally since 30 July 2012.

11. The Claimants expressed concerns about the clinical practice, conduct and competence of Ms Brammer in the light of poor clinical governance.

12. The Claimants made disclosures about alleged bullying, harassment and victimisation by Ms Brammer. Such disclosures were made on 23 September 2013 after both Claimants commenced a period of stress related sick leave on 17 September 2013. It was said, and the OH Physician agreed, that the stress was caused by work related issues. These were principally about failure by Ms Brammer to recognise and rectify their serious concerns about the OH Department and the Second Claimant's belief that she was being victimised for raising complaints about Ms Brammer.

13. On 19 September 2013 the Claimants submitted a joint whistleblowing complaint to Expolink Whistle Blowing.

14. The facts relevant to the detriments alleged to have been materially influenced by the disclosures were detailed on the Schedule before the ET. As with the disclosures, the dates of each detriment were given.

15. The ET set out the detriments alleged by each Claimant. These included an outline of the incidents relied upon.

Dr Patel: Summary of Detriments Alleged

16. At paragraph 556 the ET set out a summary of the detriments of alleged failure to properly investigate the complaints made by the First Claimant:

> **"556.1. 19 September 2013 - adoption of a non-clinician, Mr Pearson, with no experience in clinical matters to investigate the concerns lodged with Expolink.**
>
> **556.2. 4 October 2013 - Mr Pearson failed to investigate the complaints as required in the Respondent's whistle-blowing policy including a failure to interview the Claimant or review supporting evidence.**
>
> **556.3. 11 December 2013 - provision of redacted report from Santia. Report confirmed breaches of statutory obligations and poor clinical governance. Respondent still refused to investigate Expolink concerns.**
>
> **556.4. 20 December 2013 - Respondent declined permission for Dr Patel to provide redacted audit report to NMC.**
>
> **556.5. Ongoing failure to investigate protected disclosure about Ms Brammer's conduct/ competence. Dr Patel demeaned, harassed and side-lined by failure to take concerns seriously."**

17. At paragraph 564 the ET set out a summary of the detriments of alleged failure to comply with the Claimants' complaints under the Respondent's Ending Harassment Bullying and Discrimination Policy ("EHBD"). The First Claimant asked for her complaints to be dealt with under Route C of the EHBD Policy, formal investigation, to which she was entitled. The Respondent failed or refused to do this. The ET set out the alleged detriments under this heading:

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> ***"EHBD / Grievance procedure - failure to investigate grievance***
>
> **564. The complaints about this matter were set out in paragraphs 28 - 30, 31, 32 and 33 of the claim form. The allegations of the Respondent's acts or failures to act in respect of Dr Patel were as follows:**
>
> > **564.1. That on 30 September 2013, contrary to the Respondent's published EHBD Policy, Dr Patel was refused a Route C formal investigation and told to attempt to resolve matters informally.**
> >
> > **564.2. That the Respondent continued pressure for informal facilitation discussion on 18 October, 23 October and 12 December 2013 despite requests for a Route C formal investigation.**
> >
> > **564.3. Disclosure of personal information to a mediator without consent.**
> >
> > **564.4. Continued failure to investigate the EHBD grievance."**

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18. At paragraph 566 the ET set out a summary of the detriments alleged under the heading "Occupational Health Service Review" as follows:

> **"566.1. Mr Reale commissioned from Santia.**
>
> **566.2. Terms of reference lacked impartiality and objectivity.**
>
> **566.3. Respondent failed to facilitate a meeting between MP and DR to address protected disclosures in an impartial and objective manner.**
>
> **566.4. Respondent refused to provide an unexpurgated version of Mr Reale's report until 10 March 2014, after FOI request."**

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19. At paragraph 576 the ET referred to the detriment alleged by the First Claimant that contrary to the terms of her contract her probation had been extended beyond six months.

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20. The ET referred at paragraph 579 to the alleged detriment of refusal of special leave on 18 October 2013.

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21. In paragraph 580 the ET set out the detriments alleged under the heading "Failure to safeguard health and well-being" as follows:

> **"580.1. Despite recommendation of OH, Respondent continued to fail to commission an investigation under the EHBD policy and Expolink concerns re conduct/competence of Ms Brammer.**
>
> **580.2. Unreasonable expectation that Dr Patel should return to work without a formal investigation to protect her health and well-being."**

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22. In paragraph 586 the ET set out the detriments alleged under the heading "Stress risk assessment" as follows:

> **"586.1. On 16 January 2014 the response from Respondent only addressed selective aspects of questionnaire. Document not sent to OH Physician.**
>
> **586.2. Failure to action recommendations from Occupational Health in Dr Tomlinson's report of 26 November 2013.**
>
> **586.3. Failure to act on stress risk questionnaire and so safeguard health and welfare and take action to mitigate workplace stress."**

23. In paragraphs 595 to 597 the ET considered and dismissed the claim of the First Claimant that she had been dismissed for making protected disclosures.

Mrs Metcalf: Summary of Detriments Alleged

24. At paragraph 504 the ET set out a summary of the detriments alleged in respect of the probationary review of the Second Claimant. The allegations were:

> **"504.1. That on 21 August 2013 a probationary performance review was scheduled contrary to the contract of employment stating that Mrs Metcalf was not subject to a probationary period;**
>
> **504.2. That on 6 September 2013 a development need was recorded directing Ms Metcalf to raise concerns with her manager rather that (sic) with others in the team;**
>
> **504.3. That on 18 October 2013 a decision was made to maintain the probationary review and a flawed reason was given; and**
>
> **504.4. That on 28 November 2013 Mrs Metcalf's probation was extended contrary to the terms of [her contract] and contrary to the Respondent's contract of (sic) employment policy."**

25. At paragraph 518 the ET set out a summary of the detriments alleged under the heading: "EHBD/Grievance Procedure - failure to investigate grievance" as follows:

> **"518.1. That on 30 September, contrary to the Respondent's published EHBD Policy and the stated request of Mrs Metcalf, Mr Pearson advised resolution of complaints by informal further facilitated discussion.**
>
> **518.2. That on 4 October 2013, contrary to Policy, Mr Pearson asserted that he reserved the right to choose the informal option for resolution of the complaint. Further he refused to take any action to address the specific complaints of bullying and harassment if the Claimants declined to engage with Route B, the informal resolution.**
>
> **518.3. That the Respondent disclosed personal information to a mediator without the Claimant's consent.**

518.4. That the Respondent continued to fail to investigate the EHBD grievance."

26. At paragraph 524 the ET set out the alleged detriment that Mr Pearson refused to grant the Second Claimant special leave on 18 October 2013 contrary to the discretion granted in the Respondent's EHBD Policy.

27. In paragraph 530 the ET set out the detriments alleged in respect of the Occupational Health Service review. These were:

"530.1. That the Respondent failed to facilitate a meeting between Mrs Metcalf and Mr Reale.

530.2. That there was an ongoing failure by the Respondent to investigate conduct and/or competence concerns about Ms Brammer; and that the Audit was confined to issues of clinical governance.

530.3. That the Respondent disclosed a partial version of Mr Reale's report and failed to provide an unexpurgated version until 10 March 2014, after a Freedom of Information ("FOI") request."

Constructive Dismissal

28. In support of her contention that the Respondent was in fundamental breach of contract the Second Claimant relied upon all the detriments referred to in her whistleblowing claim as well as the following:

"540.1. Failure to implement OH advice and recommendations dated 26 November 2013;

540.2. Disclosure of partial version of Mr Reale's report on 11 December 2013;

540.3. Failure of Mr Pearson to meet with Ms Metcalf on 13 December 2013 or subsequently to discuss Mr Reale's report;

540.4. Requirement to return to work under Ms Brammer without assurances that concerns would be addressed and any appropriate action taken;

540.5. Refusal of further request for special leave on 6 January 2014;

540.6. Communication to Dr Patel on 8 January 2014 (pp1454-1460) that no further investigation would be carried out into Expolink or EHBD complaints;

540.7. Failure to update Mrs Metcalf on action taken to address concerns about OH Service and management as agreed by 9 January 2014."

29. The Judgment of the ET:

> **"1. <u>In respect of the First Claimant, Dr Patel</u>**
>
> **1.1. By a majority, all complaints of whistle blowing detriments were not well founded and were dismissed.**
>
> **1.1.1. The judgment of the minority of the Tribunal (Mr G Henderson) was that the First Claimant's detriment complaint in respect of the failure to formally investigate the EHBD grievances was well founded.**
>
> **1.1.2. All other complaints of whistle blowing detriments and dismissal were not well founded and were dismissed.**
>
> **2. <u>In respect of the Second Claimant, Mrs Metcalf</u>**
>
> **2.1. By a majority, all complaints of whistle blowing detriments were not well founded and were dismissed.**
>
> **2.1.1. The Judgment of the minority of the Tribunal (Mr G Henderson) was that the Second Claimant's detriment complaints in respect of the probationary review meeting on 22 August 2013, the extension of the probation period on 28 November 2013; and the failure to formally investigate the EHBD grievances were well founded.**
>
> **2.2. By a majority, the whistle blowing constructive unfair dismissal complaint was not well founded and was dismissed.**
>
> **2.2.1. The Judgment of the minority of the Tribunal (Mr G Henderson) was that by reason of the imposition of the probation process in August 2013 and the subsequent extension of the probation period in November 2013 respectively as whistle blowing detriments, the Second Claimant was constructively dismissed.**
>
> **3. In respect of both Claimants, all other complaints ("the money claims") were dismissed on withdrawal."**

The Grounds of Appeal

30. Ms Musgrave represented both Claimants before the ET. Appearing for the Second Claimant in the EAT she made submissions on her behalf before more made by Ms Robertson on behalf of the First Claimant.

Submissions

Mrs Metcalf

Ground 1 - Failed to make necessary findings about each protected disclosure

31. It was contended that the ET erred in adopting a 'rolled up approach' to the protected disclosures. In accordance with the guidance given by HH Judge Serota QC in **Blackbay**

Ventures Ltd v Gahir [2014] IRLR 416 Employment Tribunals should take a step by step approach to claims of detriment for having made protected disclosures. Those steps were set out in paragraph 98 of **Blackbay**.

32. Ms Musgrave submitted that the ET fell into the error identified in **Blackbay** paragraph 98. They failed to identify each protected disclosure and detriment by reference to date and content and adopted a 'rolled up approach' to the disclosures and the detriments.

33. In paragraph 56 the ET merely put a number on the admitted and contested disclosures and observed that there were no categories of protected disclosures which did not fall to be taken into account. It was submitted that this erroneous 'rolled up approach' was emphasised by the observation in paragraph 61:

> **"On grounds of proportionality therefore, we only set out the findings of fact which we made in respect of the disclosures, if it was necessary to do so to explain our findings on credibility or on some other substantive issue …"**

Ms Musgrave submitted that their observation in paragraph 60 that the ET adopted her analysis in paragraphs 15 to 65 of her closing submissions was inconsistent with that in paragraph 57 that "for the most part, the nine disputed disclosures had been made". The ET failed to state, as she had submitted was required, which of the disclosures they found had been made and which had not.

34. Ms Musgrave pointed to other inconsistencies in the Judgment of the ET. The ET recorded at paragraph 53.8 that it was not disputed that the Second Claimant disclosed to Ms Brammer on 24 June 2013 that there was informal management of OH referrals. However at

A paragraph 76 the ET recorded that this was not admitted by the Respondent. Further, that finding was inconsistent with the Schedule of disclosures and detriments produced for the ET.

B 35. A further error in considering whether particular protected disclosures had been made was said to be that in paragraph 80 in which the ET held of a disclosure in a conversation between the Second Claimant and Ms Brammer on 24 June 2013 that:

> **"… this conversation was fairly low level and that Ms Brammer would not have interpreted this as a protected disclosure."**

C Counsel submitted that it is irrelevant whether Ms Brammer "interpreted" the disclosure as a protected disclosure. Either it was or it was not.

D 36. Further Ms Musgrave submitted that the ET failed to resolve issues of whether certain protected disclosures had been made. Those not admitted by the Respondent were identified by the use of italics, for example in paragraphs 53.1, 53.6 and 53.9. Although the ET gave a

E lengthy narrative they did not make the required findings: whether or not the Claimant had made the disputed disclosures.

F 37. The first detriment alleged by the Second Claimant took place on 21 August 2013, scheduling a probationary performance review when she was not subject to a probationary period. Ms Musgrave contended that the ET could not decide whether and which protected

G disclosures had a material influence on carrying out this detriment without making findings of fact as to whether and when such disclosures had been made before 21 August 2013. This the ET had failed to do.

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Ground 2 - Erroneously disregarded disclosures made to Dr Patel

38. Ms Musgrave contended that the ET erred in paragraph 55 in disregarding disclosures made by the Second to the First Claimant. Counsel submitted that the ET erred in failing to explain why these should be disregarded particularly in light of their findings in paragraphs 82 and 84 that "matters only started to take a turn for the worse … after the conversations on 10 July between Ms Brammer, [the First] and [the Second Claimant] in the 1:1 and the conversation overheard by Ms Brammer" on 10 July 2013 in which the Claimants expressed their concerns about the governance of the department and other matters. Ms Musgrave observed that the ET made no finding of fact of what was overheard by Ms Brammer on 10 July 2013.

39. Ms Musgrave pointed out that a person can be influenced in their actions by a disclosure to someone else. In this case what Ms Brammer overheard was a whistleblowing conversation.

40. Ms Musgrave contended that the ET erred when they disregarded disclosures made by the Second Claimant to the First.

*Ground 3 - Failed to apply the correct legal test of causation to the claims of whistleblowing detriment and provide adequate reasons (S47B **Employment Rights Act 1996**)*

41. Ms Musgrave contended that whilst the ET referred in paragraph 28 to the correct test for establishing detriment in a claim under **Employment Rights Act 1996** ("the ERA") section 47B, they failed to apply it.

42. It was submitted that the ET erred in considering the reason for the detriments rather than whether the disclosure had materially influenced the Respondent's treatment of the

Claimants. This approach was explained by the Court of Appeal in **Fecitt v NHS Manchester** [2012] IRLR 64 at paragraph 45 per Elias LJ.

43. Ms Musgrave submitted that the ET erred in stopping their considerations at the point of saying that the Respondent has given a good reason for the detriment of which complaint is made. This error was evident in the reasoning of the ET for example in paragraphs 510, 516, 519 and 521. In those paragraphs it was because the majority accepted the reason given by the Respondent for their actions that they concluded that the Claimants had not made out their claims.

44. Ms Musgrave contrasted the erroneous approach of the majority of the ET with the correct application of **Fecitt** by Mr Henderson, the minority dissenting member. In paragraph 501 Mr Henderson held that the decision of Mr Pearson to refuse to formally investigate the Claimants' grievance, insisting upon facilitated discussions, was materially influenced by the Claimants' public interest disclosures.

45. Mr Musgrave further contended that the majority of the ET erred in uncritically accepting the explanations for their actions or inactions given by the Respondent. Counsel submitted that the majority of the ET failed to have regard to the caution given by Elias LJ in **Fecitt** at paragraph 51 in which he held:

> **"51. … I entirely accept that where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."**

A On the issue of drawing an inference of detriment being materially influenced by a protected disclosure Ms Musgrave also referred to paragraphs 7, 14 and 25 of **Anya v University of Oxford** [2001] IRLR 377.

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*Ground 4 - Misdirected themselves as to the Appellant's case of the breach of the implied term of trust and confidence causing her constructive dismissal (s103A **ERA 1996**)*

46. Ms Musgrave contended that the majority of the ET mischaracterised in paragraph 541 C the breach of trust and confidence alleged by the Second Claimant to be the reason for her resignation. Further it was submitted that the majority of the ET erred in paragraph 542 holding that the Respondent's discussions with the Second Claimant and her resignation letter supported D their conclusion that

> **"… Mrs Metcalf left because she did not believe that she had got the assurance that she would be returning to work in a professional and clinically safe environment, not because she had made the disclosures."**

E 47. Ms Musgrave referred to the resignation letter of 10 January 2014 from the Second Claimant in which she set out some of the breaches of the implied duty of trust and confidence. These acts or omissions were influenced by her protected disclosures. The letter makes no F mention of a failure to provide assurance as to the professional and clinical environment to which the Second Claimant would return. It was contended that the resignation letter states clearly that the Second Claimant is resigning due to the treatment she had received since raising her concerns about the OH Department.

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48. The error in constructing a different reason for resignation from that on which the Second Claimant relied and one which was unsupported by the evidence relied upon by them H also affected the reasoning of the majority in paragraph 541. Further in considering **ERA**

section 103A the majority erred in failing to consider whether particular protected disclosures were the real or principal reason the Respondent carried out detriments which constituted fundamental breaches of contract which were the reason or principal reason the Second Claimant resigned.

Ground 1

49. Mr Doughty, counsel for the Respondent, accepted properly and inevitably that the ET should have made findings in relation to each of the nine disputed disclosures. He recognised that the majority did not deal very well with the alleged disclosures for example by their summary way of adopting in paragraph 60 Ms Musgrave's closing submissions. Counsel fairly volunteered that the ET adopted loose language in paragraph 57 in saying that "for the most part, the nine disputed disclosures had been made". Mr Doughty submitted that whilst the shorthand in the Judgment makes it appear that the ET had not dealt with all the disclosures in reality they had dealt with them. Mr Doughty said that discerning this requires some detective work but the ET had the Schedule of disclosures before them.

Ground 2

50. Mr Doughty submitted that the ET did not err in paragraph 55 by excluding disclosures by the Second to the First Claimant on the basis that they were not made to Ms Brammer. These were not alleged to have been made to her and were therefore unlikely to have caused the alleged detriments. However counsel accepted that if person A hears what person B says to person C and then acts on it to B's detriment that can amount to a whistleblowing disclosure depending on the content of what was overheard.

A

51. Mr Doughty rightly referred to the finding of the ET at paragraph 103:

> **"When Mrs Metcalf and Dr Patel were discussing Ms Metcalf's concerns (the whistle blowing disclosures to Dr Patel), on 10 July 2013 after the meeting between Dr Patel and Ms Brammer, Ms Brammer overheard the conversation. Ms Brammer interpreted the conversation as what she described as "side conversations" that were critical of her management and flexible working arrangements."**

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Counsel pointed out that the conversation between the First Claimant and Ms Brammer on 10 July 2013 was not pleaded as a protected disclosure. On the findings of fact the "side conversations" overheard by Ms Brammer were about her management. The ET accepted at

C

paragraph 510 that such criticisms could lead to a very dysfunctional team.

52. Mr Doughty contended that the ET did not err when using the words cause or reason

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when considering whether the alleged detriments arose from the protected disclosures. Counsel pointed out that the ET correctly directed themselves in the approach to the question set out by the Court of Appeal in **Fecitt**.

E

53. Counsel submitted that in accepting the explanation given by the Respondent for the detriment of putting the Second Respondent on probationary review and therefore concluding that the alleged detriment was not caused by any protected disclosure, the reasoning of the ET

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was consistent with paragraph 41 of **Fecitt**. Lord Justice Elias held at paragraph 41:

> **"… Once an employer satisfies the tribunal that he has acted for a particular reason … that necessarily discharges the burden of showing that the proscribed reason played no part in it. …"**

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54. In respect of the alleged detriment of being subject to a probationary review, in the absence of any adequate evidential basis for finding that Ms Brammer knew that the Second Claimant had been told she did not need to serve a probation period, the majority of the ET

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accepted at paragraph 505 that Ms Brammer initiated the probationary review meetings on 21

August because she was prompted to do so by the Respondent's software. The ET held at paragraph 506:

> **"Further, while the timing of the review meeting was consistent with Mrs Metcalf's perception that it was triggered by the difficult Clinical Team meeting on 21 August, it was also fully consistent with the Respondent's case. …"**

The ET referred to additional matters including at paragraph 508:

> **"… The only real difficulty which had arisen between Ms Brammer and Mrs Metcalf by 21 August was the awkward conversation about 'side conversations' on 10 July in Dr Patel's office. …"**

Accordingly Mr Doughty submitted that the conclusion of the majority of the ET in paragraph 509 that:

> **"In all the circumstances, the majority of the Tribunal did not consider that Ms Brammer called Mrs Metcalf to a probationary review meeting because she had made protected disclosures."**

was consistent with the approach in paragraph 41 of **Fecitt**. The majority accepted at paragraph 317 that in October 2013 Ms Mills believed as did the Second Claimant that Mr Pearson had stated in a letter of 18 October 2013 to the Second Claimant that she was subject to a probationary period although the letter said that she was not. The majority held the letter was not very clearly worded. It was said that this finding supported the assertion by Ms Brammer that she did not know the Second Claimant was not subject to a probationary period.

55. Mr Doughty contended that the majority of the ET accepted that retaining the Second Claimant on probation was due to a mistake. Further at a meeting on 19 December 2013 the Second Claimant was told by Ms Mills that a probation period would not be applied. It was said as the detriment alleged was keeping the Second Claimant on probation no detriment had been suffered.

56. As for the detriment of refusing to use the route for dealing with their grievances chosen by the Claimants, the formal Route C, and adopting Route B, the majority accepted at paragraph 293 that it was appropriate to seek to persuade the parties to have mediation and/or facilitated discussions. Mr Doughty recognised that the Respondent was in breach of the EHBD Grievance Procedure by insisting on the informal Route B rather than the formal Route C required by the Claimants. However he contended that the observation of the majority that:

> **"… This was an example of the Respondent acting in accordance with the culture of dealing with matters in an informal way in the first instance before progressing to a formal process."**

showed their acceptance of the explanation given. Counsel contended that a causation test is a motivation test. As the majority had accepted the innocent motive of the Respondent in refusing the Claimants' choice of using the formal Route C for dealing with their grievances they had not erred in holding that the detriment was not caused by protected disclosures.

57. Mr Doughty contended that the ET had not erred in paragraph 535 by accepting the argument that the detriment in the way in which the Respondent dealt with the Occupational Health Service Review was not by reason of the Claimants having made protected disclosures. The ET did not err in holding:

> **"535. … that the reason for the Respondent taking the approach they did in terms of commissioning the Santia audit and its remit were appropriate and reasonable in the circumstances. There were no good grounds for looking for another explanation for their actions. We accepted Mr Doughty's closing submissions on this issue at paras 279 and 280."**

58. The ET rejected the allegation that the Respondent had failed to facilitate a meeting with Mr Reale, the person commissioned to carry out a review of the Occupational Health Service. Mr Doughty referred to the explanation set out in paragraph 531 for Mr Reale not meeting the Claimants and the fact that Mr Reale was aware of their input into the enquiry and he had their Expolink complaint documents. The Claimants had not suffered a detriment by not meeting Mr Reale and the reason for not facilitating such meeting had been accepted by the ET.

Ground 4

59. Mr Doughty contended that the ET did not err in directing themselves that for the complaint of constructive dismissal under **ERA** section 103A brought by the Second Claimant to succeed the protected disclosures must have caused the breach of contract which was the reason for the resignation. Accordingly counsel submitted that it was wholly acceptable to bring their findings on protected disclosure to the determination of the claim for constructive dismissal.

60. Counsel contended that the majority did not err in concluding in paragraph 541 that the breach of trust and confidence alleged by the Second Respondent related to a failure to change the working practices of the OH Department in respect of which the Claimants had expressed serious concerns to the Respondent.

Dr Patel

Ground 1 - Causation - Material Influence

61. Ms Robertson for the First Claimant as did Ms Musgrave for the Second Claimant contended that the ET failed to adopt the structured approach to the protected disclosure claims set out in **Blackbay**. It was said that the error is not in failing to follow **Blackbay** but rather in failing to make findings on the claims in accordance with the statutory framework. Importantly Ms Robertson contended that the ET erred in failing to consider the decision maker's actual reason for their action. Instead the ET, for example in paragraphs 577 and 578, substituted their own view of whether a decision was reasonable.

Ground 2 - Erroneously adopting a 'rolled up' approach to protected disclosures

62. Counsel contended that the ET erred by failing to make findings on each protected disclosure as is needed in order to determine claims under **ERA** section 47B. Further the ET erred in disregarding on grounds of 'proportionality' the five protected disclosures by the First Claimant which remained in dispute. These were the following disclosures:

> **14 August 2013 to Liz Mills (re outdated policies) (ET 53.9.2)**
>
> **21 August 2013 to Ms Brammer (re failure re maintaining medical records) (ET 53.6.2)**
>
> **21 August 2013 to Ms Brammer (re outdated OH policies) (ET 53.9.2)**
>
> **23 September 2013 to SCC (the Respondent) (re resulting detrimental treatment by Ms Brammer) (ET 53.13.2)**
>
> **1 October 2013 to SCC (re inadequate dermatitis and hearing surveillance) (ET 53.2.2)**

63. Ms Robertson contended that the ET further erred in holding in relation to the First Claimant at paragraph 56 that "there were no categories of protected disclosures which did not fall to be taken into account". It was submitted that four of the five disclosures on which the ET made no findings represented categories which would otherwise not be taken into account. These were disclosures about failure to maintain medical records, two of outdated OH policies, and of bullying by Ms Brammer.

Ground 4 - Firemen's concerns

64. Ms Robertson contended that the ET misunderstood the basis upon which the First Claimant raised firemen's concerns. Counsel contended that the ET failed to engage with the relevant complaint set out in the Schedule under heading 3 that Ms Brammer solicited complaints from firemen and mentioned them only when the First Claimant raised concerns about the OH service.

65. Ms Robertson contended that the Judgment of the ET was not compliant with the requirements of **Meek v City of Birmingham District Council** [1987] IRLR 250. The ET failed to make enough findings to enable them to determine whether a particular protected disclosure had a material influence on a particular detriment. Counsel pointed out that nowhere do the ET identify the date of the first detriment in considering the case advanced by the First Claimant.

66. It was submitted by Ms Robertson that it was unclear whether the ET had looked at the particulars of claim and the agreed Schedule.

67. Ms Robertson drew attention to the failure of the ET to make findings about the protected disclosure by the First Claimant of the Respondent's OH Department not maintaining medical records. The Respondent accepted that the First Claimant raised this issue with Ms Brammer on 24 July 2013. Whilst at paragraph 185 the ET referred to responses by Ms Brammer in an email of 21 August 2013 to disclosures made by the First Claimant at a meeting with her earlier that day at paragraph 185 they omitted any reference to disclosures which were made of failure to maintain medical records.

68. Ms Robertson drew attention to **ERA** section 48(2) which provides:

> **"On a complaint under subsection (1) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

The Respondent has to establish a positive case before they can benefit from the approach in **Fecitt** paragraph 41 to discharge of the burden of showing that the proscribed reason played no part in their decision. Ms Robertson contended that the ET have to consider the factors relied

upon by the Claimant to decide whether an inference should be drawn that a protected disclosure had a material influence on the decision on a detriment.

69. Ms Robertson referred to **Wright v North Ayrshire Council** [2014] IRLR 4 paragraph 14 in which Mr Justice Langstaff P pointed out that there can be more than one effective cause of an action. Ms Robertson submitted that in no part of their reasoning did the ET use the correct test for determining the claim, whether the Respondent's detrimental decisions were 'materially influenced' by particular protected disclosures. It was necessary to identify the disclosures and detriments in sufficient detail to be able to judge whether the detriment was influenced by the disclosure.

70. Ms Robertson submitted that the question of whether Ms Brammer was capable or competent spilled over into the question of whether the disclosures by the First Claimant had a material influence on the detriments of which she complained. The ET held at paragraph 154 that at their meeting on 31 July 2013 Ms Brammer:

> **"… informed Dr Patel that she had found her to be overly critical of the department and by inference of her management of the department. …"**

Disclosures of deficiencies in the operation of the OH Department were perceived as criticism of Ms Brammer. Actions taken against the First Claimant in response could be interpreted as 'protecting Gerry', Ms Brammer. There was, for example, no good explanation for the Respondent not providing the First Claimant with an unredacted Santia report (an audit of the OH Department). The report was critical of the department and also expressly or by inference of Ms Brammer.

Ground 6

71. In paragraph 294 the ET observed:

> **"It was notable in this case, that there was no comparator evidence at all put forward by the Claimants in support of their various contentions that their treatment was by reason of having made protected disclosures."**

Ms Robertson made the simple but important point that no comparator is required when considering **ERA** section 47B. All that is required is that detrimental treatment is materially influenced by a protected disclosure. Ms Robertson submitted that the comparator point was applied to all the complaints. This was a fundamental error.

Ground 1 - Material Influence

72. Mr Doughty stated that the parties agreed that **Fecitt** was the test to be applied to the protected disclosure claims. Counsel recognised that the ET had not used the 'materially influenced' **Fecitt** test on every occasion. It was submitted that the conclusions of the ET and where divergent, the majority were sustainable on the basis that they assessed the evidence and found one cause not multiple causes influencing the detriment alleged. It was submitted that it was not an error not to draw adverse inferences. The ET correctly directed themselves in paragraph 33 that it was only if they considered that the reason given for the detriment was false that it was legitimate to draw an adverse inference.

Ground 2 - Erroneously adopting a rolled up approach to protected disclosures

73. Mr Doughty stated that the First and Second Claimants had been engaged to assist in addressing defects in the Respondent's OH practices. There were bound to be criticisms and suggested improvements. Counsel enumerated the agreed protected disclosures made by the First Claimant in ten different areas of concern. The ET were well aware of these. Counsel

A referred to disclosures about Hazmat, dermatitis and health surveillance in paragraph 272 of the Judgment, three yearly medicals, lack of night work surveillance and security of records in paragraph 273, and informal management of OH referrals and outdated OH policies in paragraph 274. These concerns were justified including for example the important disclosure that the spirometer used to measure lung capacity of firemen had not been properly calibrated.

74. Counsel submitted that her disclosures showed that the First Claimant considered Ms Brammer to be incompetent and that she did not want her to remain in post.

75. Mr Doughty submitted that their assessment of the Respondent's reaction to these disclosures came back to whether the ET considered that Ms Brammer was 'on board' with these criticisms. Mr Doughty recognised that this exercise is not seen on the face of the Judgment. However counsel contended that it is implicit from the background because the Respondent had engaged with the Claimants throughout on the matters raised. For example the Respondent produced a risk assessment. The Santia report was commissioned to get the OH Department back on track. The report was provided to the Health and Safety Executive.

76. As for the contention on behalf of the First Claimant that the majority of the ET erred in considering the reasonableness of the reason why the Respondent said they carried out the acts said to constitute detriments rather than deciding whether those acts were influenced by protected disclosures, Mr Doughty recognised that, for example, paragraph 427 was not well worded. In respect of the complaint by the First Claimant that the extension of her probationary period was a detriment caused or materially influenced by her protected disclosures the ET held:

"… It appeared … that the Respondent took the responsible line in relation to this"

rather than making a finding as to why they took that action. The ET observed at paragraph 577 that the extension of probation beached the Respondent's policy but the reason for it was genuine, not related to whistleblowing and was not detrimental to the First Claimant. Accordingly the decision should be upheld.

Ground 4

77. Mr Doughty contended that the ET had dealt properly with allegations made by the First Claimant regarding firemen's concerns. Further these did not give rise to any protected disclosure or detriment.

Ground 5 - Considering contemporaneous perception

78. Mr Doughty rightly observed that passages starting at paragraph 76 in the Judgment of the ET in which they observed at paragraph 80, that Ms Brammer "would not have interpreted" a disclosure as a protected disclosure displayed an erroneous approach. Either the disclosure was a protected disclosure within the meaning of **ERA** section 43B or it was not.

Ground 6 - Comparators

79. Mr Doughty contended that the observation by the ET in paragraph 294 that there was no comparator evidence in support of their various contentions that the treatment of the Claimants was by reason of having made protected disclosures was referable to their treatment by Mr Pearson. Mr Pearson, the Chief Fire Officer, insisted on the Claimants' complaints under the grievance and bullying procedure follow the informal B route rather than the formal C route. Counsel submitted that the ET was looking at whether there was evidence of how employees raising matters of similar seriousness were dealt with.

Grounds 8.8 to 8.10 - Inadequate findings of fact/reasons

80. Mr Doughty contended that the refusal of Mr Pearson to adopt the grievance and bullying procedure route chosen by the Claimants was clearly found by the ET in paragraphs 290 and 291 to be a breach of that procedure. They gave their reasons in paragraphs 293 and 294 for holding that this decision was not taken because the Claimants had made protected disclosures. Their rejection in paragraph 521 of this claim was based on those findings of fact.

81. In summary, whilst Mr Doughty acknowledged that the Judgment of the majority could have been better expressed in many respects, their decision should be upheld.

Discussion and Conclusion

82. The most important grounds of appeal were raised by both Claimants. They will be dealt with first. Then those grounds particular to each Claimant will be considered.

83. The focus of many of the grounds of appeal is on whether the ET erred in their interpretation and application of the proper approach to **ERA** section 47B as explained by the Court of Appeal in **Fecitt**. **ERA** section 47B provides:

> **"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

All parties agreed that the approach to be adopted to the interpretation and application of section 47B has been explained in **Fecitt**. Whilst it is the Statute rather than any authority which is to be applied, the guidance in **Fecitt** is to be followed. Lord Justice Elias held:

> **"45. … s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."**

> **"41. … Once an employer satisfies the tribunal that he has acted for a particular reason - here, to remedy a dysfunctional situation - that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the *Igen* principles. …"**

84. The other important guidance to Tribunals on their approach to determining claims under **ERA** section 47B which all counsel agreed should be applied is that given by HH Judge Serota QC in **Blackbay**. The relevant steps in the approach which the EAT suggested should be adopted are:

> **"98. …**
>
> **1. Each disclosure should be identified by reference to date and content**
>
> **2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.**
>
> **…**
>
> **4. Each failure or likely failure should be separately identified.**
>
> **5. … It is not sufficient … for the employment tribunal to simply lump together a number of complaints … Unless the employment tribunal undertakes this exercise it is impossible to know which failures … attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act … it is of course proper for an employment tribunal to have regard to the cumulative effect of a [number] of complaints providing always [they] have been identified as protected disclosures.**
>
> **…**
>
> **7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. …"**

All counsel agreed that Employment Tribunals should adopt the structured approach to claims under **ERA** section 47B set out in **Blackbay**.

85. Other matters of law on which all counsel were agreed are that no comparator is needed to establish a claim under **ERA** section 47B. Further in considering such a claim it is not the

A contemporaneous perception of whether a disclosure is a protected disclosure which is relevant. Either a disclosure is a protected disclosure within the meaning of **ERA** section 47B or it is not.

B Failure to apply the correct legal test to whether the detriment was on the ground of making a protected disclosure

First Claimant - Ground 1

Second Claimant - Ground 3

C 86. The challenge made on behalf of both Claimants to the approach of the ET to determining whether the admitted detriments were done on the grounds that they had made the admitted protected disclosures is central to this appeal. That question was also central to their D claims before the ET.

87. Counsel pointed to numerous passages of their reasoning in which the ET used the terms 'the reason' for the treatment (paragraphs 510, 516, 519 and 521), 'by reason' in paragraph 533 E and whether the detriment was 'because' of the protected disclosures. Further the language of 'causation' rather than 'material influence' was used for example in paragraphs 544 and 545.

F 88. It is curious but not material that in their reference to part of the important passage in **Fecitt**, in paragraph 28 the ET refer to the wrong paragraph number, 38, which sets out submissions of counsel rather than paragraph 45. What is more material is the omission of the G confirmation of paragraph 45. Elias LJ distinguishes the test for whistleblowing under section 47B from that for unfair dismissal. As he explained in paragraphs 44 and 45, the test for automatically unfair dismissal under **ERA** section 103A is that the protected disclosure must be the sole or principal reason for the dismissal. The test for a claim under **ERA** section 47B is H

different. It is whether the protected disclosure materially influences in the sense of being more than a trivial influence on, the employer's treatment of the whistleblower.

89. Mr Doughty rightly acknowledged that the decision of the ET on the relationship between protected disclosures and detriments could have been better expressed. Where the ET had referred to 'the reason' or 'cause' it was said that this was consistent with a decision that a protected disclosure played no part in the detriment.

90. The ET themselves recognised that criticisms by the Claimants of procedures in the OH Department necessarily involved criticism of Ms Brammer. For example in paragraph 369 the ET observed in relation to the refusal of the Respondent to provide the First Claimant with an unredacted copy of the Santia report, which was a detriment relied upon by her, the ET held:

> **"It appeared to the Tribunal that a number of redactions had been made because the Respondent was sensitive about the possibility of the Claimants seeing information which was critical of their manager in circumstances which were inappropriate. …"**

The ET held at paragraph 367 that the Santia report showed that the Claimants' clinical concerns were well founded.

91. If the ET had applied the correct test of 'materially influenced' it is hard to see how they could have concluded at paragraph 561 that the withholding of an unredacted Santia report, the subject of one of the First Claimant's complaints, had "nothing to do with whistle blowing".

92. In my judgment a failure to apply the correct test of 'material influence' also undermines the conclusion of the ET at paragraph 521 that "There was no evidence … that the reason for insisting" on the informal route of dealing with both Claimants' complaints under the

EHBD/Grievance procedure was because the Claimants had made protected disclosures. The complaints made by EHBD/Grievance procedure were made in September 2013. The ET had set out numerous findings of fact that by that time the Claimants were highly critical of clinical practice in the OH Department and of Ms Brammer's management. For example at paragraph 256 the ET held that the First Claimant wrote to Ms Mills:

> **"… there had been a breakdown in trust and confidence within the Clinical Team stemming essentially from concerns raised about Ms Brammer's practice not being in keeping with the best medical practice and in line with the NMC code of practice and RCN framework on OH Nurse competence development. …"**

93. At paragraph 275 the ET held:

> **"In her EHBD complaint she alleged that in raising concerns internally about Ms Brammer's role as OH Manager, she had been victimised. …"**

Matters reported in the complaint were:

> **"275.1. Not responding to valid concerns raised about clinical issues …"**

94. In my judgment the ET showed they applied the wrong test that there was no evidence that insisting on informal resolution of the complaint (which would not result in action against Ms Brammer), was because the Claimants had made protected disclosures. Ms Musgrave was right to submit that the question of whether Ms Brammer was capable and competent spilled over into whether protected disclosures had a material influence on the detriments of which complaint was made. At paragraph 537 the ET held:

> **"As stated above, the Respondent had a duty as an employer also towards Ms Brammer, not to breach the mutual trust and confidence between them. They had to balance this with their other duties. …"**

95. The ET erred in failing to consider whether insisting on a 'resolution of any interpersonal difficulties' and therefore refusing the required formal route for dealing with the EHBD complaints was materially influenced by protected disclosures. The disclosures

A inevitably led to criticism of Ms Brammer. The ET did not consider whether the route chosen in breach of procedure was to further the objective they identified in paragraph 537 and was therefore likely to have been influenced by the critical disclosures.

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96. Mr Doughty was right to submit that if an employer satisfies the Tribunal that he has acted for a particular reason that necessarily discharges the burden of showing that the prohibited reason played no part in it. However if that reason is materially influenced by a C protected disclosure it does not provide an answer to a claim under **ERA** section 47B.

97. In paragraph 535 the ET dismissed the complaints by the Second Claimant in relation to D the Santia audit. In paragraph 299 the ET referred to the executive summary of the Santia report into the OH service as an audit of service provision. It is apparent from paragraphs 364 and 365 of the Judgment of the ET that parts of the report were critical of Ms Brammer. At paragraph 364 they recorded that Ms Brammer proposed some areas for revision in anticipation E of the Claimants wishing to see the report. The ET recorded at paragraph 365 that in amending the report, the author Mr Reale was concerned that Ms Brammer had not given a more balanced reflection on the report and that there was a lot to do in the OH Department.

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98. The ET recorded at paragraph 563 that in answer to an enquiry about the investigation into the OH Department the evidence made it clear that the Respondent wanted to support Ms G Brammer and not to punish her. At paragraph 534 the ET expressed the opinion that by raising issues of serious clinical defects in the OH Department the Second Claimant wanted a disciplinary investigation into Ms Brammer although she stated that she did not want this to happen.

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99. The ET concluded at paragraph 534 that the reason for the Respondent adopting the approach they did to the Santia audit was appropriate and reasonable. They therefore held there were no good grounds for looking for another explanation for their actions.

100. In my judgment these findings by the ET do not support a conclusion that protected disclosures played no part in the detriments alleged by the Claimants in dealing with the investigation of the OH Department and the Santia report. Their disclosures highlighted an alleged lack of competence on the part of Ms Brammer. On their own findings, the way in which the report was dealt with sought to provide support to Ms Brammer through an improvement plan (paragraphs 561 and 563). It was this approach which led to some if not all the detriments alleged by the Claimants.

101. An ET should not uncritically accept a reason advanced by a Respondent for detrimental action. That the ET may consider the reason given to be reasonable does not absolve the ET from further enquiry. In this case the ET themselves recognised that disclosures made by the Claimants about the inadequacies in the OH Department were bound up with criticisms of Ms Brammer. Accordingly the ET erred in accepting that the way in which the Respondent dealt with the inquiry into the OH Department which could be said to protect Ms Brammer did not provide 'good grounds for looking for another explanation for their actions'.

102. Similar observations may be made about the dismissal by the majority of the ET of the complaints by both Claimants about the way in which their complaints under the EHBD procedure were handled, particularly the refusal by the Chief Fire Officer, Mr Pearson to deal with them under Route C, the formal procedure.

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103. The ET recorded in paragraph 273 that both Claimants submitted an Expolink Whistleblowing Complaint citing clinical concerns and the conduct or incompetence of Ms Brammer. Both Claimants also submitted a complaint on 23 September 2013 under the EHBD (Ending Harassment Bullying and Discrimination Policy). The ET recorded at paragraph 274 that the Second Claimant claimed she had received detrimental treatment by Ms Brammer for raising concerns about her role as OH Manager and not responding to valid concerns raised about clinical issues. The ET recorded that the First Claimant made virtually identical complaints.

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104. As they were entitled, the Claimants asked for their complaints to be dealt with under the formal Route C of the EHBD procedure. At paragraph 281 the ET accepted the Respondent's case that they encouraged informal resolution of difficulties before parties resorted to formal procedures.

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105. At paragraph 519 the majority of the ET referred to the "culture and ethos of dealing with difficulties informally" and a finding of how a comparator was dealt with. They held this was the reason why Mr Pearson advised informal resolution. The ET held at paragraph 521:

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> **"… There was no evidence from which we could properly conclude that the reason for insisting that this path was followed was because the Claimants had made protected disclosures. …"**

106. As with the way in which the Respondent dealt with the Santia review of the Occupational Health Service, the very reason the ET held the Respondent adopted a procedure alleged to constitute detriments was bound up with protected disclosures. The ET accepted that the way the Respondent wished to deal with the allegations of detriment or victimisation by Ms Brammer for their making protected disclosures benefitted Ms Brammer and was to the

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detriment of the Claimants. In my judgment the acceptance by the majority of the reason advanced by the Respondent for adopting the informal EHBD procedure far from demonstrating as explained in **Fecitt** at paragraph 41 that the proscribed reason played no part in it showed or strongly indicated that it did. Accordingly the majority of the ET erred in dismissing the Claimants' claims arising from the way in which the Respondent dealt with their EHBD complaints.

107. Another example of the majority of the ET accepting an explanation given by the Respondent and not considering further whether the explanation was materially influenced, by protected disclosures was the treatment of the Second Claimant as a probationer when she was not. The ET found at paragraph 198 that it was not in dispute by the date of the hearing that the Second Claimant was not subject to probation and should not have been called to a probationary review meeting with Ms Brammer on 21 August 2013. This was after Ms Brammer had overheard criticisms of her made by the Second Claimant to the First Claimant. At paragraph 225 the majority found that Ms Brammer "had genuinely asked for the probation review meeting to be scheduled, acting after a prompt generated" by the Respondent's computer system. This finding was repeated in paragraph 509.

108. In my judgment the ET erred in taking a binary approach to the detriment of holding the probationary review meeting evidenced for example in paragraph 506. The ET erred in failing to decide whether the disclosures by the Second Claimant before that meeting materially influenced the decision of Ms Brammer to hold the meeting.

109. Whilst it may be said that other conclusions of the ET on the complaints before them in which they accepted the explanations offered are infected by the same error of acceptance of the

Respondent's explanation when those did not fall within the dictum of Elias LJ in paragraph 41 of **Fecitt** of the proscribed reason playing no part in the detriments, such an error is not as obvious in those as in dealing with the Occupational Health Review and EHBD complaints and treating the Second Claimant as a probationer.

Failure to make necessary findings about each protected disclosure

First Claimant - Ground 2

Second Claimant - Ground 1

110. All counsel were agreed that an Employment Tribunal should adopt a structured approach to determining complaints under **ERA** section 47B as explained in **Blackbay**. The relevant steps for determining the disputed issue in this case, whether the Claimants established that the admitted detriments were done on the grounds of admitted protected disclosures, are that each disclosure should be identified by reference to date and content. The disclosures should not be lumped together as the Employment Tribunal must identify which disclosure is alleged to have attracted which detriment. A rolled up approach should not be adopted. The ET should identify the detriment in question and the date of the act or deliberate failure to act relied upon by the Claimant.

111. A Schedule was provided to the ET in respect of each Claimant helpfully setting out with date and subject matter each disclosure and each detriment showing which were admitted and which were not. The criticism that the ET erred in failing to identify which of the disputed disclosures were held to be such is well made. It was not satisfactory to adopt the approach of the ET at paragraph 57 to decide:

> **"… It was not proportionate to make individual findings about each and every disputed disclosure. …"**

A It is not possible to know which disputed disclosures were not accepted in light of the ET saying that "for the most part, the nine disputed disclosures had been made".

B 112. The ET faced a daunting task. The hearing occupied many days, and more than 2,200 pages of documents were produced. The Judgment ran to 110 pages and 597 paragraphs. The ET summarised the disclosures in paragraph 53 italicising those which were disputed. They did not start setting out the alleged detriments until paragraph 504. 400 paragraphs were taken up

C with a recitation of facts, some arranged chronologically, others under topics. At paragraph 495 the ET stated:

> **"Having set out our detailed findings of fact above, the facts and conclusions are set out below in relation to each of the complaints."**

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The ET then in paragraphs 496 to 501 set out the minority opinion of Mr Henderson in relation to the probationary review detriment and constructive unfair dismissal of the Second Claimant

E and the failure to progress both Claimants' grievances by Route C of the EHBD. That section showed at paragraph 496 that the minority dissenting member adopted the correct test of whether a detriment was materially influenced by the raising of protected disclosures.

F 113. In the section titled "Summary of Majority and Unanimous Findings and Conclusions" the ET set out under the heading of each Claimant the detriments but not the related disclosures alleged by them. In my judgment the ET erred in failing to set out and to consider each

G disclosure and each detriment to which it was said to relate, making findings of fact in relation to each. In accordance with the guidance in **Blackbay** and in order to reach a determination as to whether a detriment was on grounds of an alleged related protected disclosure the disclosure

H and detriment need to be considered in a related pairing.

114. The ET failed to undertake in a structured way the necessary exercise approaching the issue before them; whether the Claimants had established that the Respondent had subjected each Claimant to each admitted or established detriment on the ground of their making a particular protected disclosure. The failure to consider the individual detriments alongside the individual protected disclosures may have led the ET to concentrate on the reasonableness of the Respondent in imposing a detriment for the reason they gave rather than considering and deciding whether the detriment was materially influenced by a particular disclosure. There are several examples but one is in relation to the detriments alleged by the First Claimant about the way in which the inquiry into the OH Department was conducted. The ET held at paragraph 561:

> **"… The full report was appropriately used by the Respondent as a basis for supporting Ms Brammer, for an improvement plan and a follow up report. The report was acted upon but not in the way Dr Patel wanted. This had nothing to do with the whistle blowing."**

115. The failure by the ET to adopt a structured approach to the claims as suggested in **Blackbay** is not a defect in form but of substance. Without adopting a structured approach specific dated disclosures in respect of which proper findings of fact are made were not put alongside specific dated detriments. This exercise is necessary for deciding the issue in this case; whether certain detriments were on the ground of certain protected disclosures.

Erroneously disregarded disclosures by the Second to the First Claimant

Second Claimant - Ground 2

116. The ET erred in disregarding the protected disclosures made by the Second to the First Claimant. They reasoned that because they were made to a complainant they were not likely to have caused a detriment. This reasoning is undermined by their findings of fact at paragraphs 103 and 104 that Ms Brammer had overheard a conversation in which the Second Claimant

A informed the First of her clinical concerns about the OH Department and Ms Brammer's management. The ET erred in failing to consider whether the related detriments were on the grounds of this protected disclosure.

B

Comparators

First Claimant - Ground 6

C 117. The submission made by Ms Robertson was correct. No comparator is required when considering **ERA** section 47B. If and insofar as the ET took into account their observation at paragraph 294:

> **"It was notable in this case, that there was no comparator evidence at all put forward by the Claimants in support of their various contentions that their treatment was by reason of having made protected disclosures."**

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In addition to repeating the error of adopting the unfair dismissal, reason or principal reason, test, the emphasis placed on the absence of a comparator indicates a further error. Consideration of a comparator is not ruled out. They may be of assistance in some cases in deciding whether a detriment was materially influenced by a protected disclosure. However no comparators are required to establish a section 47B claim.

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Conclusion on dismissal of **ERA** Section 47B complaints

118. The ET erred in dismissing or dismissing by majority the complaints made by the First and the Second Claimant under **ERA** section 47B.

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A Dismissal of claim by First Claimant for unfair dismissal under **ERA** section 103A

First Claimant - Reliance on grounds of appeal 1 to 8

119. No separate submissions were made by counsel on the dismissal of the claim for automatic unfair dismissal under **ERA** section 103A. However in her Notice of Appeal the First Claimant challenged all the dismissal of her complaints. The appeal from the dismissal of her **ERA** section 103A claim was not abandoned.

120. The conclusion of the ET in paragraph 595 on the claim by the First Claimant for automatic unfair dismissal for the reason or principal reason of whistleblowing was based or substantially based on their conclusions on her claims under **ERA** section 43B. In deciding at paragraph 595 that "there was a degree [of] inevitability about her dismissal", the ET held at paragraph 595:

> **"… Dr Patel was not going to come back to work and it did not appear that she was prepared to accept that the Respondent was working effectively on the issues highlighted …"**

As the ET erred in concluding that the First Claimant did not suffer detriments which were materially influenced by protected disclosures which criticised Ms Brammer and Ms Brammer was to remain as head of the OH Department, the basis for the dismissal of her Claim under **ERA** section 103A falls away.

Constructive dismissal

Second Claimant - Ground 4

121. The majority of the ET misdirected themselves as to the Second Claimant's reason for resigning. The basis for the ET holding at paragraph 541 that the breach of trust and confidence alleged was a failure to change the work place is not supported by the matters relied upon by the ET in paragraph 542 to reach that conclusion. The resignation letter of 10 January 2014

states that the Second Claimant was resigning because the Respondent had failed to provide her with a safe system of work and had subjected her to detriments on the grounds that she had made protected disclosures.

122. The decision dismissing the constructive dismissal claim by the Second Claimant is set aside.

Disposal

123. (1) The appeal of the First Claimant from the dismissal of her claims under **Employment Rights Act 1996** section 47B succeeds. The decision of the Employment Tribunal to dismiss her claims is set aside.

(2) The appeal of the First Claimant from the dismissal of her claim for automatically unfair dismissal under **Employment Rights Act** section 103A succeeds. The decision of the Employment Tribunal to dismiss her claim for unfair dismissal is set aside.

(3) The appeal of the Second Claimant from the dismissal of her claims under the **Employment Rights Act 1996** section 47B succeeds. The decision of the Employment Tribunal to dismiss her claims is set aside.

(4) The appeal of the Second Claimant from the dismissal of her claim for unfair constructive dismissal under **Employment Rights Act** section 103A succeeds. The decision to dismiss her claim for unfair constructive dismissal is set aside.

124. The claims of the First and Second Claimant are remitted for hearing before a differently constituted Employment Tribunal.

125. The parties are urged to agree as far as possible a statement of relevant facts for the remitted hearing.