Appeal No. UKEAT/0082/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINDS,7 ROLLS BUILDING, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 24 June 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MISS G OKWU APPELLANT

RISE COMMUNITY ACTION (A COMPANY LIMITED BY GUARANTEE) RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS G OKWU (The Appellant in Person)
For the Respondent	Mr J NKAFU (of Counsel) Direct Public Access

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

VICTIMISATION DISCRIMINATION - Dismissal

Section 43B ***Employment Rights Act 1996***

Section 103A ***Employment Rights Act 1996***

The Respondent was a small charity, providing support for individuals affected by domestic violence, female genital mutilation or HIV. It employed the Claimant, subject to a three-month probation period, as its domestic violence and female genital mutilation specialist worker; she started that employment on 15 November 2017. Having raised a number of issues regarding the Claimant's performance, on 14 February 2018, the Respondent extended her probation period for a further three months. On 21 February 2018, the Claimant wrote to the Respondent raising a number of matters, including – identified as disclosure (iii) in the ET's Judgment – concerns that the Respondent was acting in breach of the **Data Protection Act** by failing to provide the Claimant with her own mobile phone and with secure storage, when she was dealing with sensitive and confidential personal information. The ET found that the matters raised by the Claimant were not in the public interest but concerned her own contractual position; even matters relating to potential breaches of the **Data Protection Act** were raised as relevant to her performance issues. It further found that the information provided lacked sufficient detail to amount to a qualifying disclosure. In any event, the ET found that the Claimant had not been dismissed for matters relating to her personal contractual issues and it accepted that the Respondent had genuine concerns about the Claimant's performance and that the evidence supported its case in this regard. It duly dismissed the Claimant's complaint of automatic unfair dismissal due to a protected disclosure.

The Claimant appealed, contending that ET had (1) erred in its approach to the question of protected disclosure;(2) had failed to make proper findings or engage with her case on the reason for the dismissal; (3) had conducted the hearing unfairly.

***Held*:** allowing the appeal on grounds (1) and (2)

The ET had failed to ask whether the Claimant had a reasonable belief that her disclosure (relating to potential breaches of the **Data Protection Act**) was in the public interest; given the sensitive information involved, it was hard to see how it could not have been. Furthermore, it had failed to explain why considered the disclosure lacked sufficient detail.

As for the reason for dismissal, the Claimant had the burden of demonstrating that her protected disclosures had been the reason, or principal reason, for her dismissal. Her case was that the decision to dismiss must have been informed by the content of her letter of 21 February: apart from that letter, nothing had happened between the decision to extend her probation period and the decision to terminate her employment. Moreover, the dismissal letter and the Respondent's evidence before the ET had linked the decision to the letter of 21 February. If that letter contained protected disclosures (as to which, see above), the Claimant contended that these must have informed the decision that she should be dismissed. Although the ET referred to the evidence that supported the Respondent's case - that it had genuine concerns about the Claimant's performance - it had not made a clear finding that this was the reason that had led to the decision to dismiss and had failed to demonstrate engagement with Claimant's case or properly explain its reasons for rejecting that case

The Claimant's complaints of procedural unfairness – raised by grounds (3) of her appeal – did not, however, withstand scrutiny. The appeal would be allowed on grounds (1) and (2) and the issues of protected disclosure and reason for dismissal remitted to the same ET for reconsideration.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions (1) as to the approach taken by the Employment Tribunal ("the ET") to the identification of a protected disclosure, and (2) as to the determination of the reason for a dismissal, where that was said to be by reason of such a disclosure. Issues of procedural fairness were also raised relating to the conduct of the ET hearing.

2. In giving Judgment in this matter, I refer to the parties as the Claimant and Respondent as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the ET sitting at London East (Employment Judge Hallen, sitting with members Mr Morphew and Mr Ross, on 18 and 19 October and on 12 November 2018, with a further day in chambers, on 19 November 2018), by which the ET (relevantly) dismissed the Claimant's claim of automatic unfair dismissal for having made a protected disclosure. Representation before the ET was as it is today.

The Factual Background and the ET's Decision and Reasoning

3. I take my summary of the relevant history from the ET's findings of fact. In her skeleton argument for today's hearing, the Claimant has questioned a number of the ET's findings but those were not challenges made in her Notice of Appeal, and they were not matters that had been permitted to be taken forward to this hearing.

4. The Respondent is a small charitable organisation, run by a management committee and with a group of eight volunteers. It supports individuals affected by domestic violence, female genital mutilation, or by HIV status.

5. The Claimant started her employment with the Respondent on 15 November 2017. She was employed as its domestic violence and female genital mutilation specialist worker, initially subject to a three-month probation period. The Claimant has had a long and varied experience of social work, and the Respondent had considered she would be able to undertake the duties involved in this position, which required a proactive and hard-working employee to work with service users and others, to promote the service from day one of that employment.

6. Although the Claimant disputes this finding, the ET accepted the Respondent's evidence that the Claimant was given set targets to achieve during her probation period and that the induction checklist adduced in evidence was a draft of the document that the Respondent had used to confirm the induction of the Claimant into her job. The ET also referred to supervision notes, which it accepted recorded targets that had been set for the Claimant and which raised concerns as to her work activity, which was seen as insufficient given her experience and qualifications. Although, again, the Claimant disputes these findings, it is apparent that, at the end of her first three months of employment, the Claimant's probation period was extended for a further three months to enable the Respondent to assess her suitability, a decision confirmed by letter from the Respondent's Chair (Miss Faida Iga) of 14 February 2018.

7. Upon receiving Miss Iga's letter, the Claimant responded by letter dated 21 February 2018. She relied on that response in the ET proceedings as evidencing her written protected disclosures, as follows:

> **"(i) An employee cannot agree to a contractual term that gives them fewer rights or less statutory rights. Automatic entitlement is the law, and Pension enrolment cannot be conditional to successful probation. This is against the law…**
>
> **(ii) I have asked for certain things which I thought was given in any employment. I asked for the employer tax reference, because it is not on my payslip, but it should be but to date, I have not received it. My payslip states that I am paid by BACS, when it is by cheque…**

(iii) There was no internet or phone for the first six weeks of my employment. There is still no reliable internet access and the mobile phone in the office is a shared one, and this is a breach of the DPA. It also has other people's social media accounts and other things running in the background due to the sensitivity of the data emanating from my posts and to the DPA complaint, I should have been provided with a phone for my sole use. I have asked and nothing has been done. I have also raised concerns about other breaches of the DPA - for example, I have had to store a service user's personal file containing personal, sensitive information in an unlocked drawer…"

(iv) Section one of the Employment Rights Act 1996 says out that the written statement must be given to all employees who will be employed for more than one month. The written statement must be given within two months of the employer joining the organisation but you are advised to provide the statement at an earlier stage when offering the job, or, at the latest, on the person's first day at work. This helps avoid confusion and misunderstanding..."

(v) I have not been shown any of the organisation's policies neither have I read any. I specifically asked to see the organisation's lone-work policy, but was told that the organisation did not have one but HCVS will be contacted to see if they had any…."

8. The Claimant also contended that she had made a number of oral disclosures to the Respondent in respect of misuse of public funds, employing her without the necessary documentation and offering to pay her in cash. The ET did not accept that the Claimant had made those disclosures (see the ET at paragraphs 18, subparagraph (vi) and paragraph 31).

9. Following receipt of the Claimant's letter and what the ET described as, "*The Claimant making unfounded allegations in respect of contractual documents which she said was not provided*" (see the ET at paragraph 19), the Respondent's management committee decided to terminate her employment; as the ET records (see paragraph 19): "*It was satisfied that the Claimant was not prepared to take reasonable instructions from it in respect of performance issues that had already been identified to the Claimant*."

10. Miss Iga gave unchallenged evidence to the ET in this regard, which is further recorded by the ET (also at paragraph 19), as follows:

"In light of what was clearly antagonism to the charity, the board decided on a meeting on 28 February 2018 to dismiss Miss Okwu as it was clear that she had no respect for the charity, its beneficiaries, or the work they had been performing for over 12 years."

11. The decision to dismiss the Claimant was also explained in the Respondent's letter of termination, of 28 February 2018:

> **"The decision was made because of your unsatisfactory work performance, unacceptable conduct and failure to communicate effectively during your probation period. This decision was compounded by a recent communication you sent to the trustees, the content of which later demonstrated your contempt for the charity, its work, and its client group." (see the ET at paragraph 20)**

12. The letter then went on to set out 11 examples of poor work performance and/or misconduct, including (as summarised by the ET at paragraph 20) the following:

> **"These included her failure to conduct the pre- requisite number of one-one sessions, her failure to promote the services of the Respondent, her refusal to hand out organisational information, her failure to undertake the required outreach activity, her failure to produce reports on activity, her leaving the office on a number of occasions when it suited her."**

13. The Claimant was given one week's notice, for which she was paid, although she did not work out her notice. The Claimant did not appeal against her dismissal but instituted ET proceedings, claiming she had been unfairly dismissed for making protective disclosures, that she was due unpaid holiday (a claim that the Respondent settled) and making a claim for outstanding pension contributions.

14. In respect of the pension claim, the ET recorded the position as follows:

> **"The Tribunal ordered the Claimant to provide a letter from her pension provider as the Respondent had prepared a cheque made personally to the Claimant for this contribution and had agreed to pay the contribution prior to the hearing. The Claimant did not accept this cheque saying in evidence that the pension provider required the cheque to be made payable to the Claimant's pension provider. The Claimant attended the third day of the Tribunal hearing without a letter confirming this information as the Tribunal had previously directed. Accordingly, the Tribunal could not adjudicate on this particular issue as insufficient evidence was provided by the Claimant."**

15. Turning to the claim of automatic unfair dismissal, as already noted, the ET had rejected the Claimant's evidence as to any oral disclosures she claimed to have made. As for the matters she had raised in her letter of 21 February (see above), the ET concluded as follows:

> **"31. After reviewing each one of those alleged protected disclosures, the Tribunal decided that these disclosures did not qualify as protected disclosures as they did not disclose the requisite content of information with sufficient specificity tending to show a breach of any criminal or civil liability on the part of the Respondent or of any other relevant potential matters that might make a qualifying disclosure. That being the case there was no matter of public interest before the Tribunal to examine. The matters raised by the Claimant in her letter appeared to be principally personal matters that related to her personally such as her contract of her employment, her induction, the failure of the Respondent to allegedly provide her with its own policies and procedures and matters that related to her employment tax status and/or pension entitlement. These were personal contractual matters that the Claimant was dissatisfied with but did not fall within the protection provided for under Section 43(b) of the ERA. Furthermore, as cited above, the Claimant did in fact receive most of the items she was complaining about. Indeed, even the reference to the alleged breaches under the Data Protection Act relate to the Respondent's failure to provide the Claimant with internet or phone services for he to undertake her duties properly during the probation period. The reference to service users' personal information being kept in an unlocked draw referenced in the letter did not in the Tribunals' view contain specific details to fall within the protection of Section 43(b).**
>
> **32. In addition, the alleged disclosures contained in the letter of 21 February from the Claimant to the Respondent, in the Tribunal's mind were not qualifying disclosures as they were not "in the public interest". The Tribunal noted that the concerns raised by the Claimant were personal concerns relating to her own contractual situation and did not have sufficient public interest disclosure as they only related to her and nobody else."**

16. In any event, the ET went on to consider the reason for the Claimant's dismissal, concluding:

> **"34. For the sake of completeness, the Tribunal also found that the Claimant's dismissal was unrelated to any issues related to her own personal contractual situation. The Respondent had been dissatisfied with the Claimant's work performance for some time prior to her dismissal. This was the reason why the Respondent required her to prepare daily work records which the Claimant did on 28, 29 and 30 January 2018. Furthermore, this was the reason why on 14 February 2018 the Claimant's probation period was extended. The letter of dismissal which was contained at pages 128 –130 outlined the poor work performance and conduct issues which led to the Claimant's termination of employment and these reasons were supported by documentation produced by the Respondent at pages 137 –142 of the bundle which showed supervision meeting notes and discussions in relation to targets that had been set for the Claimant. The evidence in the bundle pointed to the Claimant's employment being terminated for poor performance and/or conduct issues during her probation period."**

Accordingly, the ET rejected the Claimant's claim of automatic unfair dismissal.

The Relevant Legal Framework

Protected Disclosure Dismissal

17. By section 103A of the **Employment Rights Act 1996** ("the ERA"), it is provided that:

> **"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."**

18. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H, see section 43A of the **ERA**. A qualifying disclosure is defined by section 43B, as follows:

> **"Disclosures qualifying for protection.**
>
> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—**
>
> **(a) that a criminal offence has been committed, is being committed o is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **(e) that the environment has been, is being or is likely to be damaged, or**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**

In the present case, the Claimant was relying on what she claimed were disclosures made to her employer, such as would fall within section 43C of the **ERA**.

19. As for what might constitute a disclosure of information for the purposes of section 43B **ERA**, in **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436 CA, Sales LJ (as he then was) provided the following guidance:

> **"…30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **…**
>
> **35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically,**

the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard."

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

20. The reference to the amendment in 2013 (paragraph 35 of **Kilraine**) is to the inclusion of a requirement that the disclosure be one that, in the reasonable belief of the worker in question, "is made in the public interest." This requirement was considered by the Court of Appeal in the case of **Chesterton Global Limited (t/a Chestertons) v Nurmohamed** [2017] EWCA Civ 979, in which it was held that there may not be a white line between personal and public interest, with any element of the former ruling out the statutory protection: where there are mixed interests, it will be for the ET to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation (see the guidance provided by Underhill LJ in **Chesterton Global**, at paragraphs 36 and 37).

21. As for the reason for dismissal, given that the Claimant did not have the requisite two years' continuous service to bring a claim for unfair dismissal other than if there was an automatically unfair reason for her dismissal, the burden of proof fell upon her to show that she had made a protected disclosure which was the reason or principal reason for the termination of her employment, see **Smith v Hayle Town** [1978] ICR 996 CA and **Ross v Stobart** [2013] UKEAT/0068/13.

Fair Hearing

22. It is common ground before me that a challenge to an ET's exercise of its case-management discretion can only succeed if it can be shown that the ET applied the wrong legal test, took into account irrelevant factors or failed to have regard to that which is relevant, or reached a decision which can properly be characterised as perverse. Where, however, there is a question whether the conduct of the hearing was such as to have undermined the right to a fair hearing, the role of the appellate Tribunal is to determine whether a fair process was followed, see **Galo v Bombardier Aerospace UK** [2016] IRLR 703 NICA, following the earlier pronouncement of the Supreme Court in **Osbourne v Parole Board** [2014] AC 1115, see per Lord Reed JSC at paragraph 65. By analogy, with the approach adopted in apparent bias appeals in such cases, the EAT would thus be required to stand in the shoes of the objective, informed observer and ask whether the hearing before the ET was fair.

23. In considering this question, I have also had regard to the guidance provided in respect of those who appear before the ET in person. That includes the requirement imposed under the overriding objective to seek, so far as practicable, to ensure that the parties are on an equal footing, the guidance provided by the Court of Appeal in the case of **Drysdale v Department of Transport** [2014] IRLR 892, and the guidance provided in the **Equal Treatment Bench Book**.

The Grounds of Appeal

24. The Claimant's grounds of appeal were considered on the initial paper sift by Laing J, who identified the following three questions of law as arising in this case:

(1) That the ET had erred in its approach to the question whether the Claimant had made a protected disclosure, or failed to give any reason for its decision to omit the Claimant's

main protected disclosure - specifically the disclosure made regarding a potential breach of the **Data Protection Act**.

(2) The ET had further erred in failing to make a clear finding as to the reason for the Claimant's dismissal and/or to explain its reasons.

(3) That the hearing was conducted in a procedurally unfair manner.

25. The Respondent resits the appeal, essentially relying on the reasoning provided by the ET.

The Parties' Arguments

Ground 1: Protected Disclosure

26. In permitting this matter to proceed to a Full Hearing, Laing J DBE explained her understanding of the Claimant's case in this regard, as follows:

> **"4. In paragraph 31, the ET considered that matter referred to in the Appellant's letter of 21 February 2018 (see paragraph 18) it decided that they were not protected disclosures because "they did not disclose the requisite content of information with sufficient specificity tending to show a breach of any show a breach of any criminal or civil liability on the part of the Respondent or of any other relevant potential matters that might make for a qualifying disclosure." They were personal contractual matters with no public interest.**
>
> **5. I am concerned about the ET's reasoning about the allegation that there was a breach of the DPA. The last but one sentence of paragraph 31 of the Decision does not make sense. I considered that it is arguable that leaving sensitive data in an unlocked "draw"[sic in the context "drawer" must be intended], is a sufficiently detailed allegation to fall within section 43(B), as is an allegation that the Appellant had to use a shared phone for work when she was dealing with sensitive, personal data as part of her duties."**

27. In her argument today, the Claimant makes the point that the client group she was working with included vulnerable adults and children, and she would sometimes have to contact GPs and hospitals. In the circumstances, for her to share the phone with others was thus a breach of the **Data Protection Act** ("the DPA"), and that is what she genuinely believed when she raised this matter in her letter of 21 February. She also says that she had nowhere to store sensitive information; although there were two locked filing cabinets, she did not have access to

those (although that may be a point disputed by the Respondent). She explains that she had recently attended **DPA** training and had genuinely believed that this was a breach of the **DPA**. Looking at the ET's reasoning at paragraph 31 and 32, the Claimant makes the point that the information did not relate to her personally or to her own contractual situation but to clients - potentially up to 25 clients - and it was plainly in the public interest.

28. For its part, the Respondent says that the Claimant had needed to show both the disclosure of information and that she disclosed it reasonably believing that it was in the public interest. The ET had found that the matters in issue did not qualify as protected disclosures. Accepting that the matters at point (iii) of the letter of 21 February were sufficiently specific, the Respondent contended that the ET must have found that the Claimant did not have a reasonable belief that these were disclosures in the public interest, albeit the Respondent accepted that the ET had made no actual finding about her reasonable belief and - objectively speaking – this was a matter that was plainly in the public interest. The ET, the Respondent contended, must have been taken to have found that these things were untrue and had not happened as the Claimant alleged; that must have been what the ET was stating when it said that the reference to the service users' personal information being kept in an unlocked drawer did not contain specific details.

Ground 2: Reason for Dismissal

29. In her consideration of this matter on the initial paper sift, Laing J observed as follows:

> **"6. The ET found, in paragraph 34, that the Appellant's dismissal was unrelated to any issues related to her own personal, contractual situation. It also said that "The evidence in the bundle pointed to the Claimant's employment being terminated for poor performance and/or conduct issues during her probation period." The ET did not, however, either, make a clear finding about what the Respondent's actual reason for dismissal was (as opposed to a comment on the evidence in the bundle), or that a protected disclosure played no part in the reason for dismissal."**

30. The Claimant points out that, prior to her letter of 21 February, the Respondent had not said it was going to dismiss her; rather, it had determined that her probation period should be extended. Nothing had happened between her letter of 21 February and the management committee's decision, and it must have been the content of her letter that had led to the decision to dismiss. She does not believe that this dismissal had anything to do with her work. She points out that the Respondent's reasons for her dismissal changed from the letter of dismissal, to the ET3, and then in the evidence before the ET. The ET had failed to engage with the need to determine the genuine reason for her dismissal. The matters raised in the letter of 21 February did not only relate to her personal contractual issues, so that it was not an answer to say that those issues had not informed the decision. The evidence before the ET pointed to the decision having been made as a result of her letter of 21 February, which included important disclosures of information she reasonably believed were breaches of the **DPA**. The ET had failed to engage with that question and/or had provided inadequate reasons for its decision.

31. The Respondent asserts that the Claimant was dismissed for her conduct and poor performance. The ET had set out its findings at paragraph 34 and had accepted the reasons given in the termination letter. That constituted a finding of fact. That said, the Respondent accepted that the ET had not dealt with the letter of 21 February as part of the reason for dismissal. It contended that it could be taken that the ET had accepted the Respondent's evidence that this showed the Claimant was still not prepared to accept that there were targets to be met, so it was still a performance issue that was the reason for the Claimant's dismissal.

Ground 3: Procedural Unfairness

32. The Claimant has listed her complaints in this regard in respect of each day of the ET hearing with two further, broader complaints about the conduct of the proceedings. She has

sought to support and, to some degree, expand upon those allegations by her affidavit, albeit I have limited consideration under this ground to those matters raised in the Notice of Appeal.

33. An affidavit in response has been lodged by the Respondent, from Miss Iga, and there is also a response from the ET (compiled by the Employment Judge and the lay members). The Respondent largely disagrees with the Claimant's description of the proceedings but does offer the further additional observation (under paragraph 8):

> "...
>
> **We felt the Appellant was actually given plenty of support from Judge Hallen, i.e., she was given extra time to prepare her questions. When we asked our counsel why this was, he explained that when people are not represented at the hearing, they may be given guidance by the Judges."**

34. In relation to day one, the Claimant complains that the Employment Judge had complained about the length of her witness statement and had also agreed that the Respondent could call a new witness. The Claimant also says that she was called a "*bitch*" in the corridor by someone from the Respondent, and she has said that these matters, taken together, rendered the hearing unfair.

35. The ET has responded to these allegations, as follows:

> **"At the outset of the case, as is my normal practice with a litigant in person after identifying the issues, I explained the procedure that the Tribunal will following in hearing the case. In this matter as the burden of proof was on the Appellant it was for her to start and she would face cross examination from the Respondent's counsel. I explained that she would face cross-examination from the Respondent's counsel. I explained that the Tribunal would spend the morning reading the statements and the documentation and not start until 1.30pm. Both parties complained that statements had been exchanged late and that they both wished to add additional documents to the bundle. The parties were given the opportunity to apply for an adjournment, as they were not ready to proceed with the hearing. Both parties did not wish to make an application for an adjournment and agreed to proceed with the hearing on the basis that the documents/statement was allowed in. As the Appellant was giving evidence first, she was content to prepare her cross-examination of the Respondent's new witness, (Ms German) over night. I did not tell the Appellant that her statement was too long. I am quite well used to reading long statements from parties to proceedings. As the Appellant says at paragraph 3 she agreed to accept the Tribunal's proposed course of action."**

36. In respect of day two, the Claimant complains that the Employment Judge accepted a new document from the Respondent and gave the Claimant a 15-minute break, "*To come up with some questions, as I was not convincing them – "you need to convince us" he said*".

37. Again, the ET had responded to this suggestion, in the following terms:

> **"On the second day, (19 October), the Respondent's counsel made an application to add an additional document that arose from his cross-examination of the Appellant on the afternoon of day 1. The Appellant was asked if she objected to this, and she did not. The document was accepted…"**

And, further down the page (under paragraph 8):

> **"The Appellant is referring to here to my attempt to assist her after she skimmed through the cross-examination of Ms Mason and Ms Iga. I gave the Claimant a fifteen-minute break here in order to further prepare and refocus her questions for Mr German, and then, subsequently for Ms Murungi. I reminded her that the purpose of cross-examination was to put her case to the Respondents witnesses through her questioning of them and to dispute any parts of their testimony she disagreed with. I reminded her that it may appear to be an artificial process for a litigant in person, but that was the purpose of the procedure. By doing it that way she would be in a better position of proving her case. I do not recollect using the phrases in this paragraph attributed to me, albeit I may have said to her that through cross-examination, she could convince the Tribunal of the truth of what she was saying."**

38. As for day three, the Claimant says that:

> **"Judge was visibly angry with me for failing to bring a letter from my pension provider He turned to the respondent and said, 'add this to your costs claim'. At the end, the Judge had 5 minutes or so conversation with the respondent about applying costs and went to do that. It was obvious from this conversation that the respondent had won the case."**

39. The ET addresses this issue at paragraphs 10 to 12 of its response:

> **"The Appellant, as part of her claim for unpaid contractual benefits said that the Respondent had not paid her pension contributions as it had promised to do. The Respondent was prepared to settle this part of the claim at the hearing by way of cheque made payable to the pension provider. Appellant informed the Tribunal that the provider would not accept a cheque from a third party. On the second day of the hearing, the Tribunal ordered the Appellant to obtain a letter from the pension provider confirming that this was the case. The Appellant informed the Tribunal that she would do this for the third day of the hearing … The Tribunal accordingly ordered her to produce this letter for that hearing, providing a copy to the Respondent in advance. The Appellant despite confirming that she would do so at the rescheduled hearing on 12 November turned up at the hearing with no such letter. As a consequence of this failure, the Appellant was informed that the Tribunal could not make a determination on this part of the claim, as was made clear in the Judgment. I was not visibly angry as the Appellant suggests, although I did say that, when the Tribunal orders a party to comply with an order it expects that party to do so. The points she raised at the end of paragraph 12 relating to costs, is to the Respondent seeking to make a costs application at the end of its submissions to the Tribunal on day 3 (12 November 2018). The Respondent's**

counsel sought to make costs-applications at the end of submissions and raised the issue of the Appellant's failure to comply with the Tribunal order to produce the letter from her pension provider that morning. I informed counsel that the application for costs was premature as the Judgment was going to be reserved until 19 November at which time the Tribunal would meet in chambers to come to a decision on the Appellant's claims. If he wished to make an application after receiving the written Judgment and depending upon the result he can do so. I did not say, 'Add this to your costs claim' nor did I give any indication that any party had won the case. This would have been hard for me to do at this stage of the process as the Judgment was reserved until 19 November, and no decision had been reached.

40. More generally the Claimant complained:

"Throughout I was an object of ridicule. The Respondent came with eight to 10 people, and they laughed at me when I was giving evidence, when I cross-examined and when the Judge interrupted me, which was often. The Judge did nothing to stop this. He admonished them for calling me a name on the first day, but when I told him that the abuse was continuing from behind me he said, 'I can't hear it; it's the fan'."

41. The ET's response to this is at paragraphs 4 to 5:

"…the Appellant complained about inappropriate conduct on the part of the Respondents group of witnesses/supporters who, during the short adjournment that was granted Ms Murungi to recover. The Appellant did not tell me who it was who called her a "bitch" albeit She did indicate that it was one of the Respondents retinue. I warned the Respondents party that such conduct was not acceptable and that the Appellant was to be treated with respect, despite the stresses involved in litigation. I also instructed the Respondent's counsel, Mr Nkafu as part of his duty to the court to ensure that his client and its supporters behave in a respectful manner towards the Appellant."

And then, at paragraph 9:

"I recollect a further incident to relate to an incident that occurred on the third day not the second day and I had to again to remind the Respondents party to desist from conduct that could be perceived to be disrespectful to the Appellant as well as further reminding Mr Nkafu of his obligations to the court to prevent such conduct reoccurring. I did not personally hear anything disrespectful being said during that part of the hearing as the air conditioning was loud in that particular Tribunal room and I was busy taking notes. I recollect that there was no repetition after the second admonition from me, and there was no laughter as the Appellant suggests. To the contrary, the Respondent's party appeared contrite after the second warning. The Appellant had no cause to complain again about this type of conduct. It was not correct to say I did nothing."

42. The Claimant also complains:

"I was cross-examined for almost 2 days but allowed to cross-examine my principal witness for only 1.5 hours. At the one-hour point, the Judge said, 'She needs a break; this has been going on for one hour.' On the first day, I was cross-examined for 2.5 hours without a break. He finished sentences for the witness and angrily challenged the usefulness of some or a lot of my questions."

43. To the extent that this related to the cross-examination of Miss Murungi (on the afternoon of the second day), the ET records that there was a short adjournment granted for the witness after she had broken down in tears, but, otherwise, comments as follows (under paragraphs 13 to 14):

> **"Ms Murungi commenced giving evidence and was subject to questions from the Appellant on the second day from about 3.30pm to 4.40pm. This would mean that I could not have said what the Appellant attributes to me in this paragraph namely, she needs a break after one hour. This witness was part-way through her evidence at the end of day two so was warned not to discuss her evidence with anyone before the case resumed on 12 November. Ms Murungi recommenced her evidence on day 3 at 10.00am on (12 November) and carried on until 11.30am. At this time, there was a break of fifteen minutes until 11.45am. She then carried on until about 12.30pm when her evidence finished. She was given evidence for about three and a half hours, and not one and a half hours as the Appellant states…The allegation made by the Appellant that Ms German was paid in cash was certainly part of the case that the Appellant was arguing, and so the Tribunal was interested in hearing about this. I did not say, 'what has this got to do with your case'. I would not have said this if this was an issue to be determined in the case."**

And at paragraph 15:

> **"The Appellant is incorrect when she says that I finished sentences for Ms Murungi or assisted her in anyway. I simply did not do this and she is mistaken. To the contrary, I provided greater assistance for the Appellant as she was a litigant in person whereas the Respondent was represented by counsel."**

44. As for the time given for the Claimant's evidence, the ET provides the following record, under paragraph 6:

> **"The Appellant was cross-examined from 1.40pm on the first day of the hearing on 18 October 2018 until about 4.15 on the first day. There was a break in the proceedings at 3 to 3.10 pm. On the second day, the Appellant gave evidence from 9.40 am until 11.30 at which time there was a break of 20 minutes. She then gave evidence until lunch time which was cut short, from 1 pm to 1.45pm. She finished at about 2 pm on 19 October and not until 4.40pm, as she alleges. The Respondent's witnesses were cross-examined by the Appellant after lunch from 2pm on the second day until about 4.40pm. On the first day there was a break in the Appellant's cross-examination from 3pm to 3.10pm, and on the morning of the second day, there was a break from 11.30am until 11.50am. There was also a lunch break from 1.00 to 1.45 on day two. It is incorrect for her to state that she spent a long time being cross-examined without breaks."**

45. Finally, in relation to Ms Murungi's notes, Miss Iga (for the Respondent) comments as follows (under paragraph 4):

> **"We do not recall Ms Murungi leaving the room before the appellant's cross-examination, but, rather, Ms Murungi left the room prior to the Appellant's examination when Ms Okwu mentioned issues regarding her confidential medical condition which was emotional for Ms Murungi to listen to."**

Discussion and Conclusions

Protected Disclosure

46. The question for the ET was whether the Claimant had disclosed information that she reasonably believed was disclosed in the public interest and tended to show (relevantly) a failure to comply with a legal obligation to which the Respondent was subject. Laing J was specific when permitting this matter to proceed, limiting this point to those matters raised at (iii) in the Claimant's letter of 21 February. The is because it was apparent that the ET had permissibly found that the matter raised at subparagraphs (i), (ii), (iv), and (v) were not, in the Claimant's reasonable belief, made in the public interest - those were matters which related solely to her personal, contractual position. Subparagraph (iii), however, plainly dealt with sensitive information relating to service users, not strictly to the Claimant herself.

47. The ET apparently considered that the Claimant was primarily raising those matters as relevant to her assessment of her own performance. However, as is made clear in **Chesterton Global**, that would not necessarily mean that she did not reasonably believe that her disclosure was in the public interest. Indeed, considering the nature of the interest in question it would be hard to see how it would not - in the Claimant's reasonable belief - be a disclosure made in the public interest, even if (as the ET seems to suggest, see the penultimate sentence of paragraph 31 and the reasoning at page 32) the Claimant also had in mind the impact upon her in terms of her work performance; after all, the public interest need not be her only motivation for making the disclosure (again, see **Chesterton Global**).

48. The ET also found that this did not amount to a protected disclosure because it lacked the requisite detail (see the last sentence, at paragraph 31). As the Court of Appeal explained in **Kilraine**, in order for a statement or disclosure to be a qualifying disclosure in this context, it

has to have a sufficient factual content as specificity such as would be capable of tending to show one of the matters listed in section 43B(1). The ET apparently considered that the disclosures in respect of alleged breaches of the **DPA** did not contain specific details, but - as the Respondent has fairly accepted in its arguments today - it is hard to see how that criticism can be made out. The matters raised by the Claimant - in relation to the shared internet access and mobile phone and as to the problems she experienced in storing a service user's personal file - were clearly particularised, with sufficient specificity to be capable of tending to show a breach of an obligation of the **DPA**.

49. The point for the ET was not, as the Respondent's skeleton argument for today had seemed to suggest, whether or not the information provided by the Claimant was true. The question it had to determine was whether it was a disclosure of information which, in the reasonable belief of the Claimant, was made in the public interest and tended to show one of the things listed at section 43B. On this question, I am unable to see that the ET has made permissible findings. It has either applied the wrong test, or it has failed to explain its reasoning. In either event, I allow the appeal on Ground one.

50. That, however, would not mean that the ET's Decision could not stand. The ET went on to consider what was the reason for dismissal and, as the Respondent has observed, it can be said to have accepted that the Respondent had genuine concerns about the Claimant's performance. In this regard, the Respondent was keen for me to look at the work logs completed by the Claimant in January but I declined to do so. Firstly, because the ET made specific findings of fact relating to the work logs (see the ET at paragraph 16) and there is no appeal against the those entirely permissible findings. Secondly because in any event, that evidence would not, of itself, answer the question why the Respondent had decided that the

Claimant must be dismissed. It was, after all, *after* the Respondent had considered the work logs that it determined not to dismiss the Claimant, as it might have done, but to extend her probation period. The ET was certainly entitled to see this material as part of the relevant context, but, without more, it would not provide a clear answer as to why the Respondent had determined that the Claimant would be dismissed.

51. As the Claimant has stressed in argument today, it was her case that nothing had happened between the extension of her probation (on 14 February) and the decision to dismiss (apparently taken at the board meeting on 28 February), save for her letter of 21 February. More than that, it was the Respondent's evidence before the ET that it was the Claimant's, "*antagonism to the charity*" that informed the decision to dismiss (see the ET at paragraph 19). It was the Claimant's case that this must have referred to her protected disclosures - to the matters she had set out in her letter of 21 February - because there was nothing else that it could have referred to. If so, and if at least some part of the content of that letter was capable of constituting a protected disclosure (as to which, see the reasoning above) was the Respondent's decision not motivated by that protected disclosure?

52. It was for the Claimant to show that her dismissal was by reason (wholly or principally) of a protected disclosure. The ET was entitled to reject her case, and there was certainly evidence before it (which it accepted as genuine) of the Respondent's concerns regarding her performance. At paragraph 34, the ET seems to come close to stating that it has found as a fact that those concerns were the real reason for the dismissal, but - as Laing J observed - it expresses its reasoning in terms of what was in evidence before it as opposed to what was its actual finding. More than that, however, the ET demonstrates no engagement with the Claimant's case that her personal, contractual situation might not have informed the decision to

dismiss but that her protected disclosure relating to the sensitive information of service users was the real issue for the Respondent. The is no indication that the ET had regard to her contention that the history - the decision being taken in response to her letter of 21 February - supported her argument that this was the reason, or principal reason, for her dismissal. On ground two, therefore, I also agree with the Claimant: the ET has failed to demonstrate engagement with her case; it has failed to reach a clear conclusion on the question of reason and/or has failed to provide adequate explanation for the rejection of her claim.

53. Having thus found for the Claimant on grounds one and two, it is strictly unnecessary for me to make findings on the procedural fairness ground. On the other hand, the ET has responded in some detail to the concerns raised, and I can see that it may be relevant when considering the issue of disposal. I have, therefore, gone to address the allegations made under this heading.

54. In terms of the decision to permit a witness to be called by the Respondent, notwithstanding late disclosure of their statement, and the decision to let the Respondent adduce an additional document, these were matters falling within the ET's exercise of its case-management discretion and I cannot see there is any proper basis of challenge. The Claimant agreed to both decisions. Although she now says that she felt that she had no choice, the fairer characterisation of her position before the ET was that she was unable to point to any real prejudice. Certainly, she has not been able to identify any particular unfairness arising from either of these issues before me today.

55. As for the conduct of the Respondent's witnesses, whether in the corridor or during the hearing, it seems that there were two occasions before the ET when the Claimant raised

complaints in this respect. On balance, I accept that on each occasion the Employment Judge did say something to those present and, in particular, to the Respondent's counsel as to the need to treat the Claimant with respect. I accept the ET's response in this regard because it is confirmed by the Employment Judge and the lay members, who are likely to recall this kind of matter. That recollection gains further credibility because the Employment Judge and the lay members were able to provide a detailed account of what took place. It also accords, to some extent, with the Respondent's recollection. The Claimant may well have kept in mind the negative aspect of what took place and failed to remember the steps taken by the Employment Judge to keep this in check. Certainly, however, it is apparent that the behaviour did not continue and that would seem to have resulted from an appropriate intervention on the part of the Employment Judge rather than a complete disregard of the Claimant's complaints.

56. Turning then to the Claimant's allegations about the timing of breaks and the length of cross-examination permitted in respect of her evidence and then in relation to the evidence of the Respondent's witnesses. The Claimant has accepted that she made no notes of the timings of the evidence during the ET hearing. On the other hand, the experience of the EAT is that Employment Judges do keep a note of when hearings start, when breaks take place, and when witnesses start and finish their evidence. In this case, the detail provided strongly suggests that the Employment Judge kept such a record and, in the circumstances, I consider that the best evidence is provided by the contemporaneous record thus provided by the Employment Judge in the response from the ET. The Claimant's account no doubt represents her genuinely-held belief but I find that she is mistaken.

57. In any event, the length of time needed for questioning particular witnesses or parties, and the need for breaks, will depend on the particular witness, the relevance of the questions

being asked and the view formed by the ET as to what is needed. The ET is best placed to make those decisions as part of its case-management discretion (see the guidance laid down in **Drysdale**) and I am satisfied that the overall hearing in this case was fair.

58. I have considered whether that view might be undermined by any comment made by the Employment Judge to the Claimant to the effect that she needed to "*convince*" the ET. That seems to have been a remark made when the ET had allowed the Claimant a break to consider how she was questioning the Respondent's witnesses, because the ET was concerned that she was failing to put her case with the witnesses concerned. The Employment Judge accepts that this may have been put as a need to "*convince*" the ET, but that would not have been wrong - the Claimant bore the burden of proof. On the evidence available to me, I therefore accept that the Employment Judge was seeking to assist the Claimant, as a litigant in person, to put her case effectively. That was the point of the remark that was made and the Employment Judge was trying to explain why the ET was intervening in the Claimant's questioning of the Respondent's witnesses. There was nothing unfair about this and it did not evince apparent bias on the part of the ET.

59. As for the exchange between the Employment Judge and counsel for the Respondent regarding costs, it is apparent that this arose because counsel made an application for costs as part of his closing submissions and the Employment Judge intervened to explain that was inappropriate and that no decision would be made on such an application at that stage. As the Claimant has effectively acknowledged the Employment Judge was careful to make it clear that no Judgment had been made, that the ET was going to reserve its decision, and that any application for costs could only be made once the decision was known. That was not an attempt to hide the ET's true intent (as the Claimant has alleged) but an entirely proper

explanation of the ET process. I bear in mind that this was a three-member panel and it would be surprising (to put it neutrally) if the Employment Judge had done anything other than make clear that the three-member panel would need to reach a decision after deliberating together. Again, therefore, I find that the Claimant is mistaken in her recollection in this regard and this assists me in determining whether the Employment Judge said something along the lines - in respect of the Claimant's failure to comply with the ET's order regarding the pension documentation - that the Respondent's counsel could, "*Add that to his costs application*". I do not consider that the Employment Judge volunteered this remark, although he may have said something in response to such a point being raised by the Respondent's counsel; otherwise, for the Employment Judge to have made such an observation would have been entirely contrary to the way the ET had proceeded in all other respects.

60. I also do not accept that the Employment Judge expressed particular anger in response to the Claimant's failure to bring the documentation in question to the hearing. What the Employment Judge did was to explain (quite appropriately) that when the ET makes an Order it is expected that the party concerned should comply with it.

61. On ground three therefore, had it been necessary for me to do so, I would have dismissed the appeal on each of the points raised.

Disposal

62. I allow the appeal on grounds one and two and remit the question of protected disclosure (limited to the matter raised by point (iii) in the Claimant's letter 21 February) and of the reason for the Claimant's dismissal to the ET.

63. The Claimant says this should be remitted to a differently constituted ET; the Respondent says it should be to the same ET. I have had regard to the guidance laid down in **SRT v Heard and Fellows** [2004] IRLR 763 EAT and conclude that this should be remitted to the same ET, unless that is no longer any more practical, in which case it will be for the regional Employment Judge to assign it to a different ET. That, it seems to me, is the most proportionate way forward: the hearing took place less than a year ago and I can expect the ET members to recall the evidence, reminded by their notes which, given the response to the EAT on Ground 3, are clearly fairly full. This was a three-member panel, which obviously put in considerable work on the number of the findings of facts which have not been disturbed by this appeal and it will be helpful for the same members to continue working on this case. Moreover, this is not a case where the decision can be said to have been fundamentally flawed. As my Judgment indicates, I consider the ET simply lost direction on quite specific points. I accept the Claimant is concerned about the remission to the same ET, but this is not an opportunity to simply have second bite of the cherry and I have considered her concerns about the conduct of the hearing in some detail but have rejected each of the points raised and have no reason to doubt the professionalism of the Employment Judge and lay members.