Appeal No. UKEAT/0106/19/RN
UKEAT/0107/19/RN
UKEAT/0136/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17, 18 and 19 December 2019

Judgement handed down on 4 February 2020

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

UKEAT/0106/19/RN

MS TRACY ROBINSON	APPELLANT
HIS HIGHNESS SHEIKH KHALID BIN SAQR AL QASIMI	RESPONDENT

UKEAT/0107/19/RN & UKEAT/0136/19/RN

HIS HIGHNESS SHEIKH KHALID BIN SAQR AL QASIMI	APPELLANT
MS TRACY ROBINSON	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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and
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UKEAT/0106/19/RN
UKEAT/0107/19/RN
UKEAT/0136/19/RN

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The claimant was hired in March 2007 under a contract which provided that she was responsible for paying her income tax. Between March 2007 and July 2014, she did not pay tax. The respondent was unaware of this until 2014. There was then a dispute as to whether the claimant was employed or self-employed, and whether her remuneration was paid gross or net. Between 2 June 2014 and March 2017, the claimant made disclosures, which she said were protected disclosures within section **43A of the Employment Rights Act 1996**, alleging that the respondent was failing in his legal duty to operate a PAYE system for her and other employees, and was manipulating information to make it appear that staff were self-employed when they were employees. The claimant was dismissed in May 2017. The employment tribunal found that she was not dismissed because she had made protected disclosures but because she wanted the respondent to pay her outstanding tax bill and the imposition of any detriment was not materially influenced by the making of protected disclosures. The employment tribunal found that the claimant had been unfairly dismissed in that there should have been one further meeting before dismissal and was wrongfully dismissed as she should have been given 10 weeks' notice. However, the claimant was not entitled to enforce her contract because she had performed the contract illegally by failing to pay tax.

The Employment Appeal Tribunal held that the employment tribunal had been entitled to find, on the facts, that the reason for the dismissal was not the making of the protected disclosures and the disclosures did not materially influence the imposition of any detriment. In considering whether a particular disclosure was protected within the meaning of section **43A**, a tribunal was entitled to read that disclosure with an earlier disclosure if the later disclosure expressly or by

necessary implication referred to, or incorporated, the earlier disclosure. That is a question of fact for the employment tribunal to determine. The employment tribunal were entitled to find that the claimant would not have been entitled to enforce the contract during the period 2007 to 1 July 2014 when she was performing it illegally. That fact, however, did not prevent her enforcing her contractual, and statutory, rights when she was dismissed three years later and at a time when she was not performing the contract illegally.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. There are three decisions that are the subject matter of appeal or cross-appeal. First, the claimant appeals against a decision of 21 November 2018 of an employment tribunal (Employment Judge Goodman, Mrs Olulude, and Ms Jaffe) dismissing claims for unfair dismissal, failure to provide statutory particulars of employment and wrongful dismissal and finding that the claimant was not subjected to any detriment for having made protected disclosures within the meaning of section **43A** of the **Employment Rights Act 1996 ("ERA").** I refer to the parties as claimant and respondent as they were in the tribunal below. The employment tribunal held that the reason for the claimant's dismissal was not because she had made protected disclosures and the decision to subject her to any detriment was not materially influenced by the making of protected disclosures. The claimant was dismissed for a fair reason, a dispute about liability to pay tax, and the dismissal was unfair only in so far as the respondent should have had a further meeting with the claimant prior to dismissal. However, the claimant was precluded from bringing a claim for unfair dismissal, or wrongful dismissal, because she had performed the contract illegally by failing to declare and pay income tax. The respondent cross-appeals contending that the employment tribunal erred in concluding the disclosures amounted to protected disclosures within the meaning of section **43A** of **ERA**.

2. The respondent appeals against two decisions. One appeal is against a decision of Employment Judge Stewart of 13 November 2018 granting the claimant's application for interim relief and ordering that the contract between the parties continue pending determination or settlement of the claim. The other is an appeal against a refusal of Employment Judge Stewart on 23 January 2019 to reconsider the earlier decision.

THE FACTS

The Appointment of the Claimant

3. The material facts can be taken from the decision of the employment tribunal. The respondent was the Crown Prince of Ras-al-Khaimah, one of the seven United Arab Emirates, between 1958 and 2003. He resided in Oman, Dubai and Sharjah in the United Arab Emirates where he had a home. He had children and grandchildren. He owned properties in the United Kingdom where his children lived whilst they attended university. He also had a family house in the United Kingdom where he and members of his family stayed from time to time and where one of his daughters lived whilst attending school. Mr Peter Cathcart advised the ruling family on property and commercial matters and, from 2005, acted for the respondent in respect of his affairs in the UK.

4. In 2007, the claimant was hired by Mr Cathcart on behalf of the respondent to carry out duties including looking after the respondent's children whilst they were in the United Kingdom, management of the respondent's properties in the United Kingdom, and making arrangements for the respondent and his wife when they visited the United Kingdom. The letter of appointment of 23 March 2007 said:

> **"You will be paid a management fee for undertaking this work at the rate of £34,000 year. You will be responsible for your own tax on that payment".**

5. In 2011, the respondent engaged specialist employment solicitors and tax consultants (PWC) to set his financial affairs in the UK in order with a view, it seems, of spending more time in the United Kingdom. The details are set out at paragraphs 35 and following of the employment tribunal's decision. On about 30 January 2014, the claimant met Mr Cathcart. He told her that he was going to make out a case that she was self-employed but that the advice

from PWC was likely to be that she was in fact employed and, if so, deductions for tax would have to be made at source.

6. Mr Cathcart was then told by the claimant that she was paid in cash. He was surprised as the claimant had been paid by bank transfer not cash. He began to realise that what the claimant meant was that she had not paid her tax. He asked her if that was the case and she said that she had not paid any tax on the money she had received during the last seven years. He calculated that the amount owed could be as much as £50,000 and, with penalties for non-payment, up to £100,000. The employment tribunal accepted that his account of the meeting was true. They found that when the claimant referred to being paid in cash, she meant that it was paid in a way which enabled tax to be evaded: see paragraph 43 of the judgment. They concluded that she wanted to keep the earnings as "cash" in that sense. The employment tribunal found that she had "chosen not to declare it".

7. Following this development, the claimant contended that she was, in fact, an employee not a self-employed person. Consequently, she considered that the respondent should have made arrangements for her be included in a PAYE scheme so that tax would be deducted at source. Moreover, the claimant contended that, under her contract, she was entitled to receive the yearly sum of £34,000 (later increased to £37,000) net. That is, she contended that the sum of £34,000 was not the gross salary from which tax was to be deducted but was the money that she was entitled to receive after tax had been deducted. She claimed that the respondent was liable (from 2007 onwards) to pay the tax due. That was despite the wording of the 2007 letter which made it clear that the agreement was that the claimant was responsible for paying tax on

the £34,000 and the amount she was entitled to keep was the amount of £34,000 less any tax due.

8. The respondent did not accept that the arrangement was that the claimant be paid £34,000 net and that he was responsible for paying tax on that amount from 2007 onwards. He also contended that the claimant was self-employed, not employed, and that he was not responsible for deducting any tax due. The practical difficulty for the respondent was that, if he were subsequently found to be the employer, and if he had not deducted tax, he would be liable to account for any tax due. As the claimant had not paid tax for the last seven years, and disputed that she was liable to pay any tax (as she said that the £34,000 – later £37,000 - was the net payment she was contractually entitled to receive), the claimant might not pay tax and might not be prepared to repay to the respondent any sums by way of tax due in relation to her remuneration. From 1 July 2014, therefore, the respondent began to deduct an amount from the monthly payment to the claimant which equalled the amount of tax and national insurance contributions which would be due from her if she were self-employed.

The Seven Disclosures.

9. There then ensued a number of communications between the claimant, or persons advising her, and the respondent, or persons advising him. The claimant contended that these were protected disclosures, that is, disclosures falling within the terms of section **43A** of **ERA**. The first communication relied upon was found by the employment tribunal not to be a protected disclosure. There is no appeal against that finding. The relevant disclosures are the second to seventh.

10. The second disclosure comprised a covering e-mail dated 2 June 2014 from the claimant to Mr Cathcart which included a lengthy document dated 19 May 2014 from an accountant, Mr Stefan Kitching, who had advised the claimant on her position. The e-mail and parts of the document from the accountant refer to the claimant's status and the belief that she was an employee, not self-employed. It referred to the claimant having evidence of manipulation of the tax system to avoid payment of PAYE by obfuscating lists of employees and seeking to pass off the claimant as self-employed. (Neither the employment tribunal nor this Tribunal make any observation on whether or not such claims are true or mistaken: it is not the function of the employment tribunal, or this Tribunal, to make such rulings. The employment tribunal's functions, in this respect, were to do with what the claimant subjectively believed and whether there was a reasonable basis for those beliefs, not whether, ultimately, those beliefs were correct or not).

11. The employment tribunal records at paragraph 57 of its decision that the claimant's case was that she believed that there had been a breach by the respondent of the obligation to deduct PAYE both in her case and in the case of others and she was asserting that there had been a manipulation of lists showing who was employed and on what terms in order to avoid the respondent having to register with HMRC as an employer and operate a PAYE scheme. The employment tribunal's finding is at paragraph 58 in the following terms:

> **"In our finding this is a disclosure qualifying for protection. The information is that the respondent is avoiding setting up PAYE by altering terms of employment, or more underhand means. This is a breach of legal obligation if the respondent employed staff. It is in the public interest that people pay tax and national insurance, otherwise public services could not be provided. In our finding the claimant believed this was happening: she knew in January it was thought that PWC were going to recommend she went on PAYE, but she had not been so treated, and she knew there had been a PAYE issue with Robert Ambersky. There is also an email to her from the respondent of 8 May requiring her to attend the house once a month to present petty cash accounts, but otherwise to communicate only by phone and email. We understand this is the distancing referred to, as the claimant does not otherwise say what changes were made to her duties in this period. Without making a finding about whether there was tax evasion, we hold her**

> **belief was reasonable, meaning there were objective grounds on which she could hold it. In Babula v Waltham Forest an employee could be wrong on whether there was a breach, but succeed if there were reasonable ground for the belief."**

12. The third disclosure comprised a letter of 9 July 2014, with appendices, from the claimant's tax advisers setting out a legal analysis as to why the claimant was not self-employed. The tribunal noted that the letter did not mention how others were being treated nor did it say there had been deliberate tax avoidance or manipulation to avoid PAYE. The tribunal found that the third disclosure was protected on the basis that:

> **"in our view it can be read as a disclosure of information tending to show breach of legal obligation to make PAYE deductions when read in the light of other disclosures, though on its own it is just part of a debate as to whether [the claimant] was or was not, in law, an employee."**

13. The fourth disclosure comprised an e-mail sent on 13 October 2015 by the claimant to Mr Cathcart and attached (1) an HMRC opinion of 1 May 2015 and (2) the claimant's grievance letter dated 13 October 2015. The grievance letter set out the history of the investigation of employee status, referred to the maintenance and updating of lists of employees (including the claimant) who were designated as "ad hoc" employees (irrespective of the views of the respondent's advisers that they were likely to be employees). The e-mail referred to her never suspecting that status was about to be manipulated to her disadvantage. The employment tribunal found this was a protected disclosure on the following basis:

> **"In our finding this discloses information showing a breach of legal obligation (her own statutory rights as an employee) but more particularly, that there had been "manipulation" to represent her – and others – as self-employed when she was not. We find she had a genuine belief in the manipulation, for the same reasons as before, and even if there was in fact no illegality, it was reasonable, she had grounds for her belief."**

14. The fifth disclosure was a letter of 21 July 2016 from the claimant to the respondent and his wife. The letter said it concerned her tax status past and present. It set out details of how the claimant says she assumed that she had become an employee and that the position in relation to

PAYE would be resolved but it never was. The employment tribunal found that this was a protected disclosure on the following basis:

> **"In our finding this is a disclosure of information about her own contract status, and about the need to be placed on PAYE. It suggests manipulation of her own role to make her seem "ad hoc" with the implication this will avoid having to pay PAYE, and makes some reference to others. In the context of earlier disclosures, it can be read as a belief in wrongdoing, but couched carefully given she was writing to someone who expected to be treated with deference. We hold that it is a protected disclosure. She believed there was wrongdoing, in the respondent's reluctance to set up PAYE payments for staff, though we recognize that the driver for all this was worry that if not employed on a net salary payment she had a large tax bill looming."**

15. The sixth disclosure was a letter dated 23 January 2017 from the claimant's solicitors to the respondent's solicitors. The letter referred to, and attached, the e-mail of 13 October 2015 and attachments (the fourth disclosure) and the letter of 21 July 2016 to the respondent (the fifth disclosure). The employment tribunal found that as the sixth disclosure included these two matters, which they had already held were protected disclosures, the sixth disclosure was itself a protected disclosure.

16. The seventh disclosure was an e-mail of 28 March 2017 from the claimant's new solicitors to the respondent's solicitors. The letter stated that they had just taken over conduct of the claimant's employment matter. It referred to a letter from the respondent's solicitors of 23 March 2017 contending that the claimant was self-employed. The claimant's solicitor said that she disagreed with the submission in that letter and her provisional view was that the claimant was employed but that she (the solicitor) had not yet read all the documents in the case and needed to do so. The employment tribunal found that this letter was a protected disclosure on the following basis:

> **"80. If read as a continuation of the correspondence about manipulation of employee information to avoid a PAYE system, it is protected, insofar as it is about the respondent failing to put her on PAYE and pay tax, it is capable of being in the public interest, though we do not believe that when the claimant asserted she was an employee [whose] wage was £37,000 net of tax she believed this was in the public interest."**

The Dismissal

17. By letter dated 23 March 2017, the respondent's solicitors wrote to the claimant's solicitors setting out their view of the matter. The letter stated, amongst other things, that the claimant had been responsible for payment of tax from 2007 onwards. It stated that money had been deducted from her salary from July 2014 to meet any liabilities of tax. It said that the period during which there was a dispute as to whether the respondent should have been deducting tax was limited to the period prior to June 2014. It recorded that the claimant had significant unpaid tax and national insurance liabilities due that had to be met by her. It noted the difference of views between the claimant and the respondent about her employment status and the responsibility of the respondent to deduct tax at source. It noted the claimant's position that her salary of £34,000 was payable net of tax. The letter said that:

> **"In the circumstances, [the respondent] believes that he will have no option but to terminate your client's contract unless she agrees to account for the tax due on the payments made to her".**

18. The letter of 23 March 2017 also referred to other matters including allegations that there was now less work for the claimant to perform as the respondent's children had grown up and that petrol expenses may have been wrongly claimed.

19. On 19 May 2017, the respondent wrote to the claimant dismissing her in the following terms:

> **"As you will be aware, on 23 March 2017, our solicitors responded to a letter from your (then) solicitors, Geoffrey Leaver LLP, explaining that I felt that I had little option but to terminate your contract unless you agreed to account for the tax due on the payments made to you.**
>
> **Shortly after receipt of that letter, our solicitor received an email from a new solicitor instructed by you, indicating that her "provisional view" was that you were either an employee or a worker but that she had not yet read all the relevant documents and that she would send a comprehensive reply within 14 days. I therefore held off taking action.**
>
> **That email was received on 28 March 2017 and since then we have heard no further from her, save an email promising a response by 28 April. However, that too has not been forthcoming.**

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

The Employment Tribunal's Findings

20. The employment tribunal considered what the reason for the dismissal was. It said at paragraph 84 that:

> **"The respondent was questioned on his real reasons for dismissal. He said it was not really about her duties diminishing, or about travel expenses being overclaimed, or about the comment about Mayed. He said it was about her trying to pass her tax bill on to him, and sidestep it, perhaps for ever:**
>
> **"she is after us to pay her tax"**
>
> **He referred to being met by the claimant at Heathrow when she tried to raise her status and tax and his wife took her aside and said if she just sorted out her tax she could come back and work for them. This episode is undated and features in neither side's witness statements. We are satisfied the claimant wanting him to pay her tax bill from 2007 whether on a grossed-up salary for the whole ten years, or on the actual salary paid gross for seven years is the real reason for dismissal. Through his lawyers, he understood he was in cleft stick as regards taking action himself on tax deductions."**

21. The employment tribunal then considered whether the reason for dismissal rendered the dismissal unfair. As it noted at paragraph 85, if the reason, or principal reason, was the fact that the claimant had made a protected disclosure, then the dismissal would be automatically unfair by reason of section 103A of **ERA**. The employment tribunal considered that the disclosures, taken as a group, covered two topics: putting the claimant on PAYE and suggesting deliberate avoidance of PAYE responsibilities by manipulating lists of employees and altering their duties to conceal their employment status. Pausing there, that essentially reflected the findings of the employment tribunal referred to at paragraphs 10 to 16 above. It considered that the protected

disclosures related to breaches of the obligation to deduct tax under the PAYE scheme, both in relation to the way in which the claimant said she had been treated and in relation to the alleged manipulation of lists of staff, and their duties. I do not accept the submission of Mr Laddie Q.C., for the respondent that the tribunal had found that the protected disclosures related only to the manipulation of lists, and duties, of other staff.

22. The employment tribunal accepted that the first area of disclosures (putting the claimant on PAYE) was close to the reason for dismissal, namely "her failure to pay tax whether self-employed or employed for 2007-2014" (see paragraph 86). The tribunal noted, however, that the disclosures went back to 2014 (the claimant was dismissed in 2017) and there were long periods when the claimant worked as normal without any comeback from the fact of having made the protected disclosures, and, indeed, the disclosures followed on from a process initiated by the respondent or his advisers in 2011. Against that background, the employment tribunal concluded that the reason for the dismissal was the dispute about who should pay the claimant's tax for the 2007 to 2014 period, not the allegations that the respondent was deliberately failing in his duties to operate the PAYE system (whether for the claimant or for other members of his staff). As the employment tribunal put it at paragraph 87 of its decision:

> **"On the face of it she was dismissed because the respondent did not want to agree she was an employee and that PAYE applied. In reality we think the dispute, and the reason for dismissal, was not about whether she should be on PAYE currently, but about who should pay her tax for 2007 – 2014, which was really a dispute whether her agreed term was for £34,000 gross or net. If an employee back to 2007, the respondent might have to pay the tax, and though he could then recover from her, it might take some time and be very difficult. They had retained sums from 2014 to cover the bulk of the liability. To that extent, the only disclosures causing dismissal was either her telling the respondent through Peter Cathcart in January 2014 she had not paid tax, for which she does not claim protection, or the assertion that in reality, (whatever the contract said) she was entitled to believe the respondent was paying her net. The essential dispute was not whether she was an employee, but whether her gross pay was £34,000 or around £45,000. That particular point was not, in our view, a matter of public interest. She was not dismissed because of any protected disclosure."**

23. The employment tribunal also considered whether the claimant had suffered a detriment as she had made protected disclosures. Only two alleged detriments are in issue on this appeal, first transferring authority for certain matters to the respondent's son and ceasing to have her meet the family when arriving at Heathrow airport, and secondly sidelining, or excluding, the claimant from normal contact with contractors carrying out work for the family. The findings of the employment tribunal are in the following terms at paragraphs 90(3) and (4) of its decision:

> **"(3) It is said her duties were removed, by removing authority for petty cash, sending all expenses to Mayed instead, by passing responsibility for cars to Mayed or a company, by ceasing to meet the family in the Heathrow VIP Suite when they arrive, and by handing accommodation duties to an agency or Mayed. We have combed the witness statements for detail of when or why these occurred. We can find the email of 8 May 2014 to the claimant requiring her to get prior approval for all contracts before payment, but this predated the first disclosure we have found to be protected, and there is no further mention of accounts. The claimant says her last VIP duty was in September 2016 when she approached the respondent direct about her position. We know that preceded a hospital stay, we do not know for how long. The respondent's solicitor mentioned Mayed being asked to take over duties in November/December 2016, in connection with the duties changing because the children were growing up. Was this detriment? It is an employer's right to decide what an employee does. She was still paid. She must however have felt mistrusted and excluded. Was it materially influenced by making protected disclosures? Part was, we accept, that the sons were now in their thirties and were being asked to assume responsibility, while the youngest child had left school some years before. Part was however that the respondent was unhappy (his wife's comment at the airport that she just had to pay her tax) that he was expected by the claimant to pay her substantial tax bill on the basis that she was to be paid net, which in our view was not a matter of public interest. The detriment was not because of protected disclosures.**
>
> **(4) The claimant says she was sidelined by being cut out of normal communication with contractors "since the disclosures". We do not otherwise know when this occurred, and we know she was still dealing with a tenant in May 2017. Otherwise, we know that in October 2014, four months after the third disclosure and a year before the next one, she was told to speak to Hamad rather than his parents direct. It is hard to see this on its own as detriment when she continued to meet them on VIP duties, and an employer is in our view entitled to alter reporting lines, which is all it appears to be."**

24. The employment tribunal then considered the claim that the dismissal was unfair under section 98 of **ERA**. It said that the reason for dismissal fell into section 98(2)(d) of **ERA** as the employee could not continue to work without contravention of a duty or restriction imposed by an enactment. The employment tribunal appeared to think that the relevant obligation was the duty to pay tax on earnings either as a self-employed person or, if employed, under PAYE. It is difficult to see that the reason for dismissal fell within this prohibition and neither party contended that it did. However, the tribunal also considered that, if it were wrong about that, the

dismissal was for some other substantial reason under section 98(1)(b) of **ERA**. The reasoning in paragraph 91 of the judgment is convoluted. But it is clear, read fairly and as a whole, that the employment tribunal was saying that a dismissal on the basis that the respondent would be at risk of participating in a fraud on the Revenue if he did not deduct tax when she said she was an employee would not be a fair reason for dismissal. That, however, was not the reason for dismissal as:

> **"the reason was not being on PAYE, but the term as to remuneration (£37,000 plus tax, not before tax, a substantial difference), and that the respondent should pay that going back to 2007. It was not unfair to dismiss because there was deadlock over that, so that in her view he could not make lawful deductions from £37,000."**

25. That reflects the reason for dismissal identified at paragraph 84 which is set out at paragraph 20 above. However, the employment tribunal found that the dismissal was unfair in that the respondent did not hold a final meeting with the claimant, or provide for an appeal, and to that extent the dismissal was unfair. The employment tribunal found, however, that the claimant would have continued to insist that she was entitled to remuneration (£34,000 initially then £37,000) plus tax and national insurance. At best, therefore, the employment tribunal found that she would have remained in employment for another month or so while there was a meeting.

26. The employment tribunal also found that the claimant should have been given 10 weeks' notice of termination of her employment, rather than being summarily dismissed on 19 May 2017. It is not necessary to deal with the findings on the claimant's other claims.

27. Finally, the employment tribunal turned to the question of illegality as, if it concluded that there was illegality, the claimant could not claim in contract for unlawful dismissal, wrongful dismissal nor unlawful deductions from wages. The employment tribunal referred to

relevant case law. It concluded that the illegality in this case related to the fact that the claimant did not declare or pay any tax. That meant that the contract was not illegal from its inception but was performed illegally. The contract made it clear that the claimant was to pay tax but for "seven years she did not declare any tax at all". The employment tribunal concluded that the claimant could not have believed that tax was being paid for her. At paragraph 100, it concluded that:

> **"the contract was illegal in performance because the claimant was paying no tax, and this was not because the respondent had represented to her that they were making deductions for tax, nor because they colluded to avoid tax being paid."**

28. The employment tribunal observed at paragraph 104 of its decision that:

> **"We had some concern that the respondent, when advised the claimant was an employee, did not set up a PAYE scheme for her or other local staff, nor pay the money to HMRC. We do not know whether this was because of genuine legal uncertainty or fear the respondent may become liable for tax repayments for 2007-2014 when they believed the claimant was accounting for tax; we have no evidence on the point. We recognise that the reluctance *may* have been a reluctance to pay tax, and with it employer national insurance contributions, now 12% of income, so a considerable payment over the gross salary, at all. This might make it unattractive to bar the claimant from claiming, but does not restore the claimant's access to the tribunal to enforce her employment contract, when she never declared her earnings, even on a self-employed basis. Any illegality there may have been in arrangements for deduction of tax from staff wages on the part of the respondent does not cure the claimant's own failure to pay tax on any basis."**

29. In the result, the employment tribunal concluded, amongst other things, that the claimant could not succeed in her claim for unfair dismissal or wrongful dismissal because of the illegal way in which she, the claimant, performed the contract.

The Claim for Interim Relief

30. The claimant had applied to the employment tribunal for interim relief pursuant to section 128 of **ERA**. The hearing was held before Employment Judge Stewart on 30 June 2017. The employment judge granted that application as appears from the judgment on 26 September 2017. He therefore ordered that the contract between the claimant and the respondent be

continued pending settlement or determination of the claimant's claim. The employment judge considered that the claimant had a pretty good chance of showing that the reason for her dismissal was because she had made a protected disclosure. The employment judge did not address the question of whether the claimant could enforce the contract because of the fact that she had performed it illegally. He did refer to the claimant's argument that she had been told that she would be paid the sum of £34,000 net (i.e. that the tax would be paid by the respondent not by her). He did not express any view on the issue as he said he was not in a position to form any view upon that assertion.

31. The employment judge's decision was set aside on appeal by HHJ Eady Q.C., as she then was, sitting in the Employment Appeal Tribunal. One of the grounds on which she upheld the appeal was that the employment judge had failed to address the issue of illegality. In her judgment, HHJ Eady Q.C. noted that that issue was "keenly in dispute" and that the tribunal "was obliged to deal with the point but failed to do so". The matter was remitted back to the employment judge.

32. The employment judge then dealt the question of illegality in the following way. He noted the respondent's case that the claimant was responsible for paying tax on her earnings and chose not to do so, thereby performing the contract illegally. He rejected that argument and said this:

> **"However, if the Claimant was responsible for paying the tax on her earnings from the work she performed for the Respondent as the contractual documentation relied upon by the Respondent indicates she was, I can see that her failure to pay the tax may cause her to fall foul of the HMRC but I cannot see that such failure on her part makes the contract illegal. A self-employed person is under a duty to declare truthfully his or her income to HMRC and to account for such tax as lawfully falls to be payable. But that does not mean that the contract or contracts under which the income is earned become in themselves illegal because of a subsequent failure on the part of the self-employed person to declare that income and to pay tax upon it. Were that to be the position, it would open contractual disputes between, say, a self-employed builder seeking the final payment for work done for a householder to an investigation as to whether the builder**

had paid the appropriate amount of tax on the payments previously made by the householder."

33. The employment judge therefore held that it was unlikely that the respondent would succeed at trial in demonstrating that the claimant could not take steps to enforce the contract because of her failure to pay tax on the earnings from that contract. He again ordered that the contract continue until settlement or determination of the claim.

34. That hearing of the application for interim relief took place no 23 April 2018. The statutory provisions require the tribunal to determine the application as soon as practicable (see section 128(3) of **ERA**). Notwithstanding that, Employment Judge Stewart did not give judgment until 9 November 2018 and it was not sent to the parties until 13 November 2018. At that date, the parties were in fact at the final hearing of the claim itself. The judgment on interim relief was, it seems, delivered by hand during the hearing. No explanation has been provided by the employment judge for the period of time (over six months) between the hearing of the application and the giving of judgment although, in a later judgment, he says the judgment was delayed through no one's fault but his own.

35. The judgment on the claim was given on 26 November 2018. By reason of the delay in Employment Judge Stewart handing down his judgment on interim relief, it was still possible for the respondent to apply to the employment judge to reconsider his judgment in the light of the decision of the employment tribunal dismissing the claimant's claim. Such an application has to be brought within 14 days of the date on which the decision was sent to the parties: see **rule 71** of **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2003 ("the Rules of Procedure").**

36. By a decision and reasons dated 10 December 2018 and sent to the parties on 23 January 2019, Employment Judge Stewart refused the application for reconsideration. The rules provide for a reconsideration where it is necessary in the interests of justice to do so **(see rule 70**). The material part of the judge's reasoning comes in paragraph 10 where he said:

> **"I doubt whether the concept of reconsidering a judgment regarding interim relief in the interests of justice is broad enough to justify the variation of that judgment on the basis of the eventual dismissal of the claims brought that the application for interim relief was based upon. After all, if I was correct in ignoring witness statements made and documents disclosed after the date of my June 2017 judgment why should I now take into consideration a judgment that I could not have read (as it was not written) based on disclosed documents that I did not see and oral evidence that I did not hear?"**

37. The employment judge also asked whether that result would only leave the respondent with the prospect of appealing the November 2018 decision (granting the application and ordering the contract to continue) to avoid the consequence of his order, namely that the respondent was required to make further payments to the claimant. He concluded in part that that was the result of the absence of any provision in the legislation to enable a successful respondent to apply to reverse an interim order. Alternatively, the respondent's remedy was to bring a claim for unjust enrichment.

The Result of the Decisions

38. As a result of the decision of the employment tribunal of 21 December 2018 the claimant was not entitled to bring a claim for unfair or wrongful dismissal.

39. As a result of the second interim relief judgment of Employment Judge Stewart dated 9 November 2018, and his refusal to reconsider it, the contract between the claimant and the respondent continued until determination of the claim. The respondent was required to pay the

claimant £3,083.33 a month from 19 May 2017 to the determination of the claim by the tribunal. The respondent has in fact paid that sum for the period from 19 May 2017 to the decision of HHJ Eady Q.C. in December 2017 allowing the appeal (the actual order of Employment Judge Stewart after the first hearing of the application for interim relief was set aside in February 2018). Unless the respondent's appeal against the judgment of 9 November 2018, or the refusal to reconsider it, succeeds, the respondent would still be required to pay £3,083.33 a month for the period from December 2017 until the determination of the claim in November 2018.

40. The claimant undertook, at the hearing before the Employment Appeal Tribunal in December 2019, not to take steps to enforce the order of Employment Judge Stewart of 9 November 2018 until the outcome of the appeals to the Tribunal.

THE APPEALS AND THE CROSS-APPEAL

41. The claimant appealed against the decision of the employment tribunal dismissing her claims. There were six grounds of appeal, namely that the employment tribunal erred in finding that:

(1) the claimant could not bring claims because of the illegal performance of the conduct, or in failing to sever the period of performance after May 2014 when the claimant was not performing the contract illegally (Grounds 1, 2 and 3);

(2) the reason for dismissal was other than the making of protected disclosures (Ground 4);

(3) the claimant had not been subjected to a detriment by reason of the fact that she had made protected disclosures (Ground 5); and

(4) the reason for the dismissal was that the claimant's assertion that she was entitled to receive remuneration net (that is £34,000, later £37,000, plus an amount equal to tax and national insurance contributions payable) rather than not being on PAYE (Ground 6).

42. The respondent cross-appeals on the ground that the employment tribunal erred in finding that the claimant had made any protected disclosure.

43. The respondent also appeals against (1) the decision of Employment Judge Stewart dated 9 November 2018 granting interim relief and (2) his decision of 10 December 2018 refusing to reconsider that decision.

44. For convenience, it is sensible to deal with the claimant's grounds 4 to 6 first, then the cross-appeal relating to protected disclosures and then to deal with illegality (the claimant's grounds 1 to 3). It is then sensible to consider the appeal against the decisions of Employment Judge Stewart.

GROUND 4 - WHETHER THE TRIBUNAL ERRED IN CONCLUDING THAT THE REASONS OR PRINCIPAL REASON FOR DISMISSAL WAS NOT THE MAKING OF PROTECTED DISCLOSURES

45. Ms Williams Q.C., for the claimant, contends that the employment tribunal made a number of errors in concluding that the reason, or the principal reason, for dismissal was not the fact that the claimant had made protected disclosures. She submitted that the employment tribunal had failed to give adequate reasons for its conclusion, that the decision was perverse and that the tribunal had failed to act on the basis that the burden of proving the reason for

dismissal lay on the employer (relying on **Kuzel v Roche Products Ltd**. [2008] ICR 799. Ms Williams further submitted that the tribunal had failed to have due regard to the warnings given in cases such as **Panayiotou v Chief Constable of Hampshire** [2014] IRLR 500 and other cases about ensuring that the factors underlying the reasons for the dismissal were genuinely severable from the fact of making protected disclosures.

46. Against that background, Ms Williams submitted that the employment tribunal erred, or came to a perverse conclusion, in finding that the reason for the dismissal was the dispute about who should pay the claimant's tax for 2007 to 2014. She further submitted that the employment tribunal had, wrongly, abstracted one strand of the parties' dispute (whether the remuneration was paid net or gross) from the communications about the respondent's failure to treat the claimant, and others, as employees and put them onto PAYE. She also submitted that the employment tribunal failed to have regard to the cumulative impact of the disclosures.

47. Mr Laddie Q.C. for the respondent submitted that the employment tribunal gave clear and cogent reasons for its conclusions as to the reason for dismissal. Furthermore, he submitted that the employment tribunal was well aware of the need for caution when seeking to differentiate between the fact of making protected disclosures and the way in which such disclosures were made. Here, in truth, the situation was different. It was one where the employment tribunal was distinguishing between two states of affairs, that is, dismissal because of the complaints relating to alleged manipulation of employee status for PAYE purposes and a dispute about who was responsible for paying tax on the claimant's remuneration. He submitted that the employment tribunal was well aware of the need for caution and not diminishing the statutory protection for whistle-blowers and referred to the case law emphasising that concern.

Discussion

48. In the present case, the reasons for the employment tribunal's decision emerge clearly from a reading of the decision as a whole. The reason why the respondent dismissed the claimant was because of the dispute over who was liable to pay tax on the claimant's remuneration of £34,000 (later £37,000), in particular between the years 2007-2014 when the claimant had paid no tax on the remuneration received. The position would be less acute for the period after May 2014 as, from that date, the relevant amount of money had been withheld from her remuneration so that, whoever was responsible in law for making the payment to HMRC, the money would be available. The claimant insisted that the respondent was liable to pay an amount equivalent to tax and national insurance contributions in addition to the agreed remuneration of £34,000. The respondent insisted that the arrangement was that the claimant was responsible for paying the tax from the amount of the agreed remuneration. That appears clearly from paragraph 84 of the decision, and paragraph 86 – which refers to the reason for the dismissal as being "her failure to pay tax whether self-employed or employed for 2007-2014" - and also the concluding three sentences of paragraph 87 and paragraph 88 (the claimant "was dismissed for asserting the respondent should pay tax over and above £34,000 (later £37,000) per annum"). The employment tribunal concluded at paragraph 91 that it "was not unfair to dismiss because there was deadlock over that, so that in her view he could not make lawful deductions from £37,000".

49. There was adequate evidence upon which the employment tribunal could conclude that the real reason for the dismissal was the dispute about whether the claimant's remuneration was net of tax or gross and included tax. The employment tribunal had the letter of dismissal of 19 May 2017 which referred to the respondent not being able to allow the claimant to continue

working for him while she was failing to account for tax due. The letter also referred to other reasons. The employment tribunal heard oral evidence from the respondent, which it accepted, in which he said those other reasons were not the real reason for the dismissal. He gave evidence that it was about the claimant trying to pass her tax bill on to him and sidestep liability for tax, perhaps for ever. As the tribunal recorded at paragraph 84, he gave evidence that "she is after us to pay her tax" and referred to other evidence that he gave. The employment tribunal's reasons for its conclusion are adequate. They are not perverse but based on the evidence it accepted. There was no failure to appreciate that the burden of proving the reason for the dismissal was on the employer.

50. Furthermore, the employment tribunal was entitled to draw a distinction between the fact that the claimant was alleging that the respondent was not complying with his obligations in relation to operating a PAYE system for his employees (both the claimant and others) and was allegedly manipulating information to achieve that result, and the attempt by the claimant to make the respondent responsible for any unpaid tax (in addition to the remuneration she had already received). The employment tribunal was well-aware of the need for caution in concluding that the reason, or the principal reason, for dismissal was not the making of protected disclosures but some other reason (particularly where there was a close relationship between the two states of affairs). But in the present case, it was entitled to conclude that there was a distinction and that the reason for the dismissal was the dispute about who was liable to pay the claimant's unpaid tax bill (rather than the claims about failure properly to operate a PAYE system for employees). The employment tribunal also did take into account the cumulative impact of the disclosures. Indeed, at paragraph 86 of the decision, it considered the disclosures "taken as a group". There was no error in its conclusion that the reason for the

dismissal was not the making of protected disclosures but a different reason, that is, the dispute about who should provide the money for the unpaid tax. Ground 4 therefore fails.

GROUND 5 - WHETHER THE TRIBUNAL ERRED IN CONCLUDING THAT THE CLAIMANT HAD NOT BEEN SUBJECTED TO A DETRIMENT FOR MAKING PROTECTED DISCLOSURES

51. Ms Williams challenged the findings of the tribunal in relation to the third and fourth detriments, set out at paragraphs 90(3) and (4) of its judgment (see paragraph 23 above). Ms Williams confirmed in her skeleton argument that she was not pursuing an appeal in relation to the first and fifth detriments (an allegation that the respondent's son said his parents thought the claimant was a thief and a complaint about the deduction of money from salary from 1 July 2014). In oral argument, Ms Williams confirmed that the claimant was not pursuing any appeal in relation to the findings on the second detriment (a letter of 23 March 2017 referring to an apparent fraud by the claimant on the revenue).

52. In relation to the third detriment, Ms Williams submitted that the employment tribunal erred in finding that the fact that the claimant was told to deal with the respondent's son, not the respondent or his wife or was told to communicate only by telephone or e-mail (save for specified exceptions) was not a detriment. She submitted that "detriment" in section 47B of **ERA** should be construed in accordance with the approach of the House of Lords in **Shamoon v Chief Constable of Ulster Constabulary** [2003] ICR 337 to the word "detriment" in the Sex Discrimination Act 1976. On that basis, a detriment existed if a reasonable worker would or might take the view that he or she had been disadvantaged by the act in question.

53. Ms Williams further submitted that the employment tribunal erred in concluding that the reason for subjecting the claimant to the third and fourth detriment was not the making of protected disclosures. She relied upon **Fecitt v NHS Manchester (Public Concern at Work Intervening)** [2012] ICR 372. If, however, the employment tribunal had been entitled to find that the third detriment was not imposed for that reason, Ms Williams expressly conceded that the same argument would apply in relation to the fourth detriment.

54. Mr Laddie submitted that the employment tribunal had found that the claimant had not been sidelined as alleged in respect of the fourth detriment. He submitted that the tribunal identified the relevant authority (**Fecitt**) and was entitled to conclude that imposition of any alleged detriment was not materially influenced by the making of protected disclosures.

Discussion

55. First, on the question of detriment, section **47B** of **ERA** provides that:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".**

56. "Detriment" in section **47B** of **ERA** bears a similar meaning to "detriment" in the legislation prohibiting subjecting a person to a detriment on grounds of sex or race, or some other protected characteristic, in the context of employment: see section **39**(2)(d) of the **Equality Act 2010** (and its statutory predecessors). Both the **ERA** and the **Equality Act 2010** are concerned with protecting employees who suffer adverse consequences from unlawful action by their employers. The use of similar words (not subjecting, or the right not to be subjected, to a detriment) and the context, which involves providing remedies for employees

against unlawful treatment, indicate that the word "detriment" should be construed in the same way in both statutes. Consequently, the approach taken by the House of Lords in **Shamoon** to the interpretation of the phrase subjecting an employee "to any other detriment" in the context of legislation prohibiting discrimination on grounds of sex should be applied to the interpretation of "detriment" in section **47B** of **ERA**. In those circumstances, an employee will have been subjected to a detriment within the meaning of section **47B** of **ERA** if a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she was now expected to work. That conclusion is consistent with the judgment of the Court of Appeal in **Tiplady v City of Bradford Metropolitan Council** [2019] EWCA Civ 2180.

57. Secondly, in the present case, the employment tribunal did find that the claimant had been subjected to a change in her working practices. She had formerly dealt with the respondent or his wife directly and was now required to deal with the son. The question is whether that was a detriment. The employment tribunal found it was "hard to see this on its own as a detriment when she continued to meet them on VIP duties and an employer is in our view entitled to alter reporting lines": see paragraph 90(4) of the decision. In my judgment, the employment tribunal erred in its approach to the question of detriment and failed to consider whether the change in reporting arrangements amounted in the view of a reasonable worker to a disadvantage in the circumstances in which the claimant worked. The fact that the claimant still met the respondent on other occasions, and the fact that it was seen as a change in reporting lines, would not of themselves prevent the change from failing within the concept of being subjected to a detriment within the meaning of section **47B** of **ERA**.

58. The third question is whether the claimant was subjected to either the third or fourth detriment on the ground that she had made a protected disclosure. The proper approach is set out in the judgment of the Court of Appeal in **Fecitt v NHS Manchester (Public Concern at Work Intervening)** [2012] ICR 372. The question under section 47B of **ERA** is whether the making of a protected disclosure materially influenced the employer's treatment of the employee: see paragraph 45 of the judgment in **Fecitt**.

59. The employment tribunal in the present case specifically referred to the judgment in **Fecitt** and identified that the test was whether the detriments alleged were materially influenced by the making of protected disclosures: see paragraph 89 of its decision. The third detriment involved changes in the claimant's duties, including removal of authority for petty cash, passing responsibility for cars to the respondent's son or others, not meeting the family on arrival at Heathrow and transferring accommodation duties to the respondent's son or others. In effect, they were described as examples of sidelining the claimant. The employment tribunal accepted this was a detriment as the claimant must have felt mistrusted or excluded. The employment tribunal asked whether the treatment was "materially influenced by making protected disclosures?". In other words, it applied the right test and asked the right question. It concluded that the treatment was in part the fact that the respondent's children were now in their thirties and were assuming responsibility for some matters and in part because the respondent was unhappy about the fact that he was being expected to pay the claimant's substantial tax bill on the basis that she was being paid net. As the employment tribunal had found in relation to the dismissal, that was a different reason from the making of the protected disclosures which involved allegations of failing to comply with the legal duty to operate a PAYE scheme for employees. Consequently, the employment tribunal found the "detriment was not because of

protected disclosures". There was no error of law in the approach of the employment tribunal and it was entitled to reach the conclusions it reached on the evidence it accepted.

60. In relation to the fourth detriment, that, too, involved allegations of the claimant being sidelined by being told to speak to the respondent's son rather than the respondent or his wife directly. The employment tribunal did not specifically address the question of whether this was materially influenced by the making of protected disclosures (as it did not find that there had been a detriment). Ms Williams expressly accepted in oral argument that if this Tribunal found that the employment tribunal had correctly directed itself on causation in relation to the third detriment in paragraph 90(3) of its decision, the same conclusion would inevitably apply to the fourth detriment in paragraph 90(4) of its decision. She expressly accepted that the issues of the third and fourth detriments stood or fell together. For the reasons given above, the employment tribunal did direct itself correctly in relation to the third detriment. On the basis of Ms Williams' express concession that, if the employment tribunal had found that the sidelining referred to in paragraph 90(4) of its decision was a detriment, it would inevitably have found that the decision was not materially influenced by the making of protected disclosures, the appeal in relation to that matter does not succeed. Ground 5 therefore fails

GROUND 6 - WHETHER THE TRIBUNAL ERRED IN ITS APPROACH TO DETERMINING THE REASON FOR DISMISSAL FOR THE PURPOSES OF SECTION 98 ERA

61. Ms Williams submitted that the employment tribunal erred in finding that the reason for dismissal was the disagreement about whether the respondent was liable to pay the claimant's tax, largely for the reasons she advanced in relation to ground 4. She submitted that the

employment tribunal was wrong to determine that the dismissal was for a potentially fair reason and that the only element of unfairness was the failure to provide for a meeting, or an appeal, prior to dismissal. Mr Laddie submitted that the employment tribunal was entitled to find that the reason was the dispute about liability for the outstanding tax and that was some other substantial reason for dismissal.

Discussion

62. Paragraph 91 of the tribunal's decision is set out above. It is not, read in isolation, clear. In part, it does not appear to be correct. First, as indicated above, the reason for dismissal does not appear to fall within section 98(2)(d) of **ERA**. Secondly, the discussion about the respondent being at risk of participating in a fraud on the revenue if he did not deduct tax from the claimant's remuneration, and this being some other substantial reason for dismissal and, if this were the reason, it would not be a fair reason for dismissal is convoluted and not easy to follow. Reading paragraphs 84, 86, 87 and 91 as a whole the position does become clear. The employment tribunal was, in paragraph 91, effectively saying that if the reason for dismissal was to do with the question of deduction of tax under PAYE that would not be a fair reason. However, that was not the reason for dismissal. The reason was the respondent's concern that he was being asked to assume liability for the claimant's unpaid tax, particularly in the period 2007 to 2014. That was some other substantial reason and the employment tribunal was entitled to conclude that it was a fair reason. In those circumstances, the employment tribunal was entitled to conclude that the unfairness arose only from the failure to hold a meeting, or allow an appeal, and that at most, the claimant would have remained in employment for only another month or so. Ground 6 is therefore dismissed.

THE CROSS-APPEAL -WHETHER THE DISCLOSURES WERE PROTECTED DISCLOSURES

63. Mr Laddie submitted that the employment tribunal erred in finding that the second to seventh disclosures were protected disclosures within the meaning of section 43A of ERA. First, in relation to all six disclosures, Mr Laddie submitted that the employment tribunal had failed to address the question of whether the claimant had the necessary subjective belief that the disclosure was in the public interest. The employment tribunal erred therefore as it failed to apply section 43B of **ERA** correctly in the way identified in **Chesterton Global Ltd. v Nurmohamed [**2018] ICR 731 at paragraphs 27 and 30 and **Ibrahim v HCA International Ltd**. [2019] EWCA Civ 2007. Secondly, Mr Laddie submitted that the tribunal was wrong in reading (or "aggregating" as it was put) the various disclosures together and in finding that some of the later disclosures were capable of being protected when read with earlier protected disclosures. Ms Williams submitted that the employment tribunal did apply the correct test and it was entitled to read the second to seventh disclosures together.

Discussion

64. Section 43A of **ERA** defines a protected disclosure as a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H. The opening words of section 43B of **ERA** provide that:

> **"(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 –**
>
> **….."**

65. There then follows a list of six things. One, in section **43B**(1)(b) of **ERA**, is that "a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject".

66. First, the disclosure must be of information tending to show one or more of the matters in section **43B**(1) of **ERA**. In order to be such a disclosure, "it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters in subsection (1)": see per Sales L.J., as he then was, in **Kilraine v Wandsworth LBC** [2018] ICR 1850 at paragraph 35.

67. Secondly, the employment tribunal will need to ask whether (a) the worker believed at the time of making the disclosure that the disclosure was in the public interest and (b) if so, whether that belief was reasonable. The focus is on whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures. See per Underhill L.J. in **Chesterton Global Ltd.v Nurmohamed** [2018] ICR 731 at paragraphs 27 to 30 (with whose reasoning Beatson L.J. and Black L.J., as she then was, agreed).

68. Thirdly, as was emphasised in the judgment of the Court of Appeal in **Ibrahim v HCA International Ltd**. [2019] EWCA Civ 2007, it is important to recognise that there are two separate questions: did the worker in fact believe that disclosure was in the public interest at the time he or she made it, and separately, was that belief reasonable? To that end, it is necessary for the employment tribunal to consider what was the subjective belief of the worker at the

time: see paragraphs 17 and 25 to 26 of the judgment of Bean L.J. in **Ibrahim** with which Baker and Dingemans LJJ. agreed. Whilst it is better practice to set out the various questions in relation to each disclosure, an employment tribunal will not have erred in law if it has considered each of the relevant ingredients necessary to establish that a disclosure is a qualifying disclosure: see the observations of Soole J. at paragraph 59 of the judgment in **Arjomand-Sissan v East Sussex Healthcare NHS Trust** handed down on 17 April 2019.

69. In the present case, before considering the individual disclosures alleged to be protected disclosures, the employment tribunal expressly referred to the decision in **Chesterton**. It set out the two questions that it needed to ask – namely, whether the worker believed, at the time of making it, that the disclosure was in the public interest and whether that belief was reasonable: see paragraph 51 of its decision. In relation to the second disclosure, it is implicit that the employment tribunal was asking each of those two questions. It considered that the claimant believed that the respondent was breaching his obligation to deduct tax under a PAYE scheme both in her own case and for others. It considered that not setting up a PAYE Scheme (if that was what was happening) was not in the public interest and that the claimant believed that was what was happening. It also considered whether that belief was reasonable. In the circumstances, and read against the background of paragraph 51, the employment tribunal is clearly addressing the two questions: was the claimant making the disclosure because she believed that to do so was in the public interest and was that belief reasonable. Paragraph 58 of its decision could have been more clearly drafted. Read in context, however, the employment tribunal did clearly address its mind to whether the claimant made the disclosure believing it was in the public interest to do so (and, separately, whether that was a reasonable belief).

70. The second question concerns whether the employment tribunal was entitled to read a later disclosure together with, or in the light of, an earlier disclosure to determine whether the later disclosure amounted to a qualifying disclosure within the meaning of section **43B** of **ERA**. There may be a number of reasons why a claimant would wish to do that. A claimant may be seeking to show that there was a series of protected disclosures over time as that may be a relevant factor in assessing the reason for an employer dismissing an employee or subjecting the employee to a detriment. It may be relevant to establishing whether there was a series of acts for the purposes of considering the time-limits for bringing a claim. Theoretically, it may be that neither of the disclosures contained sufficient information in itself to amount to a qualifying disclosure, but reading the two disclosures in combination might result in there being sufficient information to make one (or more) of the disclosures a qualifying disclosure although that is likely to be rare in practice.

71. Mr Laddie reviewed the case law dealing with what has been described as "aggregation" of disclosures. In my judgment, the first question is whether a later disclosure is properly to be read with an earlier disclosure in deciding whether the later disclosure amounts to a qualifying disclosure for the purposes of section **43B** of **ERA**. An employment tribunal may do that where the later disclosure expressly or by necessarily implication refers to, or incorporates, the information provided in the earlier disclosure. The later disclosure may do so by referring expressly to the earlier disclosure, or by attaching or enclosing a copy of the earlier protected disclosure, or the context may make it clear that the later disclosure is to be read with the earlier disclosure. It is a question of fact for the employment tribunal as to whether or not a later disclosure is properly to be read with an earlier disclosure.

72. That approach is consistent with the judgment of Choudury (President). in **Simpson v Cantor Fitzgerald Europe** handed down on 21 June 2019, see in particular paragraphs 31 to 34. The President had been referred to earlier case law. That approach reflects the statutory language and purpose. The question on this aspect of the case is whether a disclosure provides information with a sufficient factual content and specificity as tending to show that conduct falling within section **43B**(1) has occurred. The statutory language, and its underlying purposes, will be satisfied if a later communication does not itself do that but if it expressly or by necessary implication incorporates information in an earlier disclosure which does do that.

73. The approach adopted in this judgment is also consistent with the decision of the Court of Appeal in **Kilraine**. There, a letter (the third disclosure) referred to there being, since the end of the school term, "numerous incidents of inappropriate behaviour towards me". The Employment Appeal Tribunal found that that did not provide any specific details and did not sensible convey any information at all (see paragraph 32 of the Employment Appeal Tribunal judgment set out at paragraph 21 of the judgment in **Kilraine**). At the hearing before the Court of Appeal, the claimant contended that it was "embedded in and formed part of an ongoing serious of communications" and "should be taken in effect, to incorporate by reference other disclosures made by the claimant at different times": see paragraph 39 of the judgment in **Kilraine.** Sales L.J., with whom Kitchin L.J., as he then was, agreed, concluded that the Employment Appeal Tribunal had not erred in its approach to the third disclosure. The claimant and her legal representatives had not identified any relevant context which might inform or supplement the meaning of the third disclosure. They did not specify any part of the context which was said to supply the relevant minimum factual content necessary for a statement to amount to a qualifying disclosure within the meaning of section 43B(1). In other words, the

claimant had failed in that case to establish any relevant factual linkage between the disclosure and any earlier statement which would enable the court to treat the third disclosure as including the type of information necessary for it to constitute a qualifying disclosure. The decision of the Court of Appeal is not a decision that a later disclosure had always to be read in isolation, or that a later disclosure could never be read with an earlier disclosure.

74. Turning to the facts of this case, the material disclosures are the second to seventh disclosures. The first disclosure was held not to be a protected disclosure. The employment tribunal was entitled to find that the second disclosure, read on its own, amounted to a protected disclosure. The fourth disclosure was an email of 13 October 2015 and attachments from the claimant to Mr Cathcart. That disclosure does not fall to be read with any other disclosure. It is either a protected disclosure, on its own terms, or it is not. The employment tribunal was entitled to find that it contained sufficient information tending to show a breach of the respondent's obligation to include the claimant (and others) on a PAYE scheme as they were employees. The same is true of the fifth disclosure which comprised the letter from the claimant to the respondent set out above at paragraph 14.

75. The three disclosures which do raise the issue of combining a later disclosure with an earlier disclosure are the third, sixth and seventh. The sixth disclosure was a letter of 23 January 2017 from the claimant's solicitors to the respondent's. That letter referred to the fact that the claimant had been asked to produce a contract of self-employment to regulate her working relationship with the respondent. It said that the respondent's solicitors were newly instructed and that it would be useful for them to have copies of certain documents which were specifically referred to in the letter and which were attached. They included copies of the

grievance letter of 13 October 2015 from the claimant to Mr Cathcart and the letter of 23 January 2016 from the claimant to the respondent (the fourth and fifth disclosures). The letter than set out the claimant's case on why she was employed. This is a case where the sixth disclosure – the letter of 23 January 2017 – did specifically refer to the earlier two disclosures and also attached copies of them. The writers of the letter clearly intended that those disclosure be read with the letter of 23 January 2017. That is why the earlier disclosures were referred to and copies enclosed and why the point was made that it would be useful for the new solicitors to have copies as they were newly instructed (with the implication that they should familiarise themselves with the content of those documents). This is a case where the employment tribunal were entitled to read the later disclosure (the letter of 23 January 2017) together with the two earlier disclosures and to regard the information in the earlier two disclosures as being included within the disclosure of 23 January 2017.

76. The position is different in relation to the third and seventh disclosures. Dealing first with the seventh disclosure, that was a letter of 28 March 2017 from the claimant's newly instructed solicitor informing the respondent's solicitors that she had taken over the conduct of the claimant's employment matter. The letter did not itself contain any information capable of constituting a qualifying disclosure. The employment tribunal considered that it was a protected disclosure "If read as a continuation of the correspondence about manipulation of employee information to avoid a PAYE system". The employment tribunal erred, however, in approaching the letter in that way. The question was whether or not the letter of 28 March 2017 was to be read together with the earlier disclosures such that information contained in the earlier disclosures was expressly or by necessary implication included within that later letter for the purposes of deciding if it were a qualifying disclosure. The employment tribunal did not

address that issue but assumed that if it were read as part of a continuing correspondence it would be protected. That, however, is to assume the answer to the question rather than asking the question itself. It is necessary, therefore, for this Tribunal to consider whether the seventh disclosure can legitimately be read with the earlier disclosures.

77. There is no reasonable basis upon which the letter of 28 March 2017 could sensibly be read with any of the earlier disclosures. There was nothing in the letter of 28 March 2017 to indicate that it was written as a continuation of such correspondence. It did not refer to any specific earlier correspondence making any disclosure. It was not in context necessary to read the letter of 28 March 2017 in such a way. Rather, it reads simply as a letter from one solicitor to another informing them that they had taken over conduct of an employment matter, that they disagreed with the view of the other solicitor but that the solicitor needed to familiarise herself with the documentation. There was no context identified, and no earlier disclosure referred to, which could be said to supply the necessary relevant minimum factual content for that letter of 28 March 2017 to amount to a qualifying disclosure within the meaning of section **43B**(1) of **ERA**.

78. The third disclosure was a letter of 9 July 2014, with appendices, from the claimant's tax advisers replying to a letter from the respondent's solicitors. The letter and appendices set out a legal analysis of why the claimant was an employee. As the employment tribunal noted, there was nothing in that disclosure dealing with the claim that the employment status of the claimant, or others, had been manipulated in order to avoid them being included within a PAYE scheme. As the employment tribunal found, on its own the letter amounted to just part of a debate as to whether or not the claimant was an employee. That would not, of itself, amount to

a qualifying disclosure. The employment tribunal concluded, however, that it was a disclosure of information tending to show a breach of a legal obligation to make PAYE deduction "when read in the light of other disclosures". That, however, is not the correct approach for the reasons given above. The employment tribunal, therefore, erred in its approach to the question of whether the third disclosure amounted to a qualifying disclosure. There is no reasonable basis upon which the tribunal could have found that the letter of 9 July 2014 could be read together with other documents making disclosures tending to show a breach of the respondent's legal obligation to make deductions of PAYE. The letter, and appendices, does not refer to any such documents. There is no context requiring the letter of 9 July 2014 – which concerns the proper characterisation of the claimant's employment – to be read with other documents alleging that the respondent was seeking to avoid legal obligations to deduct tax through a PAYE scheme by manipulating the employee status of the claimant or others. Again, there is no context identified, and no earlier disclosure referred to, which could be said to supply the necessary relevant minimum factual content for that letter of 9 July 2014 to amount to a qualifying disclosure within the meaning of section **43B**(1) of **ERA**.

79. In the circumstances, the cross-appeal is dismissed so far as the second, fourth, fifth and six disclosures is concerned. The cross-appeal is allowed in relation to the third and seventh disclosures. This does not affect the outcome of the claimant's appeal against the decision of the employment tribunal. It was entitled to find that four protected disclosures were made but, for the reasons given, the respondent did not dismiss the claimant on the ground that she had made those protected disclosures and they did not materially influence the respondent in deciding to subject her to any alleged detriment.

GROUNDS 1-3- ILLEGALITY

80. The central question on which the appeal against the employment tribunal's decision turns is the question of legality. The claimant would have been entitled to seek compensation, on the findings of the employment tribunal, reflecting the failure to give her 10 weeks' notice (the wrongful dismissal claim), and the claim for unfair dismissal in so far as it involved the failure to give her the opportunity for another meeting prior to the dismissal (which would have extended the employment by about another month). In addition, the claimant would have been entitled to a basic award based on a certain number of weeks' pay for each year of employment, subject to any reduction considered just and equitable by reason of the claimant's conduct (see sections **119** and **122** of **ERA**). The employment tribunal, however, determined that the claimant could not bring any claims for unfair dismissal or wrongful dismissal as she had performed the contract illegally by not declaring or paying any tax on her remuneration.

81. Ms Williams submitted that the employment tribunal erred in approaching the question of illegality as it failed to apply the approach approved by the majority of the Supreme Court in **Patel v Mirza** [2017] AC 467. She submitted that the employment tribunal failed to assess the proportionality of refusing to allow the claimant to enforce the contract. That was, she submitted, particularly important in the present case given, amongst other things, the employer's own failure to operate a PAYE scheme and the period after 1 July 2014 when an amount equal to income tax was being withheld with a view to payment of tax. Alternatively, Ms Williams submitted that the tribunal erred in failing to sever the periods of employment before and after 1 July 2014 and allowing the claimant to claim in respect of periods after 1 July 2014, relying on the approach taking by the Employment Appeal Tribunal in its judgment in **Blue Chip Trading Ltd. v Helbawi** given on 20 November 2008.

82. Mr Laddie submitted that the employment tribunal did not err in its approach to the determination of illegality by not adopting the approach approved by the majority of the Supreme Court in **Patel v Mirza**. The Court of Appeal has determined that that decision does not alter the way in which, in practice, cases of illegality in employment law are determined, see **Okedina v Chikale** [2019] EWCA Civ 1393. In any event, the approach approved in **Patel v Mirza** would not result in a different result. Further, he submitted that the respondent had not been responsible for any illegality in the performance of the contract. It was the claimant who decided not to declare or pay any tax between 2007 and 2014. Thereafter, there was a dispute as to whether the claimant was an employee so that the respondent should deduct tax. A difference in characterisation of a contract, made in good faith, would not amount to illegality on the part of the respondent. The respondent in any event took steps to ensure that the amount of tax was deducted and paid into an account with a view to it being paid to the revenue. Further, he submitted that the claimant continued to make fraudulent claims that the amount of remuneration paid to her was a net amount not gross and the respondent had agreed to pay any tax due.

Discussion

83. The underlying issue in this case is whether considerations of public policy arising out of the fact that the contract was performed illegally mean that an employment tribunal should refuse to enforce claims for a breach of contract, in the form of a claim for wrongful dismissal, or for a breach of the statutory right not to be unfairly dismissed. Courts have long recognised that, in appropriate circumstances, a court may decline to assist a person to enforce a contract which is being performed illegally: see the judgment of Lord Mansfield CJ in **Holman v Johnson** (1775) 1 Cowp 342.

84. A contract may be prohibited by statute or the parties may have entered into the contract for an illegal purpose. In such cases, the contract may be unenforceable from the outset. In another category of cases, the contract may be lawful when made but it may be performed illegally.

85. In the employment context, the latter cases have generally involved situations where an employee was being paid in a way which involved a failure to pay tax or national insurance contributions lawfully due, or to avoid restrictions on the employment of immigrants. The traditional analysis of that category of cases (as distinct from cases where statute expressly or impliedly prohibits a contract or where the parties intend from the outset to perform an illegal act) is given by the Court of Appeal in **Hall v Woolston Hall Leisure Ltd.** [2001] ICR 99. There the employee was dismissed because she was pregnant. She brought a claim for discrimination on grounds of sex. For the five months prior to the dismissal, however, the employer had been failing to pay the amounts of tax due. The employee was aware of the discrepancy and queried it but was told that was the way things were done. Before considering whether the claimant could enforce her rights under the **Sex Discrimination Act 1975**, breach of which amounted to a statutory tort, Peter Gibson L.J. considered the position in relation to the enforcement of contractual rights. He observed that acquiescence by an employee in the employer's illegality would not generally prevent an employee from enforcing contractual rights. Rather, there needed to be, as a minimum, knowledge and active participation in the illegality. As Peter Gibson L.J. said at paragraph 38 of his judgment:

> **"In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee. And as the *Coral Leisure Group case [1981] ICR 503* shows, even if the employee has in the course of his employment done illegal acts he may nevertheless be able subsequently to rely on his contract of employment to enforce his statutory rights."**

86. Turning to the decision of the Supreme Court in **Patel v Mirza**, that case involved a claim for restitution. The claimant had paid a large sum of money to the defendant pursuant to an agreement that the defendant would use it to purchase shares based on inside information about the affairs of the company. That agreement contravened a statutory prohibition on insider dealing. The defendant did not in fact acquire the relevant information and did not make the share purchases. The claimant brought a claim for restitution of the money paid. The defendant resisted the claim on the basis that the contract was an illegal contract. The case did not therefore involve a claim to enforce a contract, still less, a contract of employment. The Supreme Court determined that, as a general rule, where a person satisfied the requirements for a claim in unjust enrichment, he should not be prevented from recovering money by reason of the fact that the money was paid for carrying out an illegal activity. Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson, Lord Hodge and Lord Wilson agreed, observed that it was right that a court considering the application of the doctrine have regard to the policy factors involved and to the nature and circumstances of the illegality (see paragraph 109). In assessing that

> **"120 ….it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether the purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts…"**

As Lord Toulson observed at paragraph 102 of his judgment:

> **"That trio of necessary considerations can be found in the case law."**

87. The Court of Appeal has subsequently considered the application of the observations of the Supreme Court in **Patel v Mirza** in the specific context of a contract of employment in **Okedina v Chilake** [2019] IRLR 905. In that case, the claimant claimed for wrongful dismissal and breaches of various statutory rights arising out of the contract of employment including,

amongst others, unfair dismissal and unlawful deductions from wages. The claimant was subject to immigration control. Statutory provisions prohibited the employment of such persons in specified circumstances (including the circumstances in that case). The Court of Appeal considered whether the statute rendered the contract unlawful. It also considered whether the contract was unlawful by reason of the way in which it was performed. The respondent had brought the claimant to the United Kingdom to work and applied for a visa for her. In the course of doing so, the respondent gave false information to the immigration authorities to obtain a six-month visa. The respondent then made an application in the claimant's name for an extension of the visa, having forged the claimant's signature, on the false basis that the claimant was a member of the respondent's family. That application was refused (and an appeal against the refusal was dismissed by the First-tier Tribunal). The claimant continued to work in the United Kingdom after the expiry of the visa. The claimant relied upon the respondent to sort out the visa and was not involved in the provision of false information and did not know of, or participate in, the appeal. The employment tribunal found that the claimant had not knowingly engaged in any illegal performance of her contract and was not barred from enforcing the contract. The respondent appealed contending that the employment tribunal had not carried out the analysis of the relevant factors contemplated by the majority of the Supreme Court in ***Patel v Mirza***. Underhill L.J. with whom the other members of the Court of Appeal agreed, dismissed the appeal. He said that:

> **"In his judgment in *Patel v Mirza* Lord Toulson was attempting to identity the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous case-law except where such an application is inconsistent with those principles. In the case of a contract of employment which has been illegally performed, there is nothing in *Patel v Mirza* inconsistent with the well-established approach in *Hall* as regards 'third category' cases. As Mr Reade puts it, *Hall* is how *Patel v Mirza* plays out in that particular type of case. Accordingly, the ET was quite right to treat its findings about the claimant's 'knowledge plus participation' as conclusive and the EAT was right to endorse that approach".**

The Period Between 2007 and 1 July 2014.

88. The essential basis of the employment tribunal's finding on illegality in this case is that the contract was being performed illegally and the claimant was not entitled to enforce it. Income tax on the remuneration paid under the contact was not declared or paid to HMRC for seven years. The contract provided for payment of a management fee to the claimant of £34,000 a year and expressly provided that the claimant would be responsible for tax on that payment. The claimant decided not to declare the income and not to pay tax. The respondent, in fact, knew nothing of that until the claimant told his adviser in about late January 2014. The claimant, therefore, knowingly performed the contract illegally, that is, she worked and was paid, knowing that tax was not being declared or paid on her earnings. The employment tribunal's approach to matters in the period 2007 to 2014 does not demonstrate any error. The fact that the employment tribunal used the established principles set out in cases involving illegally performed contracts of employment did not involve any error of law, or any failure to have regard to the considerations that ***Patel v Mirza*** would consider relevant.

89. In the context of claims for unfair dismissal, the Employment Appeal Tribunal has already considered the question of whether the policy underlying not enforcing contracts being performed illegally is outweighed by the policy underlying the creation of a right not to be unfairly dismissed. The Tribunal emphasised the importance of parties performing the contract in accordance with the law and stated that "Parliament never intended to give the statutory rights provided for by the relevant employment legislation to those who were knowingly breaking the law by committing or participating in a fraud on the revenue" see **Newlands v Simon & Willer (Hairdressing) Ltd**. [1981] ICR 521 at page 533. There may be arguments as to whether or not there are other policy considerations relating to dismissal treated as

automatically unfair because the reason for dismissal is the making of protected disclosures by an employee. It is not necessary to consider that issue here as the dismissal was not for that reason. In terms of relevant factual considerations, the courts do consider whether the degree of knowledge and participation of the employee (and, indeed, other facts such as whether any representations were made to HMRC as to the status of the contract were made in good faith: see e.g. **Enfield Technical Services Ltd. v Payne** [2008] ICR 1423) was sufficient to bar the employee from enforcing the contract of employment or statutory rights arising out of it. Those are the very sorts of considerations that would be considered under the approach identified in **Patel v Mirza** in cases involving contracts of employment as recognised in **Okedina** at paragraph 62.

90. Ms Williams submitted that the observation of Underhill L.J. in **Okedina** depended on the particular facts of that case. First, the observations were not limited in that way. Secondly, the range of considerations referred to in the case law do encompass the range of considerations that would be relevant to "keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality" to use the words of Lord Toulson at paragraph 101 of his judgment in **Patel v Mirza**. Thirdly, and separately, on the facts of this case, there were no other circumstances relevant to the period 2007 to 1 July 2014 which could, on any analysis, have led to a different conclusion.

The Period 1 July 2014 to 9 May 2017

91. The difficulty with the employment tribunal's decision on the issue of illegality arises out of its consideration of the period after 1 July 2014. The claimant was not dismissed once the

illegality for which she was responsible came to light. She was employed for a further three years.

92. The case law recognises that even if an employee has done illegal acts during the performance of the contract he or she may, nonetheless, be able to rely on the contract subsequently to enforce contractual rights. The question arose in **Coral Leisure Group v Barnett** [1981] ICR 503. There, the employee was employed as part of the team promoting a casino by retaining existing customers and finding new customers. A month or so after he was employed, he said that he was told to arrange for prostitutes to provide services to customers. At a preliminary stage, the question arose as to whether, if the employee had done that at some stage, he was precluded thereafter from ever enforcing the contact and claiming for unfair dismissal. The Employment Appeal Tribunal held that:

> **"The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of his performance) is prohibited by law. Applying that test to the present case, the fact that the employee procured and paid prostitutes in the course of carrying out his employment does not (if proved) prevent him from asserting that he was employed thereafter by the employers since, on the facts pleaded, he did not enter their employment with the intention of procuring prostitutes and there is no statutory or common law prohibition against the contract of employment by itself. Therefore the taint of illegality does not preclude the assertion by the employee of his contract of employment against the employers."**

93. That decision was cited and considered correctly to state the law by Peter Gibson L.J. in **Hall v Woolston Hall Leisure Ltd**. [2001] ICR 99 at paragraph 38.

94. In the present case, the employment tribunal did not consider or identify the illegal conduct in which the claimant knowingly participated after 1 July 2014 which would disentitle her from being able to enforce the contract, and the right not to be unfairly dismissed, when she was dismissed in May 2017. From July 2014, it was realised by both the claimant and the

respondent that income tax and national contributions in respect of the claimant's remuneration would need to be accounted for. There was disagreement between them as to whose responsibility it was to deduct the relevant amounts and pay them to the revenue. The claimant said that she was employed under a contract of employment and that it was the respondent's obligation. The respondent contended that she was self-employed and that it was her responsibility. To ensure that the money was available, the respondent deducted an amount equivalent to tax and national insurance contributions from the claimant's monthly pay and paid that into a bank account with a view to it being paid to the revenue. The employment tribunal ultimately held that the claimant was an employee and, consequently, the respondent was responsible for deducting income tax and national insurance contributions. As the decision of the employment tribunal records, the respondent thereupon undertook to pay the retained sums to HMRC.

95. The employment tribunal also does not address the question of whether the claimant's earlier conduct (prior to 1 July 2014) justified not allowing her to enforce her contractual and statutory rights when she was dismissed almost three years later. For those reasons alone, the decision of the employment tribunal on illegality is flawed.

96. Mr Laddie submitted that the employment tribunal did consider the position after 1 July 2014 in paragraph 104 of its judgment set out at paragraph 28 above. That paragraph, however, considers the question of whether or not the respondent was in some way at fault when he was advised that the claimant was an employee and he did not then set up a PAYE scheme for her and other staff. That involves consideration of the respondent's responsibility. The employment tribunal concluded that any illegality in relation to the arrangements for deduction of tax from

staff wages would not "cure the claimant's own failure to pay tax on any basis". The question that the employment tribunal should have considered is, however, a different one. The question was whether the claimant had knowingly participated in the illegal performance of the contract after 1 July 2014 and, if not, whether she should be precluded from enforcing her rights when she was dismissed in May 2017. The employment tribunal did not address that issue and did not consider the claimant's conduct after 1 July 2014.

97. Mr Laddie further submitted that the claimant was still acting illegally even after 1 July 2014. He submitted that she fraudulently, and dishonestly, alleged that the agreement was that she would receive £34,000 (later £37,000) net and that the respondent was responsible for paying any tax due over and above that amount. First, there is no finding by the tribunal that the fact that the claimant (wrongly) claimed that the remuneration was net, rather than gross, gave rise to any illegality in the performance of the contract such as to preclude the claimant from being able to enforce it. Secondly, and in truth, the conduct (however characterised) was a claim for payment of more money than the claimant was entitled to under the contract. She was entitled to £34,000 (later £37,000). She wanted to receive more, i.e. a sum sufficient to meet her liability for tax and national insurance contributions on that amount. The fact that the claimant was claiming that she was entitled to be paid more money than in fact she was entitled to does not amount to illegality in the performance of the contract. The claim to be paid more money does not mean that she illegally performed the contract between 1 July 2014 and May 2017 when she worked and received the amount contractually agreed.

98. I have considered whether the question is one that should be remitted to the employment tribunal for consideration or whether there is, in truth, only one answer to the

question. There is no reasonable basis upon which an employment tribunal could conclude that it was required as a matter of public policy in May 2017 to refuse to allow the claimant to enforce the contract of employment, and rights arising out of it, because of the events that had occurred before 1 July 2014. The respondent would have to identify (the burden being on him) the way in which the claimant knowingly participated in the illegal performance of the contract after 1 July 2014. On the facts, there could not be said to be such illegality after the 1 July 2014. There was a dispute between them as to whether she was an employee or self-employed and who was responsible for deducting income tax and national insurance. In fact, the respondent was responsible as the claimant was an employee. There was a continuing refusal by the claimant to accept that the tax and contributions had to be taken out of her agreed remuneration of £34,00 (later £37,000) but that did not lead to the illegal performance by her of the contract. Furthermore, the prospect of any money not being paid to the revenue was avoided by the fact that the respondent did, in fact, deduct sums equivalent to the amount of tax and contributions thought to be due. In those circumstances, there is no basis for concluding that there was illegality in the performance of the contract after 1 July 2014 which would justify refusing to allow the claimant to enforce the contract and the statutory rights arising out of it.

99. The alternative basis upon which the claimant seeks to achieve the same result is by the concept of severance. That is, the claimant seeks to sever the period of illegal performance (March 2007 to 1 July 2014) from the later period, in the way that Elias J., as he then was, sought to do in **Blue Chip Trading Ltd. v Helbawi**. There, for certain periods of the year, a student worked in breach of the terms of his student immigration visa by working more than 20 hours a week in term. On other periods (particularly during vacations where there was no limit on the hours that could be worked and also in one particular year), he worked in accordance

with the terms of his immigration visa. The Employment Appeal Tribunal considered that it could not condone the illegality by allowing the claimant to recover in full for all the hours worked. However, it did not consider it right to treat the whole matter as involving illegal performance rendering the contract unenforceable thereby depriving the claimant of any right to claim for the periods of work which were not carried out illegally. The Employment Appeal Tribunal considered that it was an appropriate case for severance so that the claimant could recover in respect of periods when he did not work in excess of the permitted period. For the reasons given, I would deal with this case on the basis that the respondent has not identified any illegal conduct in the period after 1 July 2014 which would justify refusing to enforce the contract and the conduct before then did not justify refusing to enforce the contract almost three years later. If that conclusion were wrong, however, I would have severed the periods of illegal performance from those where there was no illegality as was done in **Blue Chip Trading Ltd**.

The Consequences of those Conclusions

100. In the result, the claimant was entitled to bring a claim for wrongful dismissal and unfair dismissal in May 2017. She would therefore be entitled to seek compensation for the 10 weeks of notice that she should have been given and compensation for the unfair dismissal. Subject to argument by the parties, on the findings of the employment tribunal, the latter would amount to compensation in terms of salary for the period of about one additional month when the respondent would have employed her pending a further meeting before dismissal.

101. There is also the question of the basic award for unfair dismissal. That is calculated by reference to a certain number of weeks' pay for each year of work subject to any reduction considered just and equitable because of the claimant's conduct. It is clear that the employment

tribunal would have considered it just and equitable to reduce the basic award by an amount referable to the years of service between 2007 and 1 July 2014. The tribunal considered that the claimant's conduct was such that it amounted to illegal performance of the contract and she should not be entitled to claim at all. For the reasons given, that conclusion is not sustainable in relation to the period after 1 July 2014. It is clear, however, that the employment tribunal would have concluded, and would have been entitled to do so, that the claimant's conduct between 2007 and 1 July 2014 was such that it would not be just and equitable for her to receive any basic award in respect of that period. The employment tribunal has not yet heard arguments about whether the basic award should be made for other periods.

102. For completeness I note that the alternative way of dealing with this case, namely severing the period of illegal performance from the period of lawful performance would lead to the same result. The claimant would not be able to recover any amount of the basic award for the period 2007 to 1 July 2014.

103. I will hear submissions from the parties as to the appropriate order to achieve give effect to the conclusions in relation to grounds 1 to 6, and the cross-appeal.

THE RESPONDENT'S APPEALS IN RELATION TO THE DECISIONS ON INTERIM RELIEF

104. Mr Laddie submitted that the order of Employment Judge Stewart granting interim relief against the respondent should be set aside. He submitted that the analysis of whether the claimant might be precluded from bringing a claim for automatic unfair dismissal by reason of the illegal performance of the contract was flawed. Further, as the claim had not succeeded on

its merits, there could be no basis now upon which the employment judge could appropriately order interim relief. Consequently, there was no need for this Tribunal to remit the matter to the employment judge. Alternatively, he submitted that the employment judge erred in refusing to reconsider the judgment granting interim relief. The application for reconsideration was made in time and, given that the employment tribunal had by then given its judgment on the merits of the claim, it was in the interests of justice to reconsider the decision granting interim relief. Ms Williams submitted that the employment judge was entitled to come to the conclusions that he did. In any event, if there had been an error, the matter should be remitted.

Discussion

105. Section **128** of **ERA** provides for applications for interim relief where the claimant presents a complaint of unfair dismissal and the alleged reason (or principal reason) for the dismissal is one of those specified in a number of statutes, including section **103A** of **ERA**, that is, that the employee made a protected disclosure. The statute contemplates that the application will be brought promptly and dealt with speedily as appears from sections **128(2), (3)** and **(5)** of **ERA** which provide;

> **"(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).**
>
> **(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.**
>
> **.....**
>
> **(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it satisfied that special circumstances exist which justify it in doing so".**

106. Section **129** of **ERA** applies where "it appears to the tribunal that it is likely that on determining the complaint" the employment tribunal will find that the dismissal was for one of the specified reasons (here, that the reason for the dismissal was the making of a protected

disclosure). The correct approach is for the employment tribunal to ask itself whether the employee has established that he or she has a "pretty good chance of succeeding" in his complaint of unfair dismissal: see **Taplin v C Shippam Ltd**. [1978] IRLR 450 at paragraph 23. If so, the employment tribunal will ask the employer if he or she is willing to reinstate or re-engage the employee pending the outcome of the claim. If not, the employment tribunal "shall make an order for the continuation of the employee's contract of employment": see section **129(9) ERA**. That, as provided by section **130(1) ERA**, is an order that the contract of employment continues in force "from the date of its termination … until the determination or settlement of the complaint" for the purposes of pay and other benefits and for determining the period for which the employee has been continuously employed. The employment tribunal must specify the amount of pay that must be paid.

The Decision to Grant Interim Relief.

107. Employment Judge Stewart first granted the application for interim relief by a decision sent to the parties on 26 September 2017. He found that the claimant had a pretty good chance of showing that she was an employee and that the reason for her dismissal was that she had made protected disclosures. No appeal was made against that finding. The employment judge ordered that the contract of employment continue and that the respondent should pay the sum of £3,083.33 a month (that sum being equivalent to the net monthly salary after deduction for income tax and national insurance). The order was set aside on appeal to the Employment Appeal Tribunal in part because the employment judge had not addressed the question of illegality.

108. The employment judge reconsidered the matter and granted the application. The basis for his conclusion was that if the claimant was responsible for paying tax on her earnings that would cause her to fall foul of HMRC but he could not see "that such a failure on her part makes the contract illegal". He referred to what he considered would be the analogous principle applicable to those who were self-employed but failed to declare income tax.

109. The decision of the employment judge does not begin to address the relevant issue of illegality and is wrong in its understanding of the position in relation to illegality. As is clear from the case law discussed above, a contract may be illegally performed if the tax due on remuneration paid under that contract is not declared and paid to HMRC. An employee may be unable to enforce a contract of employment, or rights arising under it, if he or she knowingly participates in that illegality. The issue for the employment judge to consider was whether the respondent (the burden being on him on this issue) had established a pretty good case that that was so. The employment judge did not address that issue. He assumed, wrongly, that responsibility on the part of the claimant for non- payment of tax could not affect the ability of the claimant to enforce the contract against the respondent but only affected relations between the claimant and HMRC. The order must therefore be set aside.

110. It is clear that, at the interim stage, the employment judge might have found that the respondent had established (on the evidence and arguments advanced at that preliminary stage) that the claimant was precluded by illegality from bringing a claim. Or it might have concluded that the respondent had not established such a case. The issue was difficult (as appears from the fact that, after full argument, the employment tribunal reached one conclusion and this Tribunal has reached a different conclusion).

111. The question now, however, is whether the application for interim relief should be remitted again to the employment judge for reconsideration given that the employment tribunal has already determined the complaint. There is, in my judgment, no reason for remitting the application as, now, the employment judge could only come to one conclusion, namely to refuse interim relief. The reasons for that conclusion are as follows.

112. An application for interim relief is intended to preserve matters pending the outcome of the complaint by the claimant that (in this case) the reason for dismissal was the making of protected disclosures. That appears from the nature of the order that a tribunal may make. As section **130** of **ERA** provides, it is an order providing for the continuation of the contract from the date of its termination "until the determination or settlement of the complaint". The provisions governing the making of the order presuppose that the tribunal has not yet dealt with the substantive complaint and the employment tribunal, at the interim stage, is necessarily seeking to evaluate as best it can whether the claimant has established the likelihood to the requisite degree of succeeding at the hearing of the complaint. That conclusion is reinforced by the time limit of seven days for bringing an application and the fact that the employment tribunal is under a duty to determine the application as soon as practicable after receiving it and cannot exercise any powers of postponement save in special circumstances justifying such a course. The whole structure of the statutory provisions, and their wording, presuppose that the application will be dealt with quickly and any order made before the decision on the substantive complaint.

113. In the rare, perhaps unique, circumstances of this case, the outcome of the hearing of the complaint of dismissal for making protected disclosures is known. The claimant was not

dismissed for that reason. In those circumstances, there could be no proper justification for making an order now for the continuation of the contract of employment in the period between the dismissal in May 2017 and the determination of the tribunal in November 2018.

114. Ms Williams submitted that the matter should be remitted. The claimant is entitled to a lawful determination of her application. She drew attention to the fact that where an order is made, but the employment tribunal subsequently reaches a different conclusion at the hearing of the complaint, there is no provision for the employer to recover the money paid under the order as appeared from the decision of the Employment Appeal Tribunal in **Initial Textile Services v Rendell** handed down on 23 July 1991. She relied also on the judgment in **Dandpat v The University of Bath and TUV Product Services Ltd**., handed down on 10 November 2009. Consequently, she submitted that the employment judge should now be asked to reconsider the matter. If he grants the application and orders that the contract of employment be continued between the date of dismissal and the determination of the complaint in November 2018, with the consequent obligation to make a monthly payment of £3,083.33 until then, that is inherent in the legislation and the claimant should not be deprived of the possible benefit of such a decision.

115. In my judgment the cases relied upon deal with the situation where the application is heard and granted before the complaint is finally determined by an employment tribunal. They recognise that if an order is made but the claimant ultimately loses her claim, the employer will have had to pay money and that may be irrecoverable. But that does not deal with the unusual, possibly unique, situation here where the outcome of the complaint is known at the time that the employment judge comes to consider the application for interim relief. That application is

intended to enable the tribunal to preserve the position before a decision is reached; it is not meant to enable the claimant retrospectively to insist upon the application being considered without regard to the fact that it is known at the time that the ultimate complaint will fail. The application here would necessarily be dismissed as, given that the claim is known to have failed, the employment tribunal could not possibly grant the application. It could not, in 2020, consider that the claimant had a pretty good chance of establishing that she was dismissed for making protected disclosures. The fact that an employment judge might, legitimately, have reached that conclusion in 2018 or 2019 does not affect matters. If the matter were remitted, the employment judge would be considering the application in 2020. It would be known that the claimant was not dismissed for that reason. For that reason, the order of Employment Judge Stewart of 9 November 2018 will be set aside and the matter will not be remitted for reconsideration.

The Refusal to Reconsider the Judgment

116. The respondent applied to the employment judge for a reconsideration of the decision granting interim relief under rule **70 of the Rules of Procedure** which provides that:

> **"70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again".**

117. An application for reconsideration must be made within 14 days of the date when the original decision was sent to the parties (or of the date when written reasons were sent if later). In the present case, the decision was given to the parties on 13 November 2018. The decision of the tribunal on the claim itself was sent to the parties on 26 November 2018. That meant that the respondent was able to make an application to reconsider within 14 days of the 13

November 2018, that is the date when the original decision of Employment Judge Stewart granting the application was sent to the parties.

118. The essential reasoning of the employment judge is contained in paragraph 10 of his judgment, set out at paragraph 36 above, where he considered that the concept of reconsidering a judgment regarding interim relief was not broad enough to justify the variation of that judgment on the basis of the eventual dismissal of the claim.

119. The employment judge erred in his conclusion on the particular facts of this case. As indicated, the purpose of an interim application under section **128** of **ERA** is to enable the employment tribunal to preserve the position pending the final determination of the tribunal on the claim in certain circumstances. Where that decision is known, it is permissible in the interests of justice to reconsider the decision on interim relief in the light of the decision on the complaint if the relevant procedural rules on time-limits permit. In most, perhaps almost all, instances that would not be possible as applications for reconsideration must be made within 14 days of the decision and, generally, the decision on the application for interim relief will be made well in advance of the decision on liability. That will generally be the position given the short time permitted for making the application and the obligation to deal with the application as soon as reasonably practicable. It is only in the unusual circumstances of this case where the decision on liability came within 14 days of the decision on interim relief that an application for reconsideration is likely to be feasible. If that occurs, then it is open to an employment tribunal to conclude that it is in the interests of justice to reconsider the interim relief decision. Indeed, if that were not possible, the likelihood is that there would be injustice. The respondent would be compelled to comply with an order and pay money (here for a lengthy period of time) which is

irrecoverable even though the premise on which the order was made transpired, within a very short period of time, to be incorrect.

120. I would therefore set aside the order refusing to reconsider the decision granting interim relief. As the order to which it relates has been set aside, and the matter is not be remitted to the employment judge, no purpose would be served in remitting the application for reconsideration.

CONCLUSION

121. The employment tribunal was entitled to find that the reason for the dismissal was not the making of the protected disclosures but the fact that the claimant wanted the respondent to pay her tax bill. It was also entitled to conclude that any detriment to which the claimant was subjected was not materially influenced by the fact that she had made protected disclosures. It erred in concluding that the claimant was precluded, by reasons of public policy, from presenting a claim for wrongful dismissal and unfair dismissal following her dismissal in May 2017. Any illegal performance of the contract of employment for which the claimant was responsible had ended by 1 July 2014. Those actions did not justify the refusal subsequently, after almost three more years of employment, to allow the claimant to enforce the contract and any statutory right arising in connection with it.