Appeal No. UKEAT/0244/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 February 2020
Judgment handed down on 21 February 2020

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

MRS GINA LECLERC — APPELLANT

AMTAC CERTIFICATION LTD. — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MRS GINA LECLERC (The Appellant in Person)
For the Respondent	MR KEVIN CHARLES (of Counsel) Instructed by: Crossland Employment Solicitors 99 Park Drive Milton Park Abingdon Oxfordshire OX14 4RY

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

VICTIMISATION DISCRIMINATION – Protected disclosure

The respondent employer was one of five bodies responsible for assessing the technical documentation and quality managements systems of manufacturers of medical devices to ensure compliance with regulations and certifying that the medical devices were fit for purpose, safe and effective. The claimant was employed as a technical reviewer. She was dismissed and alleged that she had been subjected to a number of detriments. She alleged that that occurred because she had made protected disclosures within the meaning of section 43A of the **Employment Rights Act 1996** ("**ERA**"). The employment tribunal found that a number of the statement relied upon were not qualifying disclosures as they did not contain information tending to show one of the matters referred to in section 43B of **ERA**. The claimant appealed on the basis that the employment tribunal had construed the boundaries of a qualifying disclosure too narrowly.

In order for a statement to be qualifying disclosure within the meaning of section 43B **ERA**, "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 **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 at paragraph 35. Further, there is no rigid distinction between an allegation and information as sometimes a statement which can be characterised as an allegation will also constitute information and amount to a qualifying disclosure: see **Kilraine** at paragraph 31. In the present case, the employment tribunal did not draw the boundaries of qualifying disclosures too narrowly. It was well aware that a statement making an allegation was also capable in principle of containing information amounting to a qualifying disclosure. On the facts, the employment tribunal found that the particular disclosures in issue did not contain information

tending to show one of the matters in section 43B of the **ERA**. It was entitled to reach that conclusion on the evidence before it.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. This is an appeal by the claimant against a decision of the employment tribunal, Employment Judge Heal, Mrs Bosnan and Mr Sutton, given orally on 27 July 2018. Written reasons for the decision were provided on 8 November 2018. The part of the decision which is the subject of this appeal concern the dismissal of the claimant's claim that she had been subjected to detriments following the making of public interest disclosures, that is disclosures said to fall within the scope of section 43A of the **Employment Rights Act 1996** ("**ERA**").

2. There are two grounds of appeal. First, it is said that the employment tribunal erred in finding that 12 specific disclosures did not amount to qualifying disclosures for the purposes of section 43B of **ERA**. The 12 disclosures are listed in the Notice of Appeal. Secondly, it is said that, having wrongly determined that the disclosures were not qualifying disclosures, the employment tribunal commenced its consideration of whether the claimant was subjected to the alleged detriments on the grounds that she had made protected disclosures on an erroneous basis.

THE FACTS

3. The facts are set out in detail in the decision of the employment tribunal dated 8 November 2018. What follows is a brief summary of those facts that are material to this appeal. The respondent is one of five notified bodies in the United Kingdom. The role of such a body is to assess technical documentation and the quality management systems of manufacturers of medical devices to ensure compliance with relevant regulations. The

respondent determines whether to certify a device as fit for purpose, safe and effective. If the respondent grants a certificate the manufacturer is able to place the certified device on the market in the European Union. There is a competent body in the United Kingdom, known as the MHRA, which, amongst other things, performs assessments of the competence and performance of notified bodies and is responsible for designating notified bodies as authorised to certify devices.

4. The respondent employs technical reviewers whose role involves the technical assessment of safety and quality information in order to make recommendations as to whether applications for certificates should be approved or rejected. Once a device has been reviewed by a technical reviewer, a further review by an independent reviewer is carried out. That independent reviewer is also employed by the respondent.

5. Prior to her employment with the respondent, the claimant had been employed by a different notified body in other roles. From 20 October 2014, she was employed by the respondent as a technical reviewer and auditor. The letter of appointment stated that the claimant had no contractual right to overtime. The respondent's handbook also deals with overtime and the section set out at paragraph 36 of the employment's tribunal decision provides, amongst other things, that overtime must only be undertaken in those cases where a task could not be completed within normal working hours and where specific managerial agreement has been obtained. It says that casual overtime and overtime which is not properly authorised will not be recognised for reimbursement.

6. The employment tribunal decision describes the training undertaken by newly appointed technical reviewers and auditors. It describes in detail the mentoring arrangements put in place

for the claimant. The employment tribunal notes that the claimant's probationary period expired on 20 January 2015 and her employment was confirmed in default in the sense that it was continued but no formal process was undertaken or written confirmation provided. The employment tribunal records the difficulties that it found had occurred during the claimant's employment with the respondent. It records that the respondent had decided to dismiss the claimant by 10 August 2016. A meeting took place on that date and she was informed of the outcome, that is that her employment was terminated with effect from 10 August 2016, because the claimant was not considered to be up to the required standard. By letter dated 23 October, the claimant presented a 23-page grievance to the employer. This was investigated.

The Proceedings before the Employment Tribunal

7. By a claim form presented on 25 January 2017, the claimant claimed, amongst other things, that she had made protected disclosures (that is, qualifying disclosures within the meaning of section 43A of **ERA** made in accordance with relevant provisions of **ERA**). She claimed that she had been dismissed or subjected to detriments for making such disclosures. The employment tribunal heard a number of witnesses over a number of days. It was provided with four lever arch files comprising 1,991 pages and received supplementary bundles from the respondent and the claimant, and further documents, during the hearing. The employment tribunal spent one morning on the third day of the hearing going through with the claimant the documents that she said contained protected disclosures. The employment tribunal noted that, if it had not done that, the claimant would have been at real risk of failing to prove her case as her witness statement did not identify the disclosures she relied upon as protected disclosures.

8. The employment tribunal set out what it called a "concise statement of the law". It dealt first with the need for there to be a disclosure of information and said:

> **"15. In order to establish that she has made a public interest disclosure, a claimant must first show that there has been a disclosure of information. It is not sufficient that the claimant has simply made allegations about a wrongdoer. The ordinary meaning of giving information is conveying facts. Sometimes there are mixed cases however of mixed primary facts and opinion which on balance can still qualify as disclosures of information. Just because something contains allegations does not mean that it does not also contain information. The question is simply whether it is a disclosure of information."**

9. Then the employment then summarised the requirements that a claimant must believe that the disclosure was in the public interest at the time of making it and that there were reasonable grounds for that belief. It noted that an employee would have been automatically unfairly dismissed if the reason, or the principal reason, for dismissal was the fact that the employee had made a protected disclosure. It noted that an employee had a right not to be subjected to a detriment on the grounds that the employee had made a protected disclosure. It noted that the test there was whether the making of a protected disclosure materially influenced the employer's treatment of the employee.

10. The employment tribunal sets out the 17 disclosures at various paragraphs of its decision. It then analysed each of the 17 disclosures. It began its analysis with the following consideration of the respondent's case:

> **"193. The respondent argued that because many of the various disclosures were carried out as part of the nature of the claimant's work, they were not protected disclosures: she was simply doing her work. We disagree. There is no exception in the 1996 Act for a disclosure carried out as an integral part of the worker's work. We think that it was in the very nature of the claimant's work that she would potentially make protected disclosures. Her job involved, by its very nature, communicating information about possible issues which would carry a real risk to health and safety or might involve breaches of legal obligations.**
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> **194. So, we do not accept that it was not possible for the claimant to be making protected disclosures, just because she was carrying out her work. However, given that she was employed to communicate information relevant to health or safety, we think that may lessen the likelihood that this employer would subject her to detriment or dismiss her because of any disclosure intrinsic to her performance of her work. We think this because we have found the employer to be carrying out its functions with integrity. We think it supports appropriate disclosures about health and safety risks that arise as part of its service to clients."**

11. The employment tribunal then analysed the 17 disclosures at paragraph 195 referring back to the paragraphs in its decision where it had set out the disclosure. In summary, the employment tribunal found that:

(1) 10 of the alleged protected disclosures did not contain information tending to show one of the matters referred to in section 43B of **ERA;**

(2) three of the alleged disclosures had not been made;

(3) two of the disclosures did contain information (about overtime payments and the risk to the claimant of travelling alone at night following completion of an audit) but concluded that the claimant did not make the disclosure because she believed it was in the public interest to make it. Rather, it was made in connection with her wish to be paid overtime;

(4) Part of one disclosure was a disclosure of information which tended to show a breach of a legal obligation (the obligation to ensure adequate labelling and instructions for use of a medical device) and was made the claimant had a reasonable belief that it was in the public interest to make that disclosure;

(5) one alleged disclosure was the 23 page grievance letter.

12. In relation to the 23 page grievance letter, that wad dated and presented on 18 October 2016, that is after the claimant had been dismissed. The allegation was that the respondent had not investigated the grievance. It was said this constituted subjecting her to a detriment. The employment tribunal found that the respondent did investigate the grievance. Consequently, whether or not the grievance contained any protected disclosure, she had not been subjected to any detriment because of it. It was not, necessary, therefore, to analyse the 23 page grievance in detail to assess whether it contained protected disclosures.

13. At paragraph 196, the employment tribunal said:

> **"196. The claimant has made one protected disclosure (2.7 above). However, we have been able to make clear findings about the causes of the dismissal and the alleged detriments. For the reasons given below we do not find that the dismissal or the detriments were caused by the protected disclosure proved or indeed any of the alleged disclosures, whether protected or not. Even if we were wrong about any of the above findings rejecting the claimant's other alleged disclosures, we would still find that she was not dismissed or subjected to detriment because of any of the alleged disclosures……."**

14. The employment tribunal then turned first to dismissal at paragraph 197 of its decision. It said this:

> **"*Dismissal***
>
> **197. We have found as a fact that the sole reason for the claimant's dismissal was that put forward by respondent: her poor performance. The reasoning was that set out in Mr Bradbury's e-mail of 31 July 2016 which we have accepted as authentic. (Indeed, the claimant did not event put to Mr Bradbury that he had dismissed her because of the any of her alleged disclosures, even though she was prompted to do this by the tribunal.). Therefore, the reason for the dismissal was not any alleged disclosure, whether qualifying or not."**

15. The employment tribunal then turned to the eight detriments to which the claimant said that she had been subjected. They considered that at paragraphs 198 to 207. It found that:

(1) two of the things alleged to be detriments had not taken place;

(2) four of the things had occurred (two in full and two in part) and were detriments but the decision to subject her to these detriments was not materially influenced by any disclosure that the claimant had made;

(3) two of the things had taken place but did not constitute detriments.

16. The other matters dealt with by the employment tribunal are not relevant to this appeal.

THE APPEAL

17. There are two grounds of appeal, namely:

> **"Ground 1: The ET erred in law in finding that the 12 disclosures referred to below did not amount to qualifying disclosures for the purposes of s.43B ERA 1996. In particular the finding that the said disclosures did not contain information, the ET construed the boundaries of a qualifying disclosure too narrowly in light of Cavendish Munro Professional Risks Management Ltd. v Geduld 2010 ICR 325 and Kilraine v London Brough of Wandsworth 2018 ICR 1850."**

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> The 12 disclosures relied on appeal are set out in a table identifying them by reference to page and paragraph numbers in the employment tribunal decision and by description. Five of the 17 disclosures were no longer relied upon.
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> **"Ground 2: By reason of the wrong categorisation of the Claimant's disclosures as falling outwith s.43B, the ET erred in law in its approach to determining whether the detriments alleged occurred on the grounds of having made a protected disclosure.**
>
> **"2. The ET's findings in relation to detriments are at paragraphs 198-207 of the judgment of the ET at pages [37-39]. It is the Claimant's case that, having wrongly determined that the disclosures she made were not qualifying disclosures, the ET thereby commenced its determination of the causation of the detriment on an erroneous basis Shortly put, a qualifying (and protected) disclosure is more likely to engender a negative response in an employer than a disclosure which contains no information."**

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18. At the outset of the appeal, the claimant, who represented herself, applied to make what she described as a correction to paragraph 2 of Ground 2. She said that it was intended to cover both dismissal and detriments and that paragraph 2 should refer to paragraph 197- 208 (not 198-

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207). The clamant had in fact raised that issue at paragraph 87 on page 85 of her written skeleton argument. She said that dismissal was one form of detriment and the intention was that the ground of appeal was intended to refer to both. I did not accept that contention. It is

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clear that the decision of the employment tribunal dealt separately with dismissal and with detriments. That reflects the statutory provisions. Section 103A **ERA** provides that a dismissal is automatically unfair if the reason, or the principal reason, for dismissal is that the employee made a protected disclosure. Section 47B of **ERA** provides that a worker has the right not to be

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subjected to a detriment done on the ground that the worker has made a protected disclosure. It is usual to deal with dismissal and detriment separately. That is what the employment tribunal did. That is reflected in the language of Ground 2 and explains the reference to paragraphs 198

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to 208 of the decision as it was in those paragraphs that the employment tribunal dealt with detriments. The claimant was therefore seeking to expand the appeal beyond the grounds which had been allowed to go forward. There was no basis for allowing her to do so. There is

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no arguable basis that the finding of the employment tribunal on dismissal is wrong. It heard

A the evidence and concluded that the employer had shown that the reason for dismissal was not any disclosure made by the claimant. There is no basis for any challenge to that finding.

B 19. Three other matters arise in connection with the appeal. First the written reasons given for allowing the two grounds of appeal said that the claimant "could not lodge a skeleton argument running to some 112 pages as she done at the r.3(10) hearing" and that the point allowed to proceed on appeal "should be capable of being addressed in 12 pages of double paced text with font at size 12ppt.".

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20. In fact, the claimant did not follow those instructions. She produced a skeleton D argument which was 194 pages long, with two attachments, one running to 40 pages (containing extracts from statutes and case law) and the second running to 91 pages (largely analysing the disclosures). The total length of the skeleton argument and attachments was 325 pages. That was excessive. Much of it was irrelevant to the appeal and much was repetitive. It E took many hours of reading in advance of the hearing. On this occasion, the Tribunal was able to and did make time to read this material so the claimant has not suffered any detriment. If claimants in future provide material of that length, particularly when advised not to, they cannot F reasonably expect that the Tribunal will be able to allocate the hours necessary to reading the material.

G 21. Secondly, the written reasons indicated that ½ a day would be allocated for oral submissions and ½ a day for judgment preparation. Th hearing started at 10.30 a.m. At the hearing, the claimant was initially allocated up to 11.50 a.m. for oral submissions. In fact, and given some time was taken in answering questions, the claimant was allowed to continue until H 12.20. The respondent then had 20 minutes for oral submissions. The claimant then had 20

minutes to reply. Of the 2 and ½ hours available for oral argument, the claimant therefore had 2 hours and 10 minutes. I am satisfied that the claimant had all the necessary time to make her points on the two grounds of appeal. Given the amount of material provided, and the need to consider the tribunal's decision and analyse the 12 disclosures, it was not possible to complete a judgment in half a day. That task has taken some time to complete. In the event, it has been possible to produce a relative short judgment which deals with the principal points made, and avoids unnecessary length, by summarising or referring to the relevant parts of the employment tribunal's decision.

22. Thirdly, both parties confirmed that the employment tribunal had been given copies of the judgments in **Cavendish Munro Professional Risks Management Ltd. v Geduld** [2010] ICR 325 and **Kilraine v London Brough of Wandsworth** [2018] ICR 1850."

GROUND 1 – WHETHER THE 12 DISCLOSURES AMOUNTED TO PROTECTED DISCLOSURES

Submissions

23. Ms Leclerc relied upon the principal point set out in ground 1, namely that the employment tribunal had drawn the boundaries too narrowly in determining what constituted information for the purposes of determining whether a protected disclosure had been made. She submitted that the employment tribunal should have had regard to the context in which the statements were made, namely, that the respondent was one of five bodies responsible for assessing whether medical devices complied with regulations and certifying that they were safe. The material in the disclosures were, therefore, she submitted, likely to tend to show that one or more of the matters referred to in section 43B of **ERA** had occurred (e.g., a criminal offence had been or was likely to have been committed, a person was failing, or was likely to fail, to

comply with a legal obligation, or the health and safety of an individual was likely to be endangered). Ms Leclerc submitted that the context included the fact that the five notifying bodies were, in effect, competing against each other and seeking to induce manufacturers to use their services. In her view, this increased the risk that the notified bodies would overlook failures to comply with regulations and reinforced her clam that the material she submitted to the respondent involved information was likely to be within the definition of protected disclosures. She also dealt with these points at parts of her written submissions: see, by way of example only, paragraphs 1 to 22 at pages 1 to 12 of the second attachment to her skeleton argument and see paragraphs 53 and following at pages 29 and following of her skeleton argument. Ms Leclerc also submitted that the employment tribunal had made an error of law because some of the disclosures were incorrectly set out in its written decision. Part of the hearing involved going through some of the disclosures and comparing the text of the document with the text as set out in the employment tribunal's decision. The second attachment to the skeleton argument set these out in full, setting out the text of the document as set out in the employment tribunal decision, then the actual text of the document with the differences underlined. Ms Leclerc also submitted orally that the employment tribunal had not dealt with one of the passages of a document that she said amounted to a protected disclosure.

24. In succinct submissions, Mr Charles submitted that the employment tribunal did not fix the boundaries of protected disclosures too narrowly. It had been provided with the decision in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850. Its concise statement of the law did adequately deal with the issue. He submitted that paragraph 15 of the decision demonstrates that the employment tribunal were not drawing a rigid distinction between allegation and information and reflects, for example, paragraphs 30 to 31 of the decision in **Kilraine**. Further, he submitted that the employment tribunal was well aware of the context in

which the disclosures had been made as appeared, for example, from paragraph 193 of its decision.

Discussion

25. 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 [F2 is made in the public interest and] tends to show one or more of the following –**
>
> **a. that a criminal offence has been committed, is being or is likely to be committed,**
>
> **b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **c. that a miscarriage of justice has occurred, is occurring or is likely to occur,**
>
> **d. that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **e. that the environment has been, is being or is likely to be damaged; or**
>
> **f. that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**

26. There a number of requirements that must be before a disclosure is a qualifying disclosure. These include, but are not limited to, the following. 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 London Borough of Wandsworth** [2018] ICR 1850 at paragraph 35.

27. 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 Nurmohammed** [2018] ICR 731 at paragraphs 27 to 30 (with whose reasoning Beatson L.J. and Black L.J., as she then was, agreed).

28. In the present case, the employment tribunal did approach its task with a proper understanding of the law. It was well aware of the observations in **Kilraine**. In his judgment, Sales L.J said that there was not a rigid dichotomy between information and allegations. He said at paragraph 31 of his judgment that:

> **"31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amount to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."**

29. Paragraph 15 of the decision of the employment tribunal reflects those observations. The employment tribunal noted that it was not sufficient simply to make allegations. A disclosure had to convey facts. It noted that sometimes there are "cases of mixed primary facts and opinion which on balance can still qualify as disclosures of information". In other words, it expressly stated that there could not be a rigid distinction between allegations and information because, sometimes, a statement will contain both. It noted that "Just because something contains allegations does not mean that it does not also contain information". That confirms that the employment tribunal were aware that a statement may contain allegations but could also include factual information capable of falling within the definition of a protected disclosure.

30. Furthermore, it is clear, reading the decision as a whole, that the employment tribunal well understood the context it which it was said that these disclosures should be considered. It was aware that that medical devices had to satisfy certain legal requirements (see paragraph 23 of the decision). It was aware that the respondent was one of five notified bodies responsible for assessing medical devices and certifying whether a device was "fit for its purpose, safe and effective" (see paragraph 24 of its decision). It knew that a manufacturer could chose which notified body it wished to use (see paragraph 25 of its decision). It knew about, and described, the role of, technical reviewers. It knew that the claimant was employed to communicate information about health and safety (and rejected the respondent's argument that, because of that, it was not possible for the claimant to make protected disclosures): see paragraphs 193 to 194 of its decision.

31. Consequently, the employment tribunal did not construe the boundaries of a qualifying disclosure too narrowly. It knew the context. It then considered the contents of each statement said to amount to a protected disclosure. It held, as it was entitled to on the evidence, that part of one disclosure was a protected disclosure. It concluded, having carefully considered the statements in the context in which they were made, that the remainder of that statement, and 10 other statements, did not contain information. That is, the employment tribunal concluded that they did not have sufficient factual content and specificity (using the words of Sales L.J. in **Kilraine**). The employment tribunal was entitled to reach that conclusion on the evidence before it in relation to those disclosures. In fact, it appears that only nine of those 11 are the subject of appeal and two (disclosure 7 and disclosure 16) are not being relied upon.

32. For completeness, I note that the employment tribunal found that three of the alleged disclosures were not in fact made and there is no appeal in relation to those three alleged

disclosures. One alleged disclosure was the grievance letter which could not have been responsible for subjecting the claimant to any detriment. Two other statements (relating to overtime while performing audits) were found to contain information but were not qualifying disclosures because the employment tribunal found that the claimant did not, and did not reasonably, believe that she was making the disclosures in the public interest. The employment found that she was pursuing simply her own interests in relation to overtime payment. The ground of appeal does not appear to challenge the basis of this decision. In any event, the decision of the employment tribunal does not involve any error of law. It approached the issue correctly and reached a decision that it was entitled to reach on the evidence before it.

33. At the hearing, Ms Leclerc pointed out that there were a number of instances when the wording of the statement said to constitute a protected disclosure was not correctly reproduced in the text of the decision of the employment tribunal. Ms Leclerc took me through some examples at the hearing. Ms Leclerc also deals with this in detail in the second attachment to her skeleton argument. She submitted that these errors meant the decision should be set aside. It is clear that there have been errors of transcription so that the written decision does not accurately reproduce the text of disclosures relied upon. There is no doubt, however, that the employment tribunal knew exactly what the statements were that the claimant was relying upon. As is clear from paragraph 12 of the decision, the employment tribunal spent the morning of the third day of the hearing "with the claimant working through document by document to make sure that we understood exactly what she said was each disclosure". The employment tribunal therefore considered the actual documents, containing the statements relied upon, at the hearing. There is no proper basis for concluding that the employment tribunal in some way made an error or misunderstood what the claimant was saying or that they referred to incorrect documents. Errors of transcription in preparing the written reasons for the

decision should not be treated as, or confused with, errors of approach on the part of the employment tribunal at the hearing or in reaching its decision. Furthermore, having considered the text of the statement relied upon and the text as incorrectly reproduced in the written reasons for the decision, there is no reasonable basis upon which it could possibly be said that the errors were material. Ms Leclerc also sought to rely on further paragraphs in a document and said that the employment tribunal failed to consider if that was a protected disclosure. The passage appears in a document which the employment tribunal did consider at paragraph 85 of its decision. The employment tribunal said that the "claimant also identifies particular passages in the attached response as protected disclosures. They are as follows…..". The employment tribunal then sets out the passages that the claimant had identified as ones that she relied upon. They did not include the paragraphs that the claimant now seeks to rely upon before this Tribunal. The employment tribunal correctly identified and considered the statements said by the claimant to be protected disclosures. It is not open to her on appeal to add new paragraphs and contend that the employment tribunal erred in failing to consider those paragraphs. The employment tribunal considered those statements which the claimant alleged were protected disclosures. It did not err but not considering statements not relied upon by Ms Leclerc.

34. For those reasons, ground 1 is not established.

GROUND 2 - DETRIMENT

35. Ground 2 was dependent upon ground 1. It alleges that, because the employment tribunal wrongly determined whether the disclosures were qualifying disclosures, the employment commenced its consideration on an erroneous basis. First, the employment tribunal did not make any wrong determinations about the disclosures. It made determinations

it was entitled to make. It did not, therefore, commence its consideration of causation on an erroneous basis. This ground of appeal also fails.

36. For completeness, I note that, in any event, the employment tribunal considered what the position would be if it were wrong in deciding that the claimant had not made protected disclosures. It concluded that none of the detriments were in any way caused by the making of the statements that the claimant said were protected disclosures: see paragraph 196 of its decision. Dealing with the details, the employment tribunal found that the claimant had not, in fact, been subjected to two of the alleged detriments. Four of the alleged detriments had occurred but the decision to subject the claimant to those detriments was not materially influenced by the fact that the claimant had made protected disclosures. There is no basis for challenging those findings of the employment tribunal. It found that the failure to sign off the claimant as an auditor and to remove her from work or audit duties was not a detriment. There is no appeal against that finding. In any event, the decision to do that could not have been materially influenced by any protected disclosure relating to claiming overtime whilst on audit work as there were no such disclosures. Those disclosures were not made in the public interest. For all those reasons, ground 2 fails.

CONCLUSION

37. The employment tribunal approached the question of whether any of the statements relied upon by the claimant were qualifying disclosures within the meaning of section 43A **ERA** on the correct legal basis. It reached conclusions that it was entitled to reach on the evidence before it. This appeal, therefore, fails.