Appeal No. UKEAT/0080/18/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 July 2018
Judgment handed down on 29 November 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MISS MOWE SAHA — APPELLANT

CAPITA PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS MOWE SAHA (The Appellant in Person)
For the Respondent	MR DAVID MAXWELL (of Counsel) Instructed by: Irwin Mitchell LLP Solicitors 2 Wellington Place Leeds LS1 4BZ

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

The Claimant alleged in her Particulars of Claim that the Respondent subjected her to a detriment because she had alleged in an email of 1 December 2015 that asking her to work certain hours would be a breach of the **Working Time Regulations 1998**. A list of issues agreed at the outset of the hearing of her claims, categorised the allegation as a working time claim under **Employment Rights Act 1996** section 45A(1) and not one under section 48(1A), detriment on the grounds of making a protected disclosure within the meaning of section 43B(1). The Employment Tribunal erred in failing to consider the substance of the claim before them and wrongly categorising it in the list of issues as an allegation of past breach of the **Working Time Regulations**. **Parekh v London Borough of Brent** [2012] EWCA 1630 applied. Dismissal of claim of detriment for making a protected disclosure on the only basis considered by the Employment Tribunal, endangering health and safety, set aside. Claim remitted to the same Employment Tribunal for decision on the claim that the email of 1 December 2015, contained a protected disclosure of a likely breach of the **Working Time Regulations** within the meaning of section 43B(1)(b). Ground 2 of the appeal which alleged an error in holding that another email, that of 7 December 2015, was not a protected disclosure dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Following a Rule 3(10) Hearing of the **Employment Appeal Tribunal Rules 1993**, the two grounds of appeal in the Amended Grounds of Appeal were to proceed to the Full Hearing of the appeal by Miss Saha ("the Claimant"). The Claimant challenges those parts of the Judgment of the London Central Employment Tribunal, Employment Judge Lewis sitting with members Ms L Chung and Mr I McLaughlin ("the ET"), the Judgment sent to the parties on 15 March 2017 ("the Judgment"). The ET held that two emails sent by the Claimant to the Respondent on 1 and 7 December, were not protected disclosures within the meaning of the **Employment Rights Act 1996** ("**ERA**") section 43B (1). Those conclusions led to the dismissal of her claims against Capita plc ("the Respondent") of being subjected to detriments on the ground that she had made such protected disclosures and automatic unfair dismissal for whistleblowing. The ET held that the Claimant had been unfairly dismissed. They dismissed her claims for detriment and unfair dismissal in relation to Health and Safety. As before the ET the Claimant represented herself and the Respondent was represented by counsel Mr David Maxwell.

The Relevant Facts in Outline

2. The Respondent is a well-known outsourcing company with approximately 82,000 employees worldwide. After transferring from another role from February 2014, the Claimant worked in the Group Management Accounts team as an Assistant Management Accountant. There were 18 employees in that team. Ms Dreyer was her line manager. Ms Dreyer reported to Mr Mayall who was Deputy Group Financial Controller. The Group Financial Controller was Clare Waters who reported to Nick Greatorex, the Group Finance Director.

3. The material parts of the Claimant's role which may have a bearing on Ground 2 of the appeal were included in paragraph 19 of the Judgment. The ET recorded:

> **"19. The claimant's work comprised monthly reconciliation of balance sheet accounts and monthly reporting work. PRISM was the largest of the asset purchase reviews…A significant part of the claimant's role was to collect and verify support costs related to this build. She would spend approximately 50% of her time reviewing each item on the balance sheet which related to PRISM. This entailed checking whether there was evidence to support each item of expenditure as a cost against the project…."**

4. The Claimant was concerned about the lack of time off in the work timetable given for her and the team for the year end 2014/15. At paragraph 30 the ET recorded that "*Thursday 1 January 2015 was taken as a day off being the New Year Bank Holiday. The team then worked Friday 2 January 2015... the Claimant came in on Saturday (3 January 2015) [but not the Sunday]*." Whether she worked on Friday 2 January 2015 was in dispute. "*The team worked from Monday 5 January 2015 through to Friday 16 January 2015"*. At paragraph 31, the ET found that the Claimant was broadly correct when she said that the "*core hours of the team over this period were 9am–9pm Monday-Friday (5pm on the final Friday) and 10am-6.30pm on Saturday-Sunday with half an hour for lunch and 45 minutes for dinner*……" The ET found that two days off in lieu were offered for working the interim worked weekend.

5. For a variety of reasons, relations between the Claimant and her managers deteriorated.

6. On 19 November 2015, there was a team meeting to discuss arrangements for the year-end accounting process for 2015/16. The ET noted at paragraph 70 that the Claimant said, the hours were to be the same as the previous year. She considered these to be excessive. The ET held:

> **"On balance, to the extent there was any precision in the discussion, we find that the proposal was to work from Monday 4 January to Friday 15 January 2016, i.e. 12 days."**

7. On 1 December 2015, the Claimant sent an email to Mr Mayall copied to Ms Dreyer, Ms Waters and Mr Greatorex. The email, which is the first alleged protected disclosure, reads as follows:

> **"Please be advised that I will not be working the extended hours at year-end this year.**
>
> **The reasons behind my decision are that: -**
>
> **1. This is detrimental to my health given the fact that we worked approximately 76 hour weeks last year without a day's break (9am – 9pm weekdays, 10 am – 6pm weekends from 1 Jan to 15 Jan, 9am – 5.30 pm on 16 Jan 2014)**
>
> **2. This is against the working time regulations which means the right to one day off a week.**
>
> **It is not unreasonable to expect that we should have been compensated for these excessive working hours – a slice of cake and the chance to go home at 5pm instead of 5.30 pm on one particular Friday afternoon is, in no way, compensation for the effort put in by our team.**
>
> **I'm sure you are very disappointed with this but I have considered my position on this matter very carefully, and I do not expect to suffer any detriment as a result of my decision.**
>
> **Four weeks notice should provide ample time for you to address any impact on the year-end process."**

8. At paragraph 72, the ET observed that the Claimant had read the **Working Time Regulations 1998** ("**WTR**") before she wrote the email of 1 December 2015.

9. Following the email Mr Mayall held a meeting with the Claimant on 4 December 2015. In the course of the meeting he said he would like to make a 'without prejudice' offer to terminate the Claimant's employment in return for a payment of £10,000. On 7 December 2015, Mr Mayall emailed the Claimant to tell her that the offer was open until close of business on that day.

10. At 14.55 on 7 December 2015, the Claimant sent an email to Mr Greatorex with the subject 'whistleblowing and blackmail'. This is the second alleged protected disclosure. In her email of 7 December 2015 the Claimant wrote:

> **"I suffered a particularly distressing situation on Friday (4th December 2015, 10am, Room G.03 Rochester Row Office) where Simon Mayall offered me £10k to leave Capita with only a few hours notice. As I had taken Lizzie O'Brien to this "informal" meeting, Lizzie**

was able to speak on my behalf and stated, quite reasonably, that a few hours notice was not acceptable-therefore, the deadline was extended to COB today.

I would like to know whether or not you are aware of this "without prejudice" offer?

Are you also aware that without prejudice does not stand in cases such as bribery, blackmail or whistleblowing?

Is the offer made:-

1. **because I exercised my right to not work 76 hour weeks without a break as this would be detrimental to my health and safety? Or,**

2. **because I have escalated only two issues to you under the Capita open door policy (Co 05 Property Refurbishments and the PC Refresh Project)?**

Simon Mayall stated that he "couldn't have me escalating issues to you", and if I didn't take the £10k offer then I would be managed [presumably out] via my sick records.

Is that not bribery to keep my mouth shut and blackmail to take the offer?

I was not aware that my work was in question in any way and I have proven exceptional relationships with all my business contacts with improved business behaviour over the past two years.

If anything, I have gone above and beyond to benefit the company and this is how I am treated."

The Claimant then summarised work she had done for the Respondent.

11. The ET found that on 15 December 2015, Mr Mayall told the Claimant that she was dismissed because the relationship between her and the Respondent had broken down and could not be repaired.

12. The Claimant lodged an ET1 on 22 December 2015. There were three Preliminary Hearings. On 22 January 2016, Employment Judge Goodman ("the EJ") gave a Case Management Summary. At paragraph 5, the EJ recorded the issues between the parties which were to be determined. Those relating to public interest disclosure were set out in paragraphs 7.1 and 7.2.

13. A further Case Management Hearing was held on 20 April 2016 by Employment Judge Pearl. He also identified the issues in Schedule A. Included in those was automatic unfair

dismissal under **ERA** section 104(4)(d) for having asserted statutory rights under **WTR 1998**. The Schedule included the following:

> **"(5) Detriment claims. The only detriment involved is the meeting on 5 December when an offer to leave employment was made. …The relevant disclosure is therefore that of 1 December. The first detriment claim is under section 47(B).**
>
> **(6) The second, alternative, is under section 45A (working time)**
>
> **(7) The third is section 44 (c), (d) or (e) (health and safety)."**

14. On 4 May 2016, Employment Judge Auerbach held a further Preliminary Hearing.

15. On 2 June 2016, Employment Judge Grewal heard applications by the Claimant for specific disclosure.

The Relevant Statutory provisions

Employment Rights Act 1996

> **"43A Meaning of "protected disclosure"**
>
> **In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.]**
>
> **[43B Disclosures qualifying for protection**
>
> **(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—**
>
> > **(a)that a criminal offence has been committed, is being committed or is likely to be committed,**
> >
> > **(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> >
> > **…...**
> >
> > **(d)that the health or safety of any individual has been, is being or is likely to be endangered,**
> >
> > **……**
>
> **[43C Disclosure to employer or other responsible person**
>
> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure….—**
>
> > **(a)to his employer, or**
> >
> > **……**

[45A Working time cases

(1) 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—

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

…..

[47B Protected disclosures

(1) 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.

…..

The Grounds of Appeal

Ground 1

16. The Claimant contended that the ET erred in finding at paragraph 113 of their Judgment that the email of 1 December 2015, was not a protected disclosure within the meaning of **ERA** section 43B(1). It was contended that the ET failed to consider whether the email of 1 December 2015 could amount to a qualifying disclosure under **ERA** section 43B(1)(b) as tending to show a failure to comply with a legal obligation under **WTR** in addition to endangering the Health and Safety of any individual under **ERA** section 43B(1)(d), a basis of claim which they did consider.

17. The Claimant submitted that the email of 1 December 2015 which was the first protected disclosure not only stated that working the hours specified for year end was detrimental to her health but also that they were "against the working time regulations which means the right to one day off a week".

18. The Claimant pointed out that the allegation of a breach of a legal obligation in the email of 1 December 2015 was relied upon in the Particulars of Claim before the ET. In paragraph 136 the Claimant wrote:

> **"136. My 1st December 2015 email to Simon Mayall explicitly stated that I would not work the extended year-end hours because we were not allowed an uninterrupted 24 hour break in a 7 day period as conferred by the Working Time Regulations 1998."**

19. The Claimant stated that at no point did she agree that the allegation of a breach of the **WTR** should not be considered a protected disclosure in the email of 1 December 2015.

20. It was submitted that the ET erred in deciding whether the email of 1 December 2015 was a qualifying disclosure only on the basis that it contained disclosures about the effect of the proposed working hours on health. The ET held at paragraph 113:

> **"We do not think she reasonably believed her health had been or was likely to be endangered. For this reason, there was no protected disclosure by the email of 1 December 2015."**

It was submitted that the ET erred in failing to decide whether the disclosure regarding breach of the **WTR** amounted to a protected disclosure for the purpose of the claim under **ERA** section 47B. The ET failed to deal with the contention that the disclosure asserted in the email and set out in the Particulars of Claim accompanying the ET1, that the information in the email of 1 December 2015, tended to show a failure to comply with a statutory obligation, the **WTR**.

21. The Claimant contended that, as held in **Babula v Waltham Forest College** [2007] EWCA Civ 174, even if, as suggested by the ET in paragraph 130, her view of the effect of the **WTR** was wrong, it is sufficient for the purposes of **ERA** section 43(1)(b) that she reasonably believed that the proposed working hours infringed the **WTR**.

22. Further the Claimant contended that the ET erred in their approach to deciding in paragraph 114 whether the Claimant believed that the disclosure was in the public interest within the meaning of **ERA** section 43B(1). The Claimant submitted that the ET failed to apply the Judgment of Underhill LJ in **Chesterton Global Ltd and Another v Nurmohamed** [2017] IRLR

837. Underhill LJ held that four factors would be a useful tool in deciding whether a disclosure was 'in the public interest'. Included in those was the identity of the alleged wrongdoer. The Claimant adopted the approach of counsel in **Chesterton** in paragraph 34 accepted by Underhill LJ that the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, supplier and clients), the more obviously should a disclosure about its activities engage the public interest. This approach is to be qualified by not taking this too far.

23. The Claimant contended that hers was 'a huge public interest case'. It was not just her who was affected by the alleged breach of the **WTR** but all 18 employees in her department. The Respondent is a large high profile employer. The alleged proposed breach of the **WTR** was deliberate; the first, third and fourth considerations referred to by Underhill LJ.

24. The Claimant contended that the ET further erred in paragraph 115 in holding that it would not be reasonable for the Claimant to believe that her disclosure was in the interests of her colleagues as working the hours of which the Claimant complained were not inherently injurious to health. Nor was there evidence that colleagues had complained that they were being asked to work those hours.

25. The Claimant stated that her communication of 1 December 2015 was very considered. As soon as the meeting of 19 November 2015 was held at which the Claimant and the other members of her team were told the hours they would be expected to work at the year end, the Claimant looked up her rights. She considered the **WTR**. She reasonably believed that the hours they were asked to work were in breach of the **WTR**.

26. Mr Maxwell, counsel for the Respondent, contended that the ET did not err in not considering and deciding whether the email of 1 December 2015 was a disclosure under **ERA** section 43B(1)(b) as well as under **ERA** section 43B(1)(d). He pointed out that the issues to be determined by the ET at the Full Hearing of the claims were the subject of extensive consideration and decision following a number of lengthy Preliminary Hearings. These were those before EJ Goodman on 22 January 2016 and EJ Auerbach on 4 May 2016.

27. Mr Maxwell pointed out that pursuant to the Order of EJ Auerbach, the Respondent sent a proposed list of issues to the Claimant for her agreement. She did not reply. Nor were these agreed by the Claimant for the Reconsideration Hearing.

28. At the outset of the Full Hearing before EJ Lewis and members, there was a discussion and agreement on the issues to be decided. The issues relevant to the appeal were:

> **"3. <u>Whistleblowing</u>**
>
> **The claimant states that she was dismissed and subjected to a detriment because she made the following protected disclosures:**
>
> **(a) Her email dated 1 December 2015 alleging that working excessive hours at year end was detrimental to her health.**
>
> **3.1. Did the claimant make qualifying disclosures as defined by Employment Rights Act 1996, s43A? In respect of such disclosure:**
>
> **……**
>
> **3.1.3. Did the claimant reasonably believe it tended to show under s43B-**
>
> **(a) In respect of the 1 December 2015 email, that the health or safety of any individual has been, is being, or is likely to be endangered."**
>
> **……**

29. Mr Maxwell contended that the protected disclosure claim based on the email of 1 December 2015 was limited to **ERA** section 43B(1)(d): that the proposed working hours were injurious to health. It was submitted that the question of whether the hours would be a breach of the **WTR** was not before the ET and rightly not considered by them.

30. Counsel referred to the well known authority, **Chapman v Simon** [1994] IRLR 124, **Parekh v London Borough of Brent** [2012] EWCA 1630 at paragraphs 31 and 32 and **Scicluna v Zippy Stitch Limited &Ors** [2018] EWCA Civ 1320 to contend that an ET should only depart from an agreed list of issues in exceptional circumstances. It was said that the ET should be slow to depart from the list of issues before them.

31. Mr Maxwell contended that Ground 1 raised a basis of claim which was not before the ET. Counsel fairly did not say that the Claimant could not have fashioned her claim in the way she sought to do so on appeal. However, she did not rely before the ET on a threatened breach of the **WTR** as a basis of her claim of detriment for making a protected disclosure. It was therefore not an error of law for the ET to decide the claim on a basis not put before them.

Discussion and Conclusion

32. An Employment Tribunal determines the issues raised by the claims before them. The Claimant alleged that her email of 1 December 2015 contained a protected disclosure. The reasons the Claimant gave for writing that she would not be working the extended hours at year end 2015/16 were twofold. First, that they would be detrimental to her health. Second, that this would be against the **Working Time Regulations** 'which means the right to one day off a week' of the email of 1 October 2015 in the Particulars of Claim under the heading Protected Disclosure: Health and Safety she wrote:

> **"10. On 1st December 2015, I wrote to Simon Mayall to state that I could not work the extended hours for year-end as it was a health and safety risk given my experience the previous year, and was against the Working Time Regulations entitling me to one day off a week.**
>
> **12. I wrote on the team's behalf and this reflects the fact that there was no compensatory rest as laid out in Part III, sections 17 & 24 of the Working Time Regulations 1998."**

33. Pleadings relating to the email of 7 December 2015 were set out under the heading 'Protected Disclosure 2: Company Accounting.'

34. Following several Case Management Hearings at which the Claimant acted in person, at the outset of the Full Hearing, the ET listed the two elements of the 1 December 2015 email under two separate claims. They listed the allegations that working excessive hours at year end was detrimental to health under the heading Whistleblowing, a claim under **ERA** section 47B(1). However, they listed the allegations that the requirement to work the end of year hours would be a breach of the **WTR** under the Working Time detriment heading, a claim under **ERA** section 45A(1). The factual basis of the **WTR** claim was the same whether made under **ERA** section 47B(1) or 45A(1). However, the legal tests to be satisfied differ.

35. The Claimant states that she did not abandon her contention that the email of 1 December 2015 asserted that the Respondent would be in breach of the **WTR** by implementing their end of year work schedule. That is a claim of making a protected disclosure falling within **ERA** section 43B(1)(b). She was entitled to have her claim heard.

36. The duty of an Employment Tribunal is to determine the claim before it. Mr Maxwell relied upon the Judgment of the Court of Appeal in **Parekh** to submit that Ground 1 raises an argument which was not included in the list of issues before the ET and cannot be relied upon on appeal. The allegations in the email of 1 December 2015 regarding the **WTR** were included in the issues to be considered under **ERA** section 45A not under section 47B.

37. In my judgment, far from being authority for the proposition that the ET and the parties are bound by the list of issues, Mummery LJ in **Parekh** made it clear that the core duty of an

Employment Tribunal is to determine the case in accordance with the law and the evidence. Mummery LJ held at paragraph 31:

> **"A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see *Land Rover v. Short* Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see *Price v. Surrey CC* Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]."**

38. In her email of 1 December 2015, the Claimant asserted that being required to work the hours as in the previous year end would not only be damaging to health but also contrary to the **WTR**. The factual allegation was clear. The Claimant did not consent to or dissent from the categorisation of the two allegations although they were considered on many occasions.

39. The reason the ET gave for dismissing the allegation regarding the breach of **ERA** section 45A, illustrated why the allegation regarding the **WTR** in the email of 1 December 2015 was miscategorised. They dismissed the claim because the allegation was that there would be a breach of the **WTR** rather than there had been such a breach. At paragraph 133 the ET held:

> **"133. However, the claimant did not allege that the employer 'had infringed' such a right. This connotes an allegation of an infringement which has happened in the past. The claimant was not alleging a past infringement. She was stating that she would not in the future be working extended year-end hours and asserting that to do so would breach her rights under the WTR 1998. Her reference to the previous year was simply contextual. The claim for detriment under s45A(1)(f) therefore fails."**

40. Applying **Chapman v Simon** Mr Maxwell is right to submit that an ET can only determine claims made to them. In her Particulars of Claim, the Claimant claimed that her email of 1 December 2015 contained allegations that the proposed end of year work pattern would be injurious to health and a breach of the **WTR**. She alleged that because of those allegations the Respondent acted to her detriment. The Claimant, the EJs and the ET put each allegation under

a different head of claim. However, their legal categorisation may not be and in my judgment in this case should not be determinative.

41. The Claimant at all times asserted that the email of 1 December 2015 contained her first protected disclosure. The evidence she relied upon was the email itself. The email contained the allegation that the proposed end of year work pattern was a prospective likely failure by the Respondent to comply with the **WTR**. Being prospective, the disclosure could fall within **ERA** section 43B(1)(b). As the allegation was not of a past failure it could not, as found by the ET in paragraph 133, fall within section 45A(1)(f).

42. Applying paragraph 31 of the Judgment of Mummery LJ in **Parekh**, in my judgment the ET, perhaps understandably, erred in determining the claim by reference to the categorisation of the allegation of breach of the **WTR** in the email of 1 December 2015. As Mummery LJ observed the ET was:

> **"…not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence."**

43. Ground 1 of the Amended Notice of Appeal succeeds.

Ground 2

44. By Ground 2, the Claimant contended that the ET erred at paragraphs 117 to 121 of their decision in finding that the email of 7 December 2015 was not a protected disclosure within the meaning of **ERA** section 43B(1).

45. In support of Ground 2 (a), the Claimant submitted that the ET failed to consider whether an allegation made on the 7 December 2015 of whistleblowing in the 1 December email amounted

to an allegation that, a person has failed to comply with a legal obligation within the meaning of **ERA** section 43B(1)(b) and so amounted to a protected disclosure.

46. Mr Maxwell pointed out that before the ET the Claimant did not advance a case that the email of 7 December 2015 contained a disclosure, that she had made a disclosure of whistleblowing in her email of 1 December 2015. Such an allegation had not been identified in the list of issues to be determined by the ET nor was it made in the email of 7 December 2015. If the ET had been called upon to consider such a claim it would have failed because such an allegation was not contained in the email of 7 December 2015.

47. Counsel contended that in any event if the email of 7 December 2015 could be regarded as including an allegation that the Claimant had made an allegation of whistleblowing in her email of 1 December 2015, such a claim came nowhere near satisfying **ERA** section 43B. A contention or disclosure that the Claimant had made a protected disclosure in her email of 1 December 2015 did not fall within **ERA** section 43B(1). That provision sets out the disclosures which qualify for protection. They are all disclosures about or effects of actions of someone other than a claimant. The matter now relied upon as a protected disclosure is an act of the Claimant herself.

48. Mr Maxwell is right in his submissions. Even if the allegation that in her email of 7 December 2015 the Claimant made a protected disclosure by making a disclosure in her email of 1 December 2015 of a likely breach of the **WTR,** such a disclosure or allegation would not have been a disclosure qualifying for protection within the meaning of **ERA** section 43B. The disclosure or allegation now advanced was that in her email of 7 December 2015, the Claimant had disclosed that the Respondent was likely to be in breach of the **WTR**. The disclosure asserted

A is that the Claimant carried out an act. Such a disclosure does not fall within any of the provisions of **ERA** section 43B(1)(a) to (f).

49. Ground 2 (a) does not succeed.

B

50. In support of Ground 2 (b) the Claimant contended that the ET erred in failing to consider whether her belief that the information disclosed in her email of 7 December 2017, tended to C show that an offence of blackmail had been committed on 4 December 2015 may have been reasonable even though it may have been wrong in law.

51. The Claimant submitted that the ET did not consider her oral evidence that she had a D reasonable belief that she was being blackmailed. She contended that the disclosure fell within **ERA** section 43B(1)(a). Of the offer made on 4 December 2015 by Mr Mayall of £10,000 for her to leave, the Claimant wrote in the email of 7 December 2015:

E **"Is that not bribery to keep my mouth shut and blackmail to take the offer?"**

Further the subject of the email was '*Whistleblowing and Blackmail'*.

F

52. The Claimant contended that the Respondent was trying to pay off an employee instead of paying the £40,000 they said it would cost to provide more cover for the work at year end. The Claimant contended that the ET erred in failing to consider whether the Claimant's belief G that a criminal offence of blackmail had been committed, although wrong, was reasonable. The Claimant relied on the Judgment of the Court of Appeal in **Babula** to this effect. As explained in that case and in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, the issue is whether a claimant reasonably believes that a breach of a legal H obligation is likely.

53. The Claimant submitted that the ET failed to apply the Judgment of Underhill LJ in **Chesterton** in deciding whether the disclosures in the email of 7 December 2015 were made in the public interest.

54. Mr Maxwell submitted in respect of Ground 2 (b) that making an allegation of blackmail does not demonstrate a reasonable belief that a criminal offence has been committed. Counsel submitted that the ET in paragraph 118 correctly considered whether the assertion that on 4 December 2015 offering a sum of money for her to leave, was reasonably considered by her to be blackmail or bribery.

55. In my judgment Mr Maxwell is correct in his submissions. In paragraph 118, the ET considered carefully the circumstances in which the offer of £10,000, broadly amounting to six months' net pay, was made to the Claimant for leaving. The relationship between the Claimant and the Respondent had broken down. At paragraph 118 the ET held:

> **"…the claimant contends this information in her reasonable belief tended to show a criminal offence had been committed. The criminal offence was identified as blackmail and/or bribery. We reject this contention. Mr Mayall offered the claimant £10,000 – broadly amounting to six months' net pay – in return for her leaving as a result of the breakdown in relationships. He said that she was free to accept the sum or not, but if she did not, working relationships and attendance issues would need to be addressed. Proposing this solution cannot reasonably be characterised as the criminal offence of blackmail or bribery. If an employee appears unhappy at work and relationships have broken down, a reasonable sum to leave can be a good solution to both parties. If an employee does not want to go down that road, obviously the work difficulties need to be dealt with. Mr Mayall should have offered the claimant more time to think about the matter and suggested she take advice. But his failure to adopt this good practice does not make his offer a criminal offence. Nor does it become a criminal offence because the latest matter of dispute was the hours which the claimant would agree to work at year-end, even if such hours were in breach of the Working Time Regulations, which they were not (see post)….."**

56. The ET did not err in deciding that the belief that Mr Mayall had blackmailed her on 4 December 2015, was not reasonable. A belief that a criminal offence has been committed or that there is likely to be a breach of a legal obligation may be reasonable even if wrong. However, a belief that an offer of a sum of money to an employee to leave in circumstances in which relations

between the parties had broken down, is so far from blackmail that the ET were fully entitled to hold that the Claimant did not hold a reasonable belief that it was such. An assertion by the Claimant that she believed she was being blackmailed does not make the belief reasonable.

57. Ground 2 (b) does not succeed.

58. In support of Ground 2 (c) of the Appeal, the Claimant submitted that her disclosure of blackmail affected not just her but had wider implications. The Claimant repeated her contention in respect of the original disclosure of proposed breach of the **WTR** that such action would not just affect her but also the other members of the 18 person team.

59. In respect of the disclosure of blackmail in the email of 7 December 2015 the Claimant asserted that the meeting on 4 December 2015 at which the Respondent offered £10,000 to terminate her employment was said to be without prejudice. It was said that revealing the concealment of action which she said was bribery was in the public interest. Again the Claimant drew attention to the size and prominence of the Respondent. Underhill LJ in **Chesterton** approved the contention of counsel in that case that the identity of the wrongdoer was material. In this case, the Respondent fulfilled the criteria considered relevant to determining whether disclosure was in the public interest. The Respondent was a large and prominent organisation. Accordingly, it was said that the ET erred in paragraph 120 in holding that:

> **"The disclosure was not made in the claimant's reasonable belief in the public interest."**

60. Mr Maxwell contended that the ET did not err in holding that the Claimant was thinking only of her own position. Even if the Claimant had some belief that Mr Mayall was guilty of blackmail, it was difficult to see how there was any other public interest in this issue.

61. In my judgment, if the element of reasonable belief that a criminal offence of blackmail had been committed were satisfied, it could be said that the disclosure of commission of such an offence was in itself in the public interest even if, as explained in paragraph 30 of **Chesterton**, that was not the motivation for making the disclosure. However, in this case the ET did not err in holding that the belief that an offer of £10,000 to leave the company was bribery or blackmail was not reasonable. Since such a belief was unreasonable the ET did not err in not finding that the disclosure was in the Claimant's reasonable belief made in the public interest.

62. Ground 2 (c) does not succeed.

Disposal

63. Ground 1 of the appeal succeeds. The decision of the ET that the email of 1 December 2015 was not a protected disclosure is set aside. The ET had failed to consider whether the Claimant's email of 1 December 2015 was a protected disclosure within the meaning of **Employment Rights Act 1996** section 43B(1)(b).

64. Ground 2 of the appeal does not succeed. The decision of the Employment Tribunal that the Claimant's email of 7 December 2015 was not a protected disclosure stands.

65. Where as in this case, the consequence of the possible success of an appeal from the decision of an Employment Tribunal is to be considered, the parties are asked for their submissions on disposal. In an appeal such as this, the options were remission to the same or to a differently constituted Employment Tribunal or for the Employment Appeal Tribunal to substitute its decision exercising its powers under **Employment Tribunals Act 1996** section 35(1)(a).

66. The question of disposal in the event of success of the appeal was raised with the parties. Mr Maxwell for the Respondent submitted that in the event of a successful appeal, the Employment Appeal Tribunal should substitute its own decision for that of the Employment Tribunal to dismiss the claim under **ERA** section 48(1A). He contended that the only conclusion on the findings of fact made by the Employment Tribunal, was that when she wrote her email of 1 December 2015, the Claimant did not have a reasonable belief that the proposed work pattern for the year end 2015/16 tended to show that the Respondent was likely to fail to comply with a legal obligation under the **Working Time Regulations 1998**. Accordingly, counsel submitted that such a claim based on the email of 1 December 2015 must therefore fail. Mr Maxwell applied to amend the Respondent's Answer to include this contention.

67. As is recorded in the Order, the draft amendment was set out in an email from counsel sent at 5.06pm on 30 July 2018, before the conclusion of the hearing. The submissions on the oral application to amend the Answer commenced at about 5.13pm.

68. The amendment to the Answer contained no more than submissions on disposal should Ground 1 of the Appeal succeed and arguably could have been relied upon without the need of amending the Answer. They were relevant to the consideration of disposal, relied on findings in the decision of the Employment Tribunal and raised no new matters which could have caused prejudice to the Claimant. The application to amend the Answer was granted.

69. The Claimant submitted that if Ground 1 of the appeal succeeded, the claim should be remitted to the ET for further hearing. It was submitted that the Employment Tribunal considered her allegation in relation to the **WTR** within the framework of ERA section 45A(1) not **ERA**

section 43B(1)(b) which was the issue raised in Ground 1. Accordingly, the Claimant submitted that the ET considered the issue of the **WTR** retrospectively. The reason they dismissed her claim of 'Working Time detriment' was, as explained in paragraph 133, that she was not alleging a past infringement as is required by **ERA** section 45(1)(f), the provision referred to by the ET in their decision. The Claimant submitted that the issues to be considered alleging protected disclosure under **ERA** section 43B(1)(b) were different. It could not be said that decision making in a different context should be applied to that provision.

70. In my judgment, the claim under **ERA** section 47B(1) relying on a protected disclosure within the meaning of **ERA** section 43B(1)(b), the subject of the successful appeal under Ground 1, must be remitted for hearing before an Employment Tribunal. The ET did not consider the claim that the email of 1 December 2015 was a protected disclosure in relation to alleged breach of the **WTR** under **ERA** section 43B(1)(b). They considered the claim in relation to the **WTR** under section 45(1)(f). There are material differences in the matters to be established in each claim. Included in these is not only that relied upon by the Claimant, that under section 45(1)(f), a past breach of the **WTR** must be established whereas a protected disclosure under section 43B(1)(b) and in this case a likely future failure to comply with a legal obligation is within scope. There are other important differences. In considering a claim under section 45A(1)(f), by reason of section 45A(2), it is immaterial whether the worker has the right under the WTR relied upon or whether it has been infringed as long as the allegation is made in good faith. Although it may be said that the test of the mental state of the Claimant in a claim relying on section 43B(1)(b) is more rigorous, that in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show that a breach of the **WTR** is likely to be committed, it is different from that in section 45A(2).

71. Mr Maxwell relied upon the 'on balance' finding of the ET in paragraph 70 that 'the proposal was to work from Monday 4 January to Friday 15 January 2016, i.e. 12 days as Ms Dreyer states and that at paragraph 72 that the Claimant had read the **WTR** before sending the email of 1 December 2015, to contend that the ET would have found that the Claimant could not have held a reasonable belief in a likely breach of **WTR**. I disagree. For the purposes of a claim relying on a protected disclosure under **ERA** section 43B(1)(b), the question is whether the Claimant had a reasonable belief that she was being asked to work hours in breach of the regulations. A finding 'on balance' of what Ms Dreyer stated the proposal was for working over the year end 2015/16 may be relevant but by no means determinative of what the Claimant reasonably believed. That belief would affect the effect of the relevance of the Claimant reading the **WTR** before sending the email of 1 December 2015 to the reasonableness of the Claimant's belief. Further, the findings of the ET in paragraph 71 about the Claimant's working pattern at the year end 2014/15 may be relevant but not determinative of what her recollection or the reasonableness of her belief in December 2015 of that pattern nearly a year earlier.

72. As is well known the Court of Appeal in **Jafri v Lincoln College** [2014] IRLR 544 cautioned against the EAT substituting its own decision of the ET once an error of law had been identified if more than one outcome is possible. In this case, the ET failed to consider the claim under ERA section 47B(1) on the basis of an alleged protected disclosure of a likely breach of the **WTR** by the Respondent under **ERA** section 43B(1)(b). The relevant ingredients of that claim were not considered. Whilst other findings which may be said to be relevant to such a claim were made, those fall far short of being sufficient to establish that if the ET had considered the allegation of likely breach of the **WTR** under **ERA** section 43B(1)(b), they would have dismissed the claim under ERA section 47B(1).

73. The claim under **ERA** section 47B(1) alleging a protected disclosure under **ERA** section 43B(1)(b) by the Claimant in her email of 1 December 2015 of a likely breach of the **WTR,** is remitted to the Employment Tribunal for determination.

74. The claim is remitted to the same Employment Tribunal. The Employment Tribunal should hear evidence and make findings of fact relevant to the determination of the claim asserting detriment on the ground of an alleged protected disclosure within the meaning of **ERA** section 43B(1)(b) in the email of 1 December 2015 of a likely breach of the **WTR.** If necessary, findings of fact already made may need to be revisited when considering the different issues required to be determined.