Appeal No. UKEAT/0196/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 February 2019
Judgment handed down on 28 February 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MS G MILLS CBE
MR P L PAGLIARI

CITY OF LONDON CORPORATION APPELLANT

MR L MCDONNELL RESPONDENT

JUDGMENT

Revised

APPEARANCES

For the Appellant	Ben Cooper (One of Her Majesty's Counsel) Ijeoma Omambala (of Counsel) Instructed by: Ms Tarjinder Phull City of London Corporation Guildhall London EC2 2EJ
For the Respondent	In person

SUMMARY

TOPIC NUMBER(S): 11, 11F, 8N,

The Claimant was employed by the Respondent as a senior surveyor. His tasks included authorising and managing the use of various City of London properties. He was suspended for the manner in which he had dealt with his managers and clients in relation to the properties for which he was responsible. The Claimant made certain disclosures – in order to, in his words, "retaliate" - about Councillors and managers alleging fraudulent activity and political interference. The allegations against one Councillor were subsequently upheld, but the other allegations were found to be without foundation. The Claimant was subsequently dismissed for gross misconduct. The Employment Tribunal held that the reason for the dismissal was that he had made protected disclosures and found the Respondent liable for both ordinary and automatically unfair dismissal. The Respondent appealed. It contended that there had been a serious procedural irregularity in that the Tribunal's conclusion that the disclosures were the reason for dismissal was based on an incorrect interpretation on the part of the Tribunal of the evidence of one of the Respondent's witnesses, Mr Bennett, and that that interpretation had not been put to Mr Bennett by either the Claimant or the Tribunal.

Held: The appeal was upheld in part. The Tribunal had misinterpreted the evidence of Mr Bennett. In the circumstances of this case, where the finding that the real reason for dismissal was the making of disclosures was tantamount to a finding of bad faith or improper purpose, it was incumbent on the Tribunal to ensure that the witness had a fair opportunity to answer the charge against him. That did not occur.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. We shall refer to the parties as they were below. The Respondent appeals against the judgment of the Central London Employment Tribunal, upholding the Claimant's claims of ordinary and automatic unfair dismissal. The Claimant's claim of automatic unfair dismissal was based on an allegation that he was dismissed because he had made protected disclosures within the meaning of s.43 A of the **Employment Rights Act 1996** ("the 1996 Act").

Background

2. The Respondent provides local government and policing services for the square mile of London. It has a substantial property portfolio, including Leadenhall Market. The Claimant worked for the Respondent as a senior surveyor from August 2005 until his dismissal for gross misconduct on 11 May 2016. Towards the latter part of the Claimant's employment, his remit included managing Leadenhall Market. His responsibilities included authorising and managing the use of Leadenhall Market by clients for business and events.

3. During the course of 2015, there were a number of incidents which gave rise to concerns on the part of the Respondent that the Claimant was failing to comply with basic professional standards in relation to the authorisation and organisation of events, and that he had acted in an unprofessional and obstructive manner in his dealings with colleagues and clients.

4. These concerns led to the Claimant being suspended with effect from 5 November 2015. There followed a disciplinary process during which the Claimant was charged with the following allegations of misconduct:

a. In relation to an event at Leadenhall Market known as the "Tudor Markets" event, it was alleged that the Claimant had failed to put in place the necessary contractual

arrangements with the organisers of the event and had failed to comply with reasonable management instructions in relation thereto;

b. In relation to the "Barnett Waddingham Virtual Golf Event", the Claimant was alleged to have allowed his own opposition to the event to cause him to be rude, unprofessional and obstructive with the client, and had escalated his dispute to the Respondent's Chief Executive without first raising the matter with his managers;

c. The Claimant had terminated an agreement to provide pest control measures authorised by his manager, without properly investigating the background and the reasons for that agreement, and in doing so had been terse and unhelpful in his dealings with the tenant, leading to a complaint.

5. On 10 November 2015, the Claimant raised concerns about his managers and two of the Respondent's elected members. These were acknowledged to be whistleblowing complaints and were investigated in accordance with the Respondent's Whistleblowing Policy. The Claimant's allegations, in summary, were that an elected member, Mr John Chapman, had sought to exercise political interference in relation to two events, one of which was the Golf Event, and that two of the Respondent's managers, Mr Nicholas Gill (the Claimant's Line Manager, who had taken the decision to suspend him) and Mr Trevor Nelson, had in effect bowed to that political pressure and as a result had breached their duty to ensure that properties were managed on a sound commercial basis. There was a further allegation that they had failed to advertise a particular post on a fair and open basis.

6. The allegations of misconduct against the Claimant and his counter-allegations against members and managers were investigated by Mr Michael Cogher, the Respondent's Chief Solicitor. Mr Cogher's investigation into the Claimant's counter-allegations led to the Respondent's standards committee concluding that Mr Chapman had been overly involved in operational matters to the extent that he had breached the members' code of conduct. However,

the standards committee made no criticism of the two managers. Further whistleblowing allegations were also made against another elected member, Mr Mark Boleat. These were investigated and dismissed by the standards committee.

7. As regards the allegations of misconduct against the Claimant, Mr Cogher recommended that the three allegations should proceed to a disciplinary hearing. Mr Cogher considered that a further allegation of breach of trust and confidence should be added "*given the apparent gulf between the Corporation's values and expectations in relation to general conduct and client care and Mr McDonnell's conduct and attitude*".

8. On 24 March 2016, the Claimant wrote a letter to the Town Clerk of the Respondent. In that letter, the Claimant made various complaints about the procedure being followed in relation to the disciplinary hearing and also objected to the hearing being chaired by Mr Peter Bennett, City Surveyor. The Claimant also sought to highlight a number of whistleblowing issues in respect of which he said: "*Many of these were raised before I initiated any formal complaint and are clearly not as result of the current disciplinary matter*."

9. The letter proceeded to set out 8 whistleblowing allegations:

a. *Whistleblowing allegation 1* related to a complaint made to the Town Clerk in April 2013 as to the behaviour of Mr Bennett and his handling of an appeal hearing.

b. *Whistleblowing allegation 2* related to the Claimant's attempts in 2015 to highlight the fact that no planned programme maintenance tests had been undertaken in any of the buildings for which he was responsible.

c. *Whistleblowing allegations 3, 4, 5 and 6* reflected the whistleblowing allegations made against Mr Chapman, Mr Boleat, Mr Gill and Mr Nelson in November 2015. Each of these allegations was referred to as a "*formal complaint*" made "*recently*", either to the standards committee or to the finance and audit committee, that each of the individuals was "*obviously committing fraud*". No details were provided as

to the nature of the allegations and the letter does not specify when such complaints were made other than to say they were made "*recently*".

d. *Whistleblowing allegation 7* referred to a matter "*earlier in 2015*" when the Claimant complains that he was accused of being "*disloyal*" for requesting a meeting with Investors in People without first raising issues with the HR department manager, who worked under Mr Bennett.

e. *Whistleblowing allegation 8* was a complaint that from 17 June 2015 the Claimant was undertaking 2.5 full-time work roles and was working under enormous stress.

10. The Respondent rejected the Claimant's request for Mr Bennett not to preside over the disciplinary hearing.

11. The disciplinary hearing took place on 6 April 2016. The hearing was chaired by Mr Bennett, and the management case was presented by Mr Lohmann. During the hearing, the Claimant repeatedly made a fresh allegation that Mr Gill had granted a £750,000 compensation agreement without the correct authority. This was not one of the allegations of fraud against Mr Gill referred to in the letter to the Town Clerk. When Mr Bennett asked the Claimant about the allegations he had made about management, the Claimant replied: "*What am I supposed to do, I have four disciplinary accusations against me, and of course I will retaliate*".

12. Mr Bennett also noted that, at the beginning of the Claimant's summing up, he launched into a personal attack on Mr Lohmann. The Claimant's new allegation against Mr Gill was investigated after the hearing and found to be wholly untrue.

13. The disciplinary panel upheld the allegations against the Claimant and concluded that they constituted gross misconduct. Mr Bennett also found that trust and confidence had broken down. The Tribunal noted Mr Bennett's reasoning for the decision as follows:

> **"5.36 Mr Bennett describes that the panel then adjourned and considered all of the relevant evidence. In his statement he makes no attempt to set out what questions he asked the claimant, what investigation was made into the allegations against Mr Gill, what factual conclusions were reached concerning the specific allegations of the claimant, or the basis for reaching such factual conclusions. The findings are set out at paragraph 31:**

31. Having heard all the evidence and received all relevant papers Ms Al-Beyerty and I adjourned to reflect on the evidence we had read and heard and to deliberate our decision. Having done so we concluded that:

a. the allegations against the Claimant, as set out at paragraphs 21 above, had been substantiated;
b. the conduct demonstrated by the Claimant was sufficiently serious to warrant dismissal for gross misconduct;
c. the dismissal should be with notice;
d. the Claimant had failed to acknowledge or accept that his own approach in relations to allegations 1-3 was itself:

(i) unprofessional,
(ii) lacked understanding of the importance of the customer relationship that the Respondent needed/needs with its tenants and clients;
(iii) lacked understanding of the need to engage with his Line Managers and colleagues, especially when issues and complaints had been raised;
(iv) was confrontational and inappropriate in the way he communicated with tenants which was more likely to lead to complaints;

e. the Claimant had demonstrated throughout the investigation and during the Hearing that he had no respect for or, trust and confidence in his Line Managers or Senior Managers, particularly Mr. Gill. That this was shown by the repeating of unsubstantiated allegations and by blaming them for his own shortcomings;

f. there was a complete breakdown in trust and confidence between the Respondent and Claimant.

5.37 Mr Bennett was also concerned about what he describes as the "attack" on Mr Lohmann. He says at paragraph 32 of his statement:

32. We were also deeply concerned by both the attack on Mr. Lohmann and the retaliation comment made by the Claimant in the course of the proceedings We were mindful of the fact that trust and confidence needed to be mutual and that these comments/actions demonstrated a lack of this from the Claimant, but also made it difficult for managers to have the trust and confidence in him. This informed our view that dismissal was the appropriate sanction in this case. The Panel had no confidence that the type of behaviour exhibited by Mr McDonnell would not recur and it considered that this was a risk that could not be taken.

5.38 It is apparent that whatever the alleged retaliation was, it was at the very least an important factor in the deliberation. The evidence falls short of saying how significant it was."

14. The Claimant's appeal against his dismissal was not upheld.

The Hearing before the Employment Tribunal

15. The Claimant presented his claim to the Employment Tribunal on 20 August 2016. The grounds of complaint made reference to "*counter-charges*" against Mr Gill and Mr Nelson. It also referred to the letter to the Town Clerk and the eight whistleblowing allegations contained therein to explain why the Claimant had objected to Mr Bennett chairing the disciplinary panel.

A The grounds of complaint did not, however, allege that any of those eight whistleblowing allegations was the reason or principal reason for the Claimant's dismissal.

16. The lack of clarity in the Claimant's claim prompted correspondence from the Tribunal B requesting the Claimant to summarise what he believed were the reasons for his dismissal and why he considered it to be unfair. On 3 September 2016, the Claimant responded to the Tribunal's request. However, his response did not assert that the sole or principal reason for dismissal was the whistleblowing matters mentioned in the letter to the Town Clerk. The Respondent's Grounds C of Resistance thus responded to the claim on the basis that it did *not* include a claim for automatic unfair dismissal on whistleblowing grounds.

17. At a preliminary hearing before Employment Judge Auerbach (as he then was) on 4 D November 2016, the Claimant confirmed that his claim *did* include a claim that he was unfairly dismissed for making a protected disclosure. The Respondent's counsel at that hearing did not press a suggestion that this would require an amendment of the claim. Employment Judge Auerbach recorded the Claimant's confirmation that all of the protected disclosures on which he E relies are the eight occasions of whistleblowing referred to in the letter he wrote to the Town Clerk on 24 March 2016 (and that letter itself). The Respondent was granted permission to submit amended grounds of resistance to deal with the protected disclosure claim. Supplementary F Grounds of Resistance were lodged by the Respondent on 17 November 2016. In those, the Respondent admitted that the alleged instances of whistleblowing, numbered 2 to 8, would constitute qualifying disclosures within the meaning of Section 43B of the 1996 act. However, G the Claimant was put to proof as to his reasonable belief that the disclosures tended to show a failure to comply with any legal obligation and as to whether those allegations numbered 1, 7 and 8 were in the public interest. The Respondent also denied that the whistleblowing allegations H numbered 1, 2 and 7 were in fact made.

18. The full hearing of the Claimant's claims took place over 6 days from 30 January to 6 February 2017 before Employment Judge Hodgson, sitting alone. The Claimant appeared in person, and the Respondent was represented by Ms Ijeoma Omambala of Counsel.

19. On the first day of the hearing, the Judge attempted to identify the protected disclosures relied upon by the Claimant. During the discussion of the issues, the Judge asked the Claimant whether there was any disclosure which was the sole or principal reason for his dismissal. The Claimant responded, "*No. It is more complicated than that*." As it remained unclear to the Judge what the Claimant was relying upon as the reason for his dismissal, he was ordered to set out in in a 200-word summary what he contended to be the reason for his dismissal. On Day 2 of the hearing, the Claimant produced a 200-word document. However, that document identified no potential protected disclosure. Moreover, the Claimant did not allege that any protected disclosure was the sole or principal reason for his dismissal.

20. The Respondent makes a number of criticisms of the manner in which the Judge conducted this initial attempt to identify the protected disclosures relied upon by the Claimant. It is said that the Judge adopted a "*somewhat abrupt*" manner and failed to allow the parties adequately to explain the background. We shall return to those criticisms below.

The Employment Tribunal's conclusions

21. The Judge's conclusions commence at paragraph 7.1 of the reasons, where the central question was correctly identified as being, "*What was the reason or principal reason for the dismissal?*" The Tribunal reminded itself that it was concerned, essentially, with the thought processes of Mr Bennett, the decision-maker in this case. However, the Judge said that it was not possible to summarise Mr Bennett's evidence as, although it is extensive, it lacked factual detail. The Judge considered that similar difficulties existed in relation to the other evidence before him.

A At paragraphs 7.4 and 7.7, the Judge concludes that he does not doubt that Mr Bennett believed there was misconduct in relation to each of the matters considered.

22. At paragraphs 7.8 to 7.32, the Judge sets out his conclusions in relation to the first three allegations of misconduct relied upon by the Respondent. In relation to these, the Judge expressed considerable criticism as to the lack of detail, failure to investigate and Mr Bennett's failure to explore aspects of Mr Gill's conduct, which the Judge considered to be relevant to the allegations being made against the Claimant.

C 23. At paragraph 7.33, the Judge commenced his analysis of the fourth allegation of misconduct which related to the Claimant's unprofessional and obstructive manner and his failure to act in a corporate and collegiate manner. The Judge is also critical of Mr Bennett's evidence D in relation to these matters and he finds that the misconduct that Mr Bennett had in mind remains unclear. Given the nature of the Respondent's challenges in this appeal, it is necessary to set out a number of passages from this part of the Tribunal's reasons in full.

> **"7.34 I have considered Mr Bennett's statement and his oral evidence carefully. I have tried E to understand what, exactly, this was based on. It is clear that it goes beyond the specific factual matters I have outlined above. In his oral evidence, Mr Cogher said he had been referred to the claimant's appraisals, starting in 2008. Mr Bennett also considered those. He never put them to the claimant. He never identified any specific matter arising out of them. Instead, he appears to have been content to accept Mr Gill's general assertion that, in some manner, it showed poor conduct by the claimant. This was never put to the claimant what Mr Bennett had in mind remains unclear. A careful reading of Mr Bennett's evidence does provide some clarity. Paragraph 31 (e) says as follows:**
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> F **e. the Claimant had demonstrated throughout the investigation and during the Hearing that he had no respect for or, trust and confidence in his Line Managers or Senior Managers, particularly Mr. Gill. That this was shown by the repeating of unsubstantiated allegations and by blaming them for his own shortcomings;**
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> **7.35 He does not set out what he believes to be the repeated unsubstantiated allegations. Paragraph 6 of Mr Cogher's statement make specific reference to the counter allegations G concerning Mr Gill and Mr Nelson. These encompass the allegations that they gave inappropriate favours to Mr Chapman, when instead they should have been reporting his political interference. Why Mr Cogher considered the claimant's allegations to be inappropriate is not explained. These are the allegations that Mr Bennett had in mind.**
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> **7.36 Mr Bennett also specifically noted the claimant's allegation that Mr Gill had wrongly authorised £750,000 worth of compensation. His statement is inadequate to demonstrate what investigation occurred into that allegation. At paragraph 33 of his statement, he refers to an H investigation by Ms Al-Beyerty, who found it to be untrue. It was, clearly, a very brief investigation. There appears to be no attempt to ascertain from the claimant the basis for his concern, or any attempt at a detailed investigation. However, it was assumed that the claimant had acted inappropriately and wrongly and that this was a further example of his behaving in an inappropriate way towards his managers, such as to damage mutual trust and**

confidence. Why such a negative view of the claimant should be taken, when it is absolutely clear that he had identified serious wrongdoing by Mr Chapman, which was confirmed following an independent investigation, is unclear.

7.37 What is clear is that Mr Bennett reached the conclusion that the claimant made inappropriate allegations and that those allegations had led to a breakdown of mutual trust and confidence. Paragraph 32 of Mr Bennett's statement makes that clear. He refers to being concerned by the claimant's retaliation. The retaliation was the repetition of whistleblowing disclosures. His statements say specifically that these allegations demonstrated a lack of mutual trust and confidence in the claimant and made it difficult for the managers to have trust and confidence in him. It goes on to say, "this informed our view that dismissal was the appropriate sanction in this case."

7.38 When the logic of this is analysed it is clear that the following happened. Disciplinary proceedings were instigated against the claimant, initially by suspending him. Whilst suspension may be technically a neutral act, in no sense was it neutral in this case: it was the start of the inevitable process of disciplinary proceedings. The claimant raised a number of matters which were accepted at the time by the respondent as examples of whistleblowing. They were accepted as disclosures. At least one aspect of that disclosure, the allegations against Mr Chapman, proved to be well founded. It is unclear what investigation was made in relation to Mr Gill and Mr Nelson, but there is at least the possibility that the allegations were well founded, as it does appear that a number of requests by Mr Chapman were agreed to by Mr Gill and/or Mr Nelson. The fact that the claimant had raised the allegations, i.e. the retaliation, was viewed negatively by Mr Bennett. He believed it demonstrated a breakdown of mutual trust and confidence, for which he blamed the claimant and sacked him. There is a direct causational link between the claimant's whistleblowing allegations and the dismissal. That is the only logical interpretation of Mr Bennett's own evidence.

7.39 There can be no doubt that this is an unfair dismissal. The respondent fundamentally failed to give the claimant sufficient information about the alleged misconduct such that he could prepare adequately for the hearing. Put simply, the respondent never set out the specific factual allegations the claimant was to answer. That breached paragraph 9 of the ACAS code. In this case the breach is fatal."

24. At Paragraphs 7.40 to 7.43, the Judge makes further criticisms of the investigation and disciplinary procedure and concludes that the deficiencies in Mr Bennett's dismissal were obvious.

25. At 7.44, the Judge commences his analysis of the allegation of automatic unfair dismissal. Once again, it is necessary to set out the relevant passages in full:

"7.44 I next consider the allegation of automatic unfair dismissal. I need to ascertain whether there were protected disclosures. It would be fair to say that the claimant does not set out in any clear detail the specific allegations. The claimant accepts that his allegations were made after he was suspended and he is candid in accepting that, in some sense, they were retaliatory and were an attempt to prevent Mr Bennett from chairing the disciplinary hearing.

7.45 As to the specific disclosures, there is reference to whistleblowing in April 2013. That refers to a specific written complaint. The written complaint has never been produced to me and I cannot find that it was a protected disclosure.

7.46 It is clear that there were a number of disclosures of information in 2015 which were viewed by both sides as protected disclosures.

7.47 The respondent has not sought to defend this claim on the basis that there was no disclosure of information or that the disclosure of the information did not tend to demonstrate one of the matters outlined in section 43B. The defence has been run on the basis that disclosures were not in the public interest.

7.48 It is not for me to invent the detail that neither party has seen fit to present. It is clear that there were a number of disclosures of information. There is enough evidence for it to be clear that the claimant questioned on a number of occasions whether his senior managers were doing favours which were inappropriate. This is the foundation of the Barnett Waddingham and Monte Carlo events when no fee was charged.

7.49 A number of allegations were made concerning the action of Mr Chapman. It was alleged there was undue political interference. This included events such as the Barnett Waddingham event.

7.50 There were formal complaints about Mr Gill when he suggested he was committing fraud. Similar complaints were made concerning Mr Nelson. The respondent received a document (R1/356) which gave details of allegations against Mr Gill and Mr Nelson. The complaints concerned, particularly, the failure to deal commercially with the Monte Carlo event and the Barnett Waddingham event. He complained that Mr Nelson had given permission to Mr Chapman two weeks prior to the event without consulting the claimant.

7.51 It is clear the claimant believed there was no good reason not to charge fees, and he questioned the involvement of both Mr Gill and Mr Nelson. As I have noted, it is clear that Mr Chapman was found to have breached his own obligations as an elected member.

7.52 There can be no doubt that there were disclosures of information which were protected (subject to the dispute on public interest). There can be no doubt that Mr Bennett knew of the disclosures of information. It was the disclosures that he found to be false, at least in as far as they related to Mr Gill and Mr Chapman. It was the disclosures that led him to conclude there was a loss of mutual trust and confidence. It is clear he took them into account when dismissing.

7.53 As to whether the disclosures of information were protected, the only defence advanced by the respondent is they were not made in the public interest. The basis for that is the claimant's admission that he made the complaints when he was suspended by Mr Gill. He accepts, to that extent, they are retaliatory.

7.54 Ms Omambala did not put to the claimant, at any time, that he failed to make the disclosures in the public interest. It follows that the respondent's position is a technical one. The respondent's position is that because the disclosures were raised in order to protect the claimant's position and prevent him from being dismissed, that should be seen as retaliation, and that it cannot be in the public interest.

7.55 I asked for a further submissions on this from the respondent. Respondent refers the case of *Chesterton Global Ltd and another v Nurmohmed* 2015 ICR 1920. There is some suggestion the question is not whether the disclosure was in the public interest per se, but whether the worker making the disclosure had a reasonable belief that it was in the public interest. There is a general question as to whether public interest in 43B refers to an objective test or whether what is envisaged is the subjective reasonable belief of the worker.

7.56 In this case, nothing turns on this point. I do not read section 43B as requiring me to analyse the principal motive of any claimant. There may be many occasions when there are mixed motives. In this case, it is absolutely clear that the claimant raised issues about the conduct of Mr Chapman, Mr Gill and Mr Nelson because he believed there was wrongdoing. His primary concern was a public interest concern. He believed there was undue political interference and inappropriate favours given to Mr Chapman. He believed such favours were wrong. It is clear that he had grounds to believe Mr Chapman's conduct was wrong. There is no doubt that his motivation for raising these matters was the public interest. I have no doubt that when raising those matters, as he clearly did, with his managers, he was making disclosures. He raised these matters long before the suspension. It may have

been that his managers failed to act. His managers may have resented the claimant's intervention. However, the claimant's general objections were undoubtedly disclosures of information which were protected. Subjectively, the claimant thought there was a public interest. Objectively, there was a public interest.

7.57 Mr Gill was unhappy with the claimant. He felt that the claimant's disclosures were examples of the claimant not acting in a collegiate or corporate manner. There is no doubt there was conflict between the claimant and Mr Gill. Mr Gill, thereafter, suspended the claimant. The claimant retaliated by repeating his allegations in a formal context. I have no doubt this was a repetition of complaints which had been made previously to Mr Gill. There is no doubt that the claimant's primary purpose at that point was to protect himself. That is legitimate. That is reasonable. It explains the timing of his action. The claimant's action was to escalate the disclosures which he had been making, in the public interest, all along. The suspension explains the timing of the formal complaint. The claimant's need to defend himself does not negate the claimant's underlying concern, which was based on public interest.

7.58 It follows that I find that the disclosures were made in the public interest. They tended to show a failure of duty. They were protected.

7.59 What was the sole or principal reason for dismissal?

7.60 There is some argument that the claimant was at times insensitive. There is some evidence that he could have acted in a more diplomatic way. However, he was not dismissed for being insensitive or undiplomatic. He was not dismissed for being rude. Had he been dismissed purely for such matters, I doubt very much it would have been within the band of reasonable responses.

7.61 The claimant was dismissed because it is alleged that there was a fundamental breakdown of mutual trust and confidence. That breakdown in mutual trust and confidence arises out of the alleged retaliation by the claimant and his previous protected disclosures. The alleged retaliation by the claimant is a shorthand reference to his protected disclosures. The causative link is made out. The sole or principal reason for his dismissal was the fact he made protected disclosures, which the respondent did not like.

7.62 My findings are based predominantly on Mr Bennett's own evidence. It is clear that Mr Bennett believed that it was appropriate to dismiss the claimant because his allegations against the managers were in some manner unfounded. He ignores the fact that the claimant's allegations against Mr Chapman were well-founded and appropriate. He ignores the fact that the allegations against Mr Chapman and those against Mr Gill and Mr Nelson were irretrievably bound together.

7.63 It appears to be the respondent's case that as Mr Bennett found that the claimant's allegations against Mr Gill and Mr Nelson were unfounded, it was reasonable and appropriate for him to dismiss. That is a fundamental misconception.

7.64 A disclosure is either protected or it is not. If it is protected, and an employer dismisses because the disclosure was made, there will be a finding of unfair dismissal. The fact that the manager believes it is untrue is irrelevant. The fact that the manager believes it is untrue does not make the disclosure any less protected. Even if the disclosure were to be untrue, it may still be protected. The only possible defence in this case was that the disclosures were not protected, as they were not made in the public interest. In this case, disclosing the wrongdoing of Mr Chapman, and the potential complicity of the claimant's managers, was in the public interest: it is exactly the sort of situation that the legislation was designed to protect. "

26. Accordingly, the Tribunal found that the Claimant had been dismissed contrary to s.103 A of the 1996 Act.

Legal Framework

27. Section 103A of the 1996 act provides:

> **"103A Protected Disclosure**
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> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

28. Guidance as to the application of this provision was provided by the Court of Appeal in ***Kuzel v Roche* [2008] EWCA Civ 380 [2008] IRLR 530**, where Mummery LJ held as follows:

> **"56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.**
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> **57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
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> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
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> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
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> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**
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> **61. I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98 (1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my**

> **view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was."**

29. In a judgment in a different context, namely that of trade union victimisation, but dealing with the similar test of determining whether an act was done for the "sole or main" prohibited purpose, Simler J (as she then was) held as follows in ***Serco v Dahou*** **[2015] IRLR 30** (in a judgment subsequently upheld by the Court of Appeal: **[2017] IRLR 81**):

> **"62. The Tribunal identified (at paragraph 144) two competing purposes of the suspension and investigation: the fact that there was misconduct by the Claimant to investigate, as the Respondent contended; and removing him from the workforce at a time when strike action was being contemplated to coincide with the Olympics, as the Claimant contended. If the Claimant raised an arguable case of an ulterior purpose, it was for the Respondent to prove the (main) proper purpose for which it acted. If the Tribunal was not satisfied by the Respondent's evidence that the main purpose was as it asserted, it did not follow that the Tribunal was bound (on any basis, whether as a matter of law or logic) to conclude that the purpose was that identified by the Claimant (Kuzel). The Respondent's main purpose would need to be determined by reference to the evidence, the findings of fact and the inferences that could properly be drawn from those facts.**
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> **63. Even if there was genuine misconduct by the Claimant, if the Respondent was acting opportunistically in relying on this misconduct (in circumstances where others would not have been similarly treated) it would be open to the Tribunal to conclude that despite the misconduct, the Respondent's true purpose in acting as it did was a different purpose. However, it would not be enough for the Tribunal to find that the relevant decision-makers merely welcomed the opportunity to suspend and investigate the Claimant for misconduct because he was associated with the Olympics strike; to succeed, the Tribunal had to find that their main purpose in doing so was to prevent or deter him from these activities: see The Co-operative Group Ltd v Baddeley [2014] EWCA Civ 658 (Underhill LJ) at 43. Provided that the main purpose in acting as they did was the misconduct, the fact that they may have been pleased about this is insufficient.**
>
> **64. At paragraph 17 of the Reasons, the Tribunal directed itself in relation to Yewdall as discussed above, and also that "the burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment on the prohibited grounds which requires to be explained". It followed this direction at paragraph 144, where it set out six factors calling for an explanation; and at paragraph 145, it concluded that the Respondent "failed to discharge the burden of proving that the treatment was not on the prohibited grounds." There was here a repeated failure to reflect the statutory language: it was for the Respondent to show the main purpose for which it acted; and in doing so, that this was not an improper purpose; not that the treatment was not on prohibited grounds. This is not a mere infelicity of language. Given its earlier legal direction, and the failure to adopt the correct statutory test, it is quite possible that the Tribunal treated the burden of proof as operating in exactly the same way as it would in a discrimination case so that it required the Respondent to show that the improper purpose (or prohibited grounds) played no part whatever in the Respondent's actions; and having failed to discharge the burden, drew a mandatory inference that 'the treatment was on the prohibited grounds'. Moreover, the Tribunal did not identify precisely what 'the prohibited grounds' were and there was therefore a danger that the burden placed on the Respondent was of giving an explanation in a situation where it is not clear what the Tribunal required the Respondent to explain. The Tribunal had not concluded that there was a prima facie or arguable case that the acts complained of, with the resulting detriment were done for the purpose of preventing, deterring or penalising the Claimant's participation in trade union activities at an appropriate time.**

> **65. In deciding that the Respondent failed to discharge the burden of proof, the Tribunal relied on the six factors that called for an explanation at paragraph 144 as being relevant, and on the three additional factors at paragraph 145. There is no explanation as to why or how these factors were relevant to the Tribunal's conclusion that the burden of proof had not been discharged. If these factors led the Tribunal to conclude that the misconduct was an excuse to suspend and investigate the Claimant in circumstances where any other employee would not have been treated in this way, the Tribunal should have said so. More importantly, having identified nine factors that called for an explanation, the Tribunal did not engage with the Respondent's explanations. Before concluding that the Respondent had not discharged the burden of proof, it was necessary for the Tribunal to address the Respondent's explanations as disclosed by its findings of fact, inferences drawn from those facts or identified in the undisputed evidence, as to the main purpose of the suspension and investigation, and decide whether it accepted them or not. To find that the decision makers acted with an improper purpose was a serious finding to make against the Respondent's managers, and tantamount to a finding of bad faith. If the Tribunal rejected the evidence as dishonest, unsatisfactory or unpersuasive or concluded that the misconduct was merely a pretext, and the main purpose was a different improper purpose, that rejection and finding should have been carefully and properly explained."**

30. The following principles relevant to this appeal may be gleaned from those decisions:

a. A finding that the reason for dismissal was not as asserted by the employer but was in fact for the sole or principal reason that the employee had made protected disclosures is a serious one that is tantamount to a finding of bad faith on the part of the employer: ***Serco v Dahou*** at [64].

b. It is for the Tribunal, having heard the evidence of both sides relating to the reason for dismissal, to consider that evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from those primary facts: ***Kuzel v Roche*** at [50];

c. It will be important to identify as a primary fact the specific protected disclosures relied upon. This will almost invariably include details as to the timing, content and recipient of the disclosures.[1] Failure to make such findings could give rise to the danger of the Respondent being required to give an explanation of its conduct in circumstances where it is not clear precisely what the Respondent had to explain: see ***Serco v Dahou*** at [64]. Furthermore, the absence of clear primary findings of fact as to the protected disclosures may render it difficult or impossible to make

[1] A similar point is made in the case of ***Blackbay Ventures Ltd v Gahir*** **[2014] ICR 747 at [94]** although not cited in argument.

findings as to further relevant matters such as whether or not the employee making the disclosures had the requisite reasonable belief and/or that they were made in the public interest.

Notice of Appeal and Preliminary Haring

31. The Respondent lodged its appeal against the decision on 24 August 2017. It relied upon five grounds of appeal, numbered 7 through to 11, each of which contained a number of sub-grounds. The matter came before HHJ Eady QC on the sift, who directed that there be a preliminary hearing. The preliminary hearing came before Langstaff J on 16 February 2018. Langstaff J gave permission to proceed in respect of just four grounds, namely Grounds 7, 8, 9.6 and 11 of the grounds of appeal, and dismissed the remaining grounds.

32. Those grounds of appeal, which are referred to here as Grounds 1, 2, 3 and 4, are as follows:

a. Ground 1: The Judge erred in failing to identify the alleged protected disclosures as an essential prerequisite for his analysis of both whether they were protected and, if so, whether they were the reason or principal reason for dismissal.

b. Ground 2: The Judge breached the requirements of essential fairness and natural justice and/or reached a perverse conclusion by finding, as a principal ground for concluding that the disclosures were made in the public interest and were therefore protected, that the Claimant had raised the same matters which formed his protected disclosures *prior* to his suspension.

c. Ground 3: The Judge breached the requirements of essential fairness and natural justice and/or reached a perverse conclusion by finding that the sole or principal

reason for the Claimant's dismissal was that he had made protected disclosures on a basis that was not argued by the Claimant, not put to Mr Bennett and contrary to the evidence given by Mr Bennett.

d. Ground 4: The Judge breached the requirements of essential fairness and natural justice and/or reached a perverse conclusion by finding that the dismissal was unfair on the basis of matters not advanced by the Claimant, and not put (or not adequately put) to the Respondent's witnesses and/or that was contrary to the evidence before the Judge.

33. Langstaff J also made an order that the Respondent must serve a Scott Schedule setting out the procedural errors and/or unfairness alleged and an affidavit or affidavits regarding the procedure adopted at the Employment Tribunal. The Claimant was ordered to respond to the Scott Schedule and lodge an affidavit in response. There was a further order directing that the Judge be "*asked for his comments*" on the Scott schedule and the affidavits for the purpose of the full hearing. No further guidance was given to the Judge as to the nature and extent of the comments to be provided.

34. Ms Omambala swore a 34-page affidavit (with a further 120 or so pages of exhibits) setting out a detailed account of what transpired during the entirety of the hearing. She also produced a Scott Schedule setting out the grounds of appeal which were permitted to proceed with details of the Respondent's contentions in relation to the judgment and cross-references to the judgment and to the affidavit.

35. As we have said already, the Judge was given no guidance as to the nature, purpose or extent of the comments which he was expected to provide; and, perhaps unsurprisingly, the Judge produced a response to the affidavit and to the Scott Schedule which amounted to a detailed defence of his judgment and his reasoning. The Judge rejected each and every one of the Respondent's criticisms.

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36. We were very concerned that this Judge was put in a position whereby he considered that he was required to defend his judgment and reasoning in this way. We note that this was not an appeal brought on the grounds of bias, and nor was this a case where there was any real dispute of fact between the parties as to the conduct of the hearing. Had there been such allegations, there might have been good reason to follow the guidance, first set out in ***Facey v Midas Retail Security* 2001 ICR 287**, and now formalised in paragraph 13 of the EAT Practice Direction, as to the swearing of affidavits and the obtaining of comments from the Tribunal. In appropriate cases, the EAT can also make a *Burns/Barke* order requiring the Tribunal to provide verification or amplification of reasons which are considered to be inadequate. It is well-established that such an order should not be made where the reasons given by the Tribunal are too deficient to be remedied by amplification; it is also clear that the Judge responding to a request upon a *Burns/Barke* order should limit his or her response to doing just that and should not attempt to justify or argue in support of the original decision: ***Woodhouse School v Webster* 2009 EWCA Civ 91, [2009] IRLR 568**:

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> **"25.Although I do not think that it affects the outcome of this appeal, the procedure followed by the EAT in putting questions to the ET and the response of the ET chairman in this case calls for a firm reminder of the importance of taking care to observe the limits of the exceptional Burns/ Barke procedure, as it has come to be called following the decision of the EAT in Burns v. Royal Mail Group plc (formerly Consignia plc) [2004] ICR 1103 and the decision of this court in Barke v. SEETEC Business Technology Centre Ltd [2005] ICR 1373. There is a valuable discussion of these decisions in Green & Heppinstall's Manual of Employment Appeals, paragraphs 8.174 – 8.203.**
>
> **26.The procedure is available where the EAT considers that there is possibly an inadequacy in the ET's reasons for its decision. The EAT may, before it finally decides the appeal, refer specific questions to the ET at the preliminary hearing of the appeal, requesting it to clarify or supplement its reasons where no reasons were given or where the reasons given were inadequate. The purpose of the procedure is to give the ET the opportunity of fulfilling its duty to provide adequate reasons for its decision without the inconvenience that might be involved in the EAT allowing a reasons challenge to the ET decision under appeal and having to remit the case to the ET for a further hearing. Under the procedure developed by the EAT and this court the ET can be asked before the hearing of the appeal to supply, if it is possible to do so, the reasons for which the request is made.**
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> **27.It is not, however, desirable for the ET to do more than answer the request. The ET should not, for example, advance arguments in defence of its decision and against the grounds of appeal. It must not engage, or appear to be engaged, in advocacy rather than adjudication. My concern about the use of the Burns/Barke procedure in this case is twofold.**
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> **28.First, it is necessary for the EAT to identify correctly the point on which the ET's reasons may be inadequate. This was not done here. The EAT's questions were directed to the reasons**

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> **for the finding that no express instruction was given by Mr Moore. On that issue the ET gave reasons, in particular its reliance on the evidence of Ms Murphy–Colett, which all the members accepted as credible. If there were grounds for considering that the reasons of the ET were inadequate (which I doubt), it would have been more to the point to ask for additional reasons for the finding of an implicit instruction to dismiss.**
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> **29.Secondly, having been asked questions by the EAT, the well-intentioned ET chairman went further than the questions required and than was justified under the Burns/Barke procedure. He supplied all his notes, including notes of the deliberations of the ET. These were neither requested nor necessary. He also gave reasons for not interfering with the ET's findings e.g. additional comments about the ET's view of Ms Murphy-Collett; there being no substitute for seeing the witnesses, evaluating their evidence and the way it is given; and the comment that Mr Webster had exaggerated his case, though he had no need to do so, as it was entirely clear to the ET that Mr Moore had made it clear beyond misunderstanding to Mr Webster that he was instructed to dismiss Rowan Ward. It is natural for the chairman to defend the decision of the ET challenged in the appeal, but that is neither the function of the ET nor the purpose of the Burns/ Barke procedure."**

37. The Judge in the present case engaged in what can be described as extensive advocacy in support of his own decision. We do not criticise the Judge for taking that course: there was, as we have mentioned, no guidance provided to the Judge as to the purpose, nature or extent of the comments he was to make, and it is natural that he would seek to defend his judgment and reasoning which were perceived by him to be the subject of a general attack. The fault lies, we believe, with the breadth of the affidavit, which dealt with almost the entirety of the hearing, and with the generality of the order requiring the Judge's comments. We consider it highly undesirable that a Judge should be required to make comments on anything other than very specific allegations as to the conduct of part or parts of the hearing. Such allegations (best set out as questions requiring the Judge to confirm whether or not something occurred at the hearing as alleged) should generally be highly focused and capable of being responded to in brief terms. It would only be in the most exceptional circumstances that a Judge should be requested or expected to provide comments that amount to a defence of the judgment and/or reasoning; indeed, it seems to us that such circumstances will rarely, if ever, arise. Any challenge to the Tribunal's judgment and/or reasoning should, in the vast majority of cases, be capable of being dealt with primarily by reference to the written reasons set out in the judgment; and so it has proved in this case. Mr Cooper QC, who represents the Respondent before us, placed very little reliance on the Judge's

comments in support of the Respondent's appeal, relying instead on what was said in the reasons themselves. That is as it should be.

38. Although Mr Cooper's primary focus was on Ground 3 of the appeal, his submissions in relation to that ground also addressed Grounds 1 and 2. We therefore deal with Grounds 1 to 3 together.

Submissions – Grounds 1 to 3

39. Mr Cooper submits that the Tribunal's approach to the reason for dismissal was fundamentally flawed and unfair. In particular, he submits that the Tribunal made fundamental errors in interpreting Mr Bennett's evidence; that such errors flowed from the fact that the Tribunal had not taken the necessary first step of identifying the specific protected disclosures relied upon; and that having misconstrued Mr Bennett's evidence, the Tribunal then compounded that error and acted unfairly by relying upon its interpretation without giving Mr Bennett or the Respondent an opportunity to respond to the Tribunal's interpretation of that evidence. Mr Cooper supported that submission with a careful deconstruction of the Tribunal's reasoning at paragraphs 7.34 to 7.38 and 7.60 to 7.62, which are set out above. He submits that it is clear from a close analysis of those passages that the Tribunal made a number of unjustified leaps of logic and conflated aspects of Mr Bennett's evidence in order to come to a conclusion which was simply not a permissible option on a proper understanding of the evidence.

40. The Claimant, who represents himself as he did below, largely adopts the Tribunal's comments in response to Ms Omambala's affidavit and the Scott Schedule. Those comments essentially provide that the Tribunal's decision as to the reason for the dismissal was a question of fact and was one that was open to it on the basis of the evidence presented.

Discussion

41. The usual starting point in any analysis of a claim of automatic unfair dismissal by reason of having made protected disclosures will be to identify and make findings as to the protected disclosures relied upon. The Tribunal was faced with the considerable difficulty here of a litigant in person whose case in respect of protected disclosures was, and remained, unclear. However, that lack of clarity, does not necessarily absolve the Tribunal from the task of identifying with specificity the disclosures being relied upon; nor does the fact that the Respondent had, in broad terms, accepted that there were qualifying disclosures (subject to its contentions as to reasonable belief and the public interest). That task was not undertaken at any stage in the reasons.

42. At paragraph 7.46 of the reasons, the Tribunal, having acknowledged that the Claimant does not set out any clear detail of the whistleblowing allegations made and that he accepted that his allegations were made *after* he was suspended (paragraph 7.44), concludes as follows:

> **"7.45 As to the specific disclosures, there is reference to whistleblowing in April 2013. That refers to a specific written complaint. The written complaint has never been produced to me and I cannot find that was a protected disclosure.**
>
> **7.46 It is clear that there were a number of disclosures of information in 2015 which were viewed by both sides as protected disclosures.**
>
> **7.47 The Respondent has not sought to defend this claim on the basis that there was no disclosure of information or that the disclosure of the information did not tend to demonstrate one of the matters outlined in section 43 B. The defence has been run on the basis that disclosures were not in the public interest."**

43. The Tribunal thus disregards whistleblowing allegation 1 in the Town Clerk letter, but in relation to the remaining disclosures, the Tribunal is content to rely on its conclusion that there were "a number of disclosures of information in 2015". The Tribunal does not make any finding as to the date, form or substance of any disclosures. The need to make such findings is not an arid technicality. In the first place, given the seriousness of the allegation, i.e. one that is tantamount to an allegation of bad faith or that the employer's act of dismissal is on a false or improper basis, there ought, as a matter of fairness, to be clear findings as to the specific disclosures made in order that the Respondent knows the case that it has to meet. It may be very difficult for an employer to explain that a disclosure was not the reason for dismissal where it is not clear what

disclosure is being relied upon or when it was made. In the second place, and perhaps more fundamentally given the areas of dispute in this case, precise identification of the date, substance and form of the disclosures was necessary in order to make proper findings as to whether those disclosures were made in the public interest. It is clear from paragraph 7.64 of the Tribunal's reasons that the Tribunal considered that the "only possible defence in this case was that the disclosures were not protected, as they were not made in the public interest." Putting aside for the moment that that was not in fact the only defence relied upon by the Respondent, the Tribunal's view that the public interest argument was the only possible defence rendered it all the more critical that the Tribunal should ensure that its conclusions in this regard are based on a proper evidential foundation. However, an analysis of the Tribunal's reasoning reveals that there was no such foundation:

a. At paragraph 7.56 of the reasons the Tribunal held that:

> **"… There is no doubt that his motivation for raising these matters was the public interest. I have no doubt that when raising those matters, as he clearly did, with his managers, he was making disclosures. He raised these matters long before the suspension. It may have been that as managers fail to act. His managers may have received presented the Claimant's intervention. However, the Claimant's general objections were undoubtedly disclosures of information which were protected. Subjectively, the Claimant thought there was a public interest. Objectively, there was a public interest." (Emphasis Added)**

b. It is clear from that passage that, in concluding that the Claimant's motivation for raising these matters was the public interest, a principal plank of the Tribunal's reasoning was that he "raised these matters long before the suspension";

c. However, in the absence of clear findings as to the date on which a disclosure was made, the form which it took and the substance of its contents, it is our judgment that the Judge was simply not in a position to reach that conclusion. The fact that a qualifying disclosure is made in November 2015 (after the suspension) does not mean that all and any prior references to the subject matter of that disclosure by the Claimant also amounted to a qualifying disclosure. There are no findings whatsoever to suggest that that the Claimant's "general objections" about his

managers and/or the members' conduct in 2015, or that his raising of these matters, amounted to a qualifying disclosure. If the Claimant had, for example, simply said to his manager, "I'm not happy about the way this is being handled", that is unlikely, without more, to amount to the disclosure of information tending to show a breach of a legal obligation. The difficulty here is that we simply do not know what the pre-suspension allegations involved (save for a general understanding that they concerned the same general subject matter), who they were made to or when they were made. It is quite possible that, had the Tribunal engaged in a proper fact-finding exercise, it would have reached the conclusion that, whilst the Claimant had been expressing concerns about aspects of his managers and members' handling of certain matters, the first qualifying disclosure was only made after his suspension. We note here as an aside that if such conclusion had been reached it would have been consistent with the Claimant's own case which was that his allegations were made after he was suspended: see para 7.44.

44. The failure to make specific findings as to the disclosures relied upon also gives rise, in our judgment, to difficulties with the Tribunal's analysis of the reason for the dismissal. The Tribunal's conclusion that the sole or principal reason for the Claimant's dismissal was the fact that he made protected disclosures is almost entirely based on the Tribunal's interpretation of Mr Bennett's evidence. The Tribunal says so in terms at paragraph 7.62: "My findings are based predominantly on Mr Bennett's own evidence." However, an analysis of the Tribunal's approach to that evidence reveals some serious flaws:

a. At paragraph 7.34, the Judge refers to paragraph 31(e) of Mr Bennett's evidence and the reference therein to the Claimant's "repeating of unsubstantiated allegations".

b. At paragraph 7.35, the Tribunal notes that Mr Bennett "does not set out what he believes to be the repeated unsubstantiated allegations." However, on a fair reading

of the statement, the reference to unsubstantiated allegations would appear to be a reference to paragraph 29 of Mr Bennett's statement in which he said that, "throughout the proceedings the Claimant repeated serious allegations against Mr Gill, namely that he had granted a £750,000 compensation agreement without the correct authority and this should be investigated". Instead of treating that as the unsubstantiated allegation to which Mr Bennett was referring, the Tribunal draws upon paragraph 6 of Mr Cogher's statement and the reference therein to the counter-allegations concerning Mr Gill and Mr Nelson, and concludes that "these are the allegations that Mr Bennett had in mind.". Thus, having unjustifiably found there to be a gap in Mr Bennett's evidence, the Tribunal proceeded to fill that gap with the content of Mr Cogher's statement. It was never put to Mr Bennett, either by the Tribunal or by the Claimant, that the allegations to which Mr Cogher refers were the ones that Mr Bennett had in mind.

c. It is right to note that the Tribunal does refer to the fact that Mr Bennett had noted the Claimant's allegation about Mr Gill wrongly authorising £750,000 worth compensation. However, it does so in order to make criticisms as to how that issue was subsequently investigated. Those criticisms were also not put to Mr Bennett. More importantly, the Tribunal apparently failed to see any connection between the reference to repeating unsubstantiated allegations at paragraph 31(e) of Mr Bennett's statement and the reference in paragraph 29 to the Claimant making repeated serious allegations against Mr Gill.

d. The Tribunal then directs its attention at paragraph 7.37 of the reasons to paragraph 32 of Mr Bennett's statement in which Mr Bennett said that the disciplinary panel was "also deeply concerned by both the attack on Mr Lohmann and the retaliation comment made by the Claimant in the course of the proceedings." The Tribunal

concluded that Mr Bennett's reference to being concerned by the Claimant's retaliation was a reference to the "repetition of whistleblowing disclosures". In our judgment, there does not appear to be any proper basis for that conclusion. Mr Bennett is quite clear that he is referring to the Claimant's "retaliation comment" and not to retaliatory measures in general or to disclosures. In the context of the statement, that reference is much more likely to be a reference to Mr Bennett's description at paragraph 29 of his statement of what the Claimant had said to him in response to a question, namely, "What am I supposed to do, I have four disciplinary accusations against me, and of course I will retaliate." It was never put to Mr Bennett, either by the Tribunal or by the Claimant, that Mr Bennett's reference to the "retaliation comment" was a reference to the repetition of whistleblowing disclosures.

e. Then at paragraph 7.38, the Tribunal sums up what it sees as the "logic" of the position by concluding that:

> **"The fact that the Claimant had raised the allegations, i.e. the retaliation, was viewed negatively by Mr Bennett. He believed it demonstrated a breakdown of mutual trust and confidence, for which he blamed the Claimant and sacked him. There is a direct causational link between the Claimant's whistleblowing allegations and the dismissal. That is the only logical interpretation of Mr Bennett's own evidence.**

f. In our judgment, not only is that not a logical interpretation of Mr Bennett's evidence, it is one that does not necessarily follow from that evidence that all. Mr Bennett's evidence does not, on its face, suggest that his concern about the Claimant's "retaliation comment" was in effect a concern that the Claimant had made whistleblowing disclosures in November 2015 following his suspension. The Tribunal's conclusion would appear to be, as Mr Cooper submits, an extrapolation by the Tribunal, based on a series of doubtful interpretations of the explanation given by Mr Bennett for the panel's conclusion that trust and confidence had broken down. Indeed, if the Tribunal were correct in its interpretation then it would mean that Mr

Bennett had effectively admitted in his statement that the reason for dismissal was the making of protected disclosures.

g. Whilst this part of the Tribunal's analysis is contained in the section dealing with ordinary unfair dismissal, it is clear that it informs the Tribunal's analysis in relation to the automatic unfair dismissal appearing subsequently in the reasons at paragraphs 7.44 onwards.

h. The core of the Tribunal's reasoning as to the reason for dismissal is set out at paragraph 7.61:

> **"The Claimant was dismissed because it is alleged that there was a fundamental breakdown of mutual trust and confidence. That breakdown in mutual trust and confidence arises out of the alleged retaliation by the Claimant and his previous protected disclosures. The alleged retaliation by the Claimant is a shorthand reference to his protected disclosures. The causative link is made out. The sole or principal reason for his dismissal was the fact he made protected disclosures, which the Respondent did not like."**

i. It is clear from that passage that the Tribunal relies upon the same leaps of reasoning that led to its conclusion earlier in the reasons that Mr Bennett's reference to being concerned about the Claimant's retaliation comment was actually an expression of concern about the fact that the Claimant had made protected disclosures. Mr Bennett is clear in his statement that his concern about the retaliation comment was only *one* of the factors that led the panel to conclude that there was a breakdown of mutual trust and confidence; the other factors including the Claimant's unwarranted attack on Mr Lohmann, the repeated unsubstantiated allegations against Mr Gill and the fact that the allegations against the Claimant had been established. Notwithstanding that, and without any explanation as to why those other factors played little or no part in Mr Bennett's mental processes, the Tribunal appears to have taken a further leap of reasoning in concluding that the retaliation was the sole or principal reason for the dismissal.

45. The failure to identify with any precision the actual disclosures in question also meant that the Tribunal lacked the firm factual foundation necessary for the drawing of any inferences as to the reason for the dismissal. As is apparent from the above analysis, the Tribunal appears to have concluded that the Claimant had made protected disclosures even before his suspension and that the Respondent's reason for dismissing him was that he sought to "retaliate" against his suspension and the disciplinary charges by "repeating" those earlier disclosures. It is not clear therefore whether the Tribunal considered that the Respondent's dismissal was based on the earlier disclosures (i.e. those before the suspension), those made immediately after the suspension (i.e. those made in November 2015) or on some later disclosure whether at the disciplinary hearing in April 2016 or otherwise. As stated above, the disclosures made on each of those separate occasions were not necessarily protected: the mere fact that the Respondent had admitted that the disclosures made after his suspension in November 2015 were qualifying disclosures does not mean that disclosures coming before or after then were also necessarily protected. It may be possible to draw a distinction between the disclosure of information and steps taken by the employee in relation to the information disclosed: see ***Panayiotou v Chief Constable of Hampshire Police*** **[2014] IRLR 500 at 49**. Whilst the Respondent would not be permitted to rely upon a protected disclosure as a reason for dismissal, it would not necessarily be unlawful for the Respondent to dismiss an employee because of the manner in which earlier disclosures were pursued or repeated. However, the Tribunal in this case disabled itself from any analysis along these lines because the actual disclosures relied upon were never clearly and precisely identified.

46. We are conscious that matters relating to the interpretation of evidence are very much the province of the Tribunal as the arbiter of fact. However, as the above analysis demonstrates, we consider that the Tribunal's interpretation of Mr Bennett's evidence led to conclusions and inferences that were not properly open to the Tribunal to reach. Even if we are incorrect in our

A view and it was open to the Tribunal to interpret the evidence in the way that it did, there is, in our judgment, a serious procedural irregularity in that none of the interpretations relied upon were in fact put to Mr Bennett.

B 47. Our attention was drawn to the judgment of the Court of Appeal in ***Judge v Crown Leisure Ltd*** **[2005] EWCA Civ 571** in which Smith LJ held as follows:

> **"20. Mr Mulholland now accepts that it was open to the ET to make the findings of the fact that it made about what had been said at the Christmas party. He complains, and plainly with justification, that neither the appellant nor the respondent had contended for that finding and had not anticipated it. They had not had the opportunity to address the Tribunal upon the**
> C **legal impact of that finding. Mr Mulholland submits that it is a cardinal principle of fairness that the parties should have the opportunity to be heard on any issue that is likely to be relevant to the decision. As a general proposition, that is obviously right. It is highly desirable that if a tribunal foresees that it might make a finding of fact which has not been contended for, that possible finding should be raised with the parties during closing submissions. If the Tribunal does not realise what its findings of fact are likely to be until after the hearing has finished, it will usually be necessary to give the parties the opportunity to make further submissions, at least in writing, although not, in my view, necessarily by oral argument.**
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> D **21. However, the giving of such an opportunity is not, in my judgment, an invariable requirement. That is so for two reasons. First, paragraph 11 of the Employment Tribunal Regulations gives the ET a wide discretion on procedural matters. It seems to me that that discretion is wide enough to encompass a decision as to the appropriate course to take where this kind of situation arises. In any event, if the legal effect of the findings of fact that are to be made is obviously and unarguably clear, no injustice will be done if the decision is promulgated without giving that opportunity. Even if an opportunity should have been given**
> E **and was not, the consequence will not necessarily be that an appellate court will set aside the decision of the lower court. It will only do so if it concludes that the lower court's application of the law was wrong.**
>
> **22. It follows that the main issue for this court is whether the ET's application of the law to the facts that it found was right or wrong. Mr Mulholland contended that the ET applied the wrong legal test to the question of whether there was an intent to create legal relations when Mr Fannon spoke to the appellant at the Christmas party. He sought to rely on the same**
> F **authorities as had been cited to the EAT.**
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> **24. As I have said, at paragraph 9, the ET had set out the proposition of law which it was to apply. In my judgment, that proposition of law was obviously and unarguably correct. Mr Mulholland does not suggest to the contrary. The ET applied that proposition of law to the facts it found. The conclusion was, in my view, the inevitable consequence of their findings of fact. Although, as I have said, as a general rule Tribunals should be careful to ensure that the parties have an opportunity to make submissions on any matter that might affect the outcome**
> G **of the case, in the particular circumstances of this case the facts found by the Tribunal could result in only one conclusion. That being so, I do not consider that this Tribunal should be criticised in any way for not having given the parties the opportunity to make submissions on the basis of the facts as found. It follows that, in my judgment, this appeal should be dismissed."**

48. We were also taken to the decision of the EAT in ***BAE Systems (Operations) Ltd v***
H ***Paterson*** **UKEATS/0003/12/BI** (Unreported), where Langstaff P held as follows:

> **"31. However, I do accept other submissions which he made. In my view the principles which apply are these; (1) An Employment Tribunal should determine the issues placed before it. It**

> **has no entitlement to consider issues which are not before it. If authority were needed that is provided by *Chapman v Simon* [1994] IRLR 124 CA. However; (2) a Tribunal is not in error in raising an issue it considers to be relevant even where the parties have not done so, though especially where parties are represented a Tribunal should take very great care before doing so. The reason for that is plain. Represented parties must generally be assumed to have considered the law carefully and considered what findings of fact are relevant to the issues of law which they consider relevant. If a point has not been taken it may well be because the parties, for their own purposes, have concluded it should not be taken. The procedure is an adversarial one. I would not wish without further and more developed argument to accept what is set out in *Taskmaster Resources Ltd v Kanyimo* at principle number 2 to the effect that a Tribunal is under a statutory duty to enquire into the matters before it, certainly as entitling a Tribunal in general terms to raise whatever issue it wishes, rather than to determine the issues which the parties wish to determine so far as the Tribunal may properly do so within the available law; (3) If, however, a Tribunal does, as it is entitled to do, raise an issue which it has considered relevant, although the parties have not appeared to appreciate the relevance of it, it must (as the Tribunal in Taskmaster pointed out) consider the consequences of doing so. Generally, matters of fact are before a Tribunal for it to determine. There may be matters of law for it to determine. Where all the facts have been determined, matters of how the law applies are matters of argument, which may require no adjournment. The case of *Eddie Stobart Ltd v Moreman and Ors* UKEAT/0223/11/ZT 17 February 2012, a decision of Underhill J as President makes that plain. However, a new issue may require facts to be found. Where that is so, then if a party raises the possibility, it is almost always going to be incumbent upon the Tribunal to give that party a proper opportunity to advance those facts; (4) The reason why that is the case is a manifestation of the fundamental principle of justice that a party is entitled to know the case against it. That is the way in which the principle is often formulated. Knowledge of itself, however, in this context does not make for justice merely because there is *information*. The purpose of knowing the case against oneself is to afford a chance to meet the case. Where a case can be met by argument alone, then a proper opportunity for argument in the light of that case will meet it (see *Eddie Stobart Ltd*) but where knowing the case implies the opportunity to consider whether, and if of a mind to do so, to call evidence on the point to meet it factually then that opportunity must be given. If it is not then there is a material procedural irregularity. Fairness has been denied. A party simply has not been given proper opportunity to meet the case against it, her or him."**

49. A similar point was made more recently in the judgment of the EAT in ***NHS Trust Development Authority V Saiger and Others* [2018] ICR 297**, where HHJ Hand QC said as follows:

> **"99. So it is the conduct of the Tribunal (in the above scenario that conduct was a failure by the Tribunal to indicate concern that the point had not been put) upon which the procedural irregularity rests and not on the conduct of the parties or the nature of their evidence. In Secretary of State for Justice v Lown [2016] IRLR 22 (see above at para 81) the conduct of the Tribunal was drawing an inference of bad faith on the part of the prison governor without that matter having been put to him and the opportunity to put it having been given or even required by the Tribunal. All that said, it will not usually be a fair procedure for a Tribunal to reach conclusions about a factual scenario if that factual scenario has not been put. If conclusions of dishonesty are to be reached, it will usually be unfair to reach them unless the person likely to be condemned has had an opportunity to deal with them. If a Tribunal is minded to reach a conclusion that is purely inferential and such a conclusion is neither obvious nor has it been advertised in that form at any point in the proceedings, then the Tribunal must give the parties an opportunity to address the matter.**
>
> **100. Sometimes the error of the Tribunal will be one of reaching a conclusion, which cannot be supported by, or is contradicted by, the evidence. This seems to me to be one way of characterising the underlying error in Browne v Dunn 6 R 67 . The evidence of the neighbours not having been challenged, the jury had no evidence upon which they could have reached**

> **the conclusion they did. Alternatively, the error might be that of reaching a perverse conclusion; one can also look at Browne v Dunn in that way. Sometimes the error will be that of inadequate reasoning, which is the way Underhill LJ characterised the error in Co-operative *Group Ltd v Baddeley* [2014] EWCA Civ 658 at [58]–[60]. But these are all different species of errors of law. They might also be serious procedural irregularities but they are not only serious procedural irregularities."**

50. In our judgment, the principles, relevant to this appeal, which may be drawn from those cases are as follows:

a. The Tribunal does have the power to deal with points not identified by the parties, although it would be especially careful not to do so where both sides are represented: ***BAE Systems v Paterson*** at [31]

b. Although it is open to the Tribunal to make findings of fact not contended for by either party, where the Tribunal's conclusion of fact is likely to be tantamount to a conclusion that there was bad faith on the part of a decision-maker or reliance upon an improper reason then it is likely to amount to a serious procedural irregularity for the Tribunal to reach such a conclusion without giving that decision-maker an opportunity to respond: ***BAE Systems v Paterson*** at [31] and ***NHS Trust Development Authority v Saiger*** at [99] and [100];

c. Parties would usually be given an opportunity to make submissions as to the effect of a finding of fact not contended for by either party, although that would not apply where the legal effect of the findings of fact that are to be made is obviously and unarguably clear: ***Judge v Crown Leisure*** at [21].

51. Mr Cooper submits that there was a serious procedural irregularity in this case in that Mr Bennett did not have the opportunity to answer the Tribunal's interpretation of the evidence, particularly where that interpretation led to the drawing of an inference that was tantamount to a finding of bad faith on the part of Mr Bennett and was not one which the Claimant himself was pursuing. We agree with that submission. None of the Tribunal's interpretations of Mr Bennett's evidence considered above were put to him. They ought to have been. Even if, contrary to our

A view, the Tribunal had been entitled to reach the findings of fact that it did, this was not a case where the legal effect of those findings was unarguably clear such as to obviate any need for the parties to make submissions as to that effect.

B 52. The Claimant submits that the Respondent had ample opportunity in the course of this six-day hearing to raise the points that is now making or to invite the Judge to give the Respondent's witnesses an opportunity to be heard on these issues. The difficulty with that submission is that the Respondent would have been unaware of the Tribunal's approach to Mr C Bennett's evidence until it saw the Tribunal's judgment, by which stage it would be too late to recall any witnesses. In our judgment, there was a serious procedural irregularity arising out of that approach.

D 53. We should note here that the Respondent sought to make much of the fact that the Tribunal's conclusions are somewhat confusing in structure and approach in that there is no strict demarcation between the analysis of the two types of unfair dismissal or as between the reason for dismissal and procedural issues. We do not accept that criticism. As has been repeatedly stated E by this appeal Tribunal and higher courts, Tribunal Judgments do not need to be a model of legal draughtsmanship and should not be subjected to an overly refined critique. The difficulty with the Tribunal's Judgment does not lie with its structure; it lies in the fact that some of its F conclusions, as we set out here, were based on a flawed interpretation of the evidence of the decision-maker in this case in circumstances where that interpretation was not put to the witness.

54. For these reasons, Grounds 1, 2 and 3 of the appeal are upheld.

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Ground 4

55. The challenge here is to the Tribunal's finding on ordinary unfair dismissal and the reasonableness of the investigation. Mr Cooper submits that the Judge made a number of H criticisms of the process which had not been advanced by the Claimant and which were either

not explored or not adequately explored with the Respondent's witnesses. Mr Cooper highlights five aspects of the Tribunal's reasons:

a. The first is the Tribunal's conclusion that Mr Cogher had not adequately investigated the Claimant's complaints against Mr Gill and Mr Nelson. The Tribunal found that Mr Cogher's evidence failed to provide any details as to his investigation into these matters and that the basis for Mr Cogher's view remains entirely obscure;

b. The second is the Tribunal's view that it was unclear why Mr Cogher had recommended that the Claimant's complaints against Mr Gill and Mr Nelson should form part of the matter for consideration at the disciplinary hearing. It is said that the reason for including these allegations was apparent from the face of the relevant document in which it was stated that "these allegations appear central to [the Claimant's] defence to the disciplinary allegations against him… [It is] recommended that these allegations be considered and determined as part of the disciplinary hearing itself";

c. The third is the Tribunal's criticism of the Respondent's investigation into the Claimant's new allegation about the £750,000 compensation payment authorised by Mr Gill;

d. The fourth is the Tribunal's criticism that the Respondent had not identified any particular procedure the Claimant had allegedly breached in relation to the Tudor Markets event, the Tribunal apparently having missed the point that the allegation was one of a breach of basic professional standards not set out in any specific written procedure;

e. The fifth and final aspect is the Tribunal's criticism that the Claimant was not given sufficient information about the allegations and that the investigation failed to identify the relevant allegations and seek both incriminating and exculpatory

evidence. This was said to be contrary to the evidence before the Judge which was to the effect that the Claimant had in fact understood the allegations being made against him.

56. In our judgment, none of these points amounts to anything more than a challenge to findings of fact which were open to the Tribunal to make. Whilst it might be right to say that some of the points or criticisms made by the Tribunal were not directly put to the witnesses, the matters to which they relate are ones in respect of which the Tribunal was entitled to conclude that the Respondent had not sufficiently evidenced or explained its position. Furthermore, the conclusions about Mr Cogher's investigations were not based on a misinterpretation of the evidence on a key issue, as was the case with Mr Bennett's evidence. The Tribunal was entitled to conclude, for example that Mr Cogher had not sufficiently investigated the Claimant's complaints against Mr Gill and Mr Nelson because Mr Cogher's evidence on this issue was cursory. Similarly, the Tribunal was entitled to conclude that the investigation into the new allegation against Mr Gill raised at the disciplinary hearing was inadequate. The Tribunal referred to the very short timeline for the investigation and the absence of detail in the Respondent's evidence. In those circumstances, the Tribunal was entitled to draw the inference that the investigation into that matter was "very brief" and "inadequate".

57. Unlike the position under Grounds 1, 2 and 3, the Tribunal's conclusions as to the Respondent's shortcomings in its investigations and its procedures would not involve any finding of bad faith; nor as we have said above, was it based on a flawed interpretation of the evidence. Thus, the principal justifications for upholding those grounds notwithstanding the fact that they also involve challenges to the Tribunal's interpretation of the evidence and findings of fact, does not apply to this challenge to the Tribunal's findings in respect of ordinary unfair dismissal. We must make it clear that a ground of appeal does not arise simply because a particular point or evidential matter was not put to a witness or explored with a witness by a Judge or party. Whether

A or not it does will depend on whether it can be said that, in the particular circumstances of the case, such as where there is, in effect, a finding of bad faith arising out of a clear misinterpretation of evidence, the failure to give a witness the opportunity to answer the point amounts to a serious procedural irregularity: see paragraph 50 above.

B 58. There is no serious procedural irregularity in relation to the finding of ordinary unfair dismissal and this ground of appeal is dismissed.

C **Conclusion**

59. For the reasons set out above, it is our judgment that Grounds 1, 2 and 3 of the appeal should be upheld, but that Ground 4 should be dismissed.

D **Disposal**

60. The Respondent submits that this matter should be remitted to a freshly constituted Tribunal. Mr Cooper reminds me that the Judge in this case reached fairly trenchant views as to the Respondent's motivations and did so without adopting a fair approach. Mr Cooper also invites me to have regard to the conclusions reached by HHJ Shanks in a related appeal against the refusal by the same Judge to adjourn a remedies hearing. The appeal was allowed and the decision as to when the remedies hearing should proceed was remitted to another Judge. This was on the basis that the reasons given for refusing the adjournment disclosed "an unwillingness to consider the matter with an open mind".

G 61. The Claimant submits that the matter should be remitted to the same Judge.

62. The relevant principles to be considered are those set out in the well-known case of ***Sinclair Roche and Temperley v Heard*** **[2004] IRLR 763** at [46]:

> **"46. There is no authority which has been cited to us, or of which we ourselves know, which would assist us in such a situation, and we set out what appear to us to be relevant factors:**
>
> **46.1 <u>Proportionality</u> must always be a relevant consideration. Here the award was for £900,000, and although we are conscious that ordering a fresh hearing in front of a different**

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Tribunal would add considerably to the cost to parties on both sides who have already invested in solicitors and Counsel, both at the Tribunal and on appeal (in the case of the Applicants, two Counsel for the appeal), sufficient money is at stake that the question of costs would from the one point of view not offend on the grounds of proportionality and from the other not be a decisive, or even an important, factor. Similarly the distress and inconvenience of the parties in reliving a hearing must be weighed up, but (a) are rendered necessary in any event by the decision to set aside the original decision and (b) will not be greatly less by virtue of the extra time taken by a fully, rather than partially remitted, hearing, the main distress and inconvenience being caused by the matter being reopened at all.

46.2 Passage of Time. The appellate tribunal must be careful not to send a matter back to the same tribunal if there is a real risk that it will have forgotten about the case. Of course, tribunals deal with so many different cases per month that it is impossible for them to carry the facts in their minds, nor would they be expected to do so. But they can normally refresh those minds from the notes of evidence and submissions if the case occurred relatively recently. This case was a relatively long one, and will not on that basis alone have completely evanesced from the minds of the tribunal. It was only just over a year ago. That in itself is quite a long time, though the lengthy reserved decision sent to the parties on 30 July 2003 would have kept the case in the minds of the Tribunal at least until then: but in addition they have held a remedies hearing which began in October 2003, the hearing lasting until 18 December, and then required consideration in chambers' meetings in January and March, and did not result in a promulgated decision until as recently as 19 March 2004. We are satisfied therefore that the question of delay and loss of recollection is not a material factor in this case one way or the other.

46.3 Bias or Partiality. It would not be appropriate to send the matter back to the same Tribunal where there was a question of bias or the risk of pre-judgment or partiality. This would obviously be so where the basis of the appeal had depended upon bias or misconduct, but is not limited to such a case.

46.4 Totally flawed Decision. It would not ordinarily be appropriate to send the matter back to a tribunal where, in the conclusion of the appellate tribunal, the first hearing was wholly flawed or there has been a complete mishandling of it. This of course may come about without any personal blame on the part of the tribunal. There could be complexities which had not been appreciated, authorities which had been overlooked or the adoption erroneously of an incorrect approach. The appellate tribunal must have confidence that, with guidance, the tribunal can get it right second time.

46.5 Second Bite. There must be a very careful consideration of what Lord Phillips in English (at paragraph 24) called "*A second bite at the cherry*". If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say "I told you so". Once again the appellate tribunal would only send the matter back if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised.

46.6 Tribunal Professionalism. In the balance with all the above factors, the appellate tribunal will, in our view, ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission. By professionalism, we mean not only the general competence and integrity of the members as they go about their business, but also their experience and ability in doing that business in accordance with the statutory framework and the guidance of the higher courts. Employment law changes; indeed it has been a rapidly developing area of the law. Employment tribunals are therefore all too familiar with the need to apply a different legal approach to a case today from that which they applied last year, or even last week, where the law has changed, although the cases may be on all fours as regards their facts. Some areas of employment law have not been easy, and the approach to be adopted in

considering whether there has been race or sex discrimination in a case such as this is just such a matter which has understandably caused problems for tribunals. It follows that where a tribunal is corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a "totally flawed" decision described at 46.4), then, unless it appears that the tribunal has so thoroughly committed itself that a rethink appears impracticable, there can be the presumption that it will go about the tasks set them on remission in a professional way, paying careful attention to the guidance given to it by the appellate tribunal."

63. Dealing with each of these factors in turn our views are as follows:

a. Proportionality - we note that the Tribunal has determined the liability hearing and also the first part of the remedy hearing, dealing with the question of reinstatement or engagement. The second part of the remedy hearing will deal with financial compensation. We note in this regard that the Claimant has indicated that his claim is for up to £2.5 million: see judgment of HHJ Shanks in UKEAT/0074/19/JOJ at [12]. It seems to us that in those circumstances it certainly would not be disproportionate, having regard to the sums at stake, to remit to a freshly constituted Tribunal, although we recognise that this will undoubtedly cause the Claimant some distress;

b. Passage of Time - This is not an issue in this case given that the Tribunal has dealt with the matter on several occasions, including most recently in producing written comments pursuant to the order made by Langstaff J;

c. Bias or Partiality. This is not a bias case. However as made clear in **Sinclair Roche**, the risk of pre-judgment or partiality is not necessarily limited to cases involving an allegation of bias. This case is an unusual one because of the opportunity given to the Tribunal to produce extensive comments. These comments, as we have discussed above, advocate strongly in favour of the original judgment and reasons. The Judge rejects in the strongest terms the Respondent's criticisms of its reasoning and, in the course of defending his reasons, he expresses trenchant views in support of his original conclusions. For the purposes of considering whether to remit to the same Tribunal or to a freshly constituted one, this is a document which cannot be ignored.

There is a real risk, in our view, that given the tenor of the Judge's comments and also the trenchant nature of the views expressed as to the Respondent's reasons for dismissal, the Tribunal would be seen to have pre-judged the matter;

d. Totally Flawed Decision - We do not regard the decision as totally flawed. The challenges to the decision as to ordinary unfair dismissal have not been upheld. However, in relation to the Tribunal's conclusions in respect of automatic unfair dismissal there are serious flaws both as to the identification of the protected disclosures in question, and as to the Tribunal's approach to the Respondent's evidence as to the reason for the dismissal. In our judgment, this factor leans in favour of remittal to a freshly constituted Tribunal;

e. Second Bite of the Cherry – For the reasons set out under (c) above, this is a case where there is a very real risk that the Tribunal will be seen to have already made up its mind and this Appeal Tribunal could not be confident that it would be possible for it to look at all matters again with a fresh mind. It is significant that the Judge, in having been asked to produce his comments, has in effect already been given a second bite of the cherry. This, therefore, is a factor which weighs in favour of remittal to a freshly constituted Tribunal.

64. Taking account of all of these matters, and the Tribunal's professionalism, of which we have no doubt, it is our view, very much on balance, that the appropriate course is for the matter to be remitted to a freshly constituted Tribunal. The question which then arises is as to whether the entirety of the case should be remitted or only that part of it concerned with automatic unfair dismissal. In our view, given that the reason for dismissal is a fundamental issue in relation to both the ordinary and automatically unfair dismissal claims, and given that the factual findings for both claims are, in this case, necessarily intertwined to a significant extent, the only appropriate course is to remit the matter in its entirety to a freshly constituted Tribunal.

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