Appeal No. UKEAT/0133/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 November 2019
Judgment handed down on 13 March 2020

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR CHRISTOPHER RILEY — APPELLANT

BELMONT GREEN FINANCE LTD, T/A VIDA HOMELOANS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER RILEY (the Appellant in person)
For the Respondent	MR JAMES LADDIE (one of Her Majesty's Counsel) Instructed by: Torque Law 2 Maple House Northminster Business Park York YO26 6QW

SUMMARY

VICTIMISATION DISCRIMINATION – Whistleblowing

PRACTICE AND PROCEDURE - Perversity

The Claimant was a worker employed by the Respondent on a temporary assignment. On 14 March 2017, the Respondent terminated the assignment with immediate effect. There had been a meeting the previous day between the Claimant and one of the Respondent's managers. The Claimant had made several complaints at the meeting. He contended that they amounted to protected disclosures under Part IVA of the Employment Rights Act 1996 and that the Respondent's subsequent actions amounted to unlawful detriments on the grounds of his having made those disclosures. The Employment Tribunal dismissed the Claimant's claim, finding that no qualifying disclosures had been made at the meeting and, in the alternative, on the basis of causation. On appeal, the Employment Appeal Tribunal dismissed the appeal and held that:

1. The Employment Tribunal had not made perverse findings of fact regarding what the Claimant had disclosed to the Respondent at the meeting on 13 March 2017.
2. On the Employment Tribunal's factual findings about what the Claimant disclosed in the meeting, there was no material error of law in its conclusion that the matters raised did not amount to qualifying disclosures attracting statutory protection.
3. The Employment Tribunal had erred in law in its approach to causation. Having found that the Respondent's actions in subjecting the Claimant to the detriments complained of had been motivated in part by the Claimant's attitude and behaviour during the meeting, it had failed to address the issue of whether that behaviour was separable from the making of any disclosures. However, given the Employment Tribunal's finding that the complaints that it had found were made did not amount to qualifying disclosures, any such error was not material to the outcome.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this judgment, I shall refer to the parties as they were before the Employment Tribunal, i.e. as "the Claimant" and "the Respondent".

2. This is an appeal against the reserved Judgment of the Employment Tribunal sitting at Reading (Employment Judge Hawksworth, Mrs J Wood and Ms B Osborne) which was sent to the parties with written Reasons on 18 July 2018. The Tribunal had heard evidence and argument over two days on 8-9 May 2018. Before the Employment Tribunal, the Claimant represented himself and the Respondent was represented by Counsel. By its Judgment, the Tribunal held that the Claimant was a worker employed by the Respondent within the meaning of section 43K of the Employment Rights Act 1996 ("the ERA 1996"). However, the Tribunal dismissed the Claimant's claim that he had been subjected to detriments by the Respondent, contrary to section 47B of the ERA 1996. The Claimant now appeals against the dismissal of his claim. The Respondent has not cross-appealed against the Employment Tribunal's finding regarding the Claimant's status as a worker.

3. On this Appeal, the Claimant represented himself. The Respondent is represented by Mr James Laddie QC, who did not appear before the Employment Tribunal. I am grateful to them both for their written and oral submissions.

Statutory Provisions

4. Part IVA of the ERA 1996 contains the statutory provisions providing protection for those who make disclosures of certain types of information in specified circumstances, more usually referred to as "whistleblowers". Section 43A of the ERA 1996 provides:

> **"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

5. Section 43B(1) of the ERA 1996 provides, so far as is material:

> **"(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 -…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,…"**

6. Section 43C of the ERA 1996 provides that a qualifying disclosure is made in accordance with that section if it is made by the worker to his employer. Such a qualifying disclosure is therefore a "protected disclosure" pursuant to the provision in section 43A.

7. Section 47B(1) of the ERA 1996 provides:

> **"(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 on the ground that the worker has made a protected disclosure."**

8. Section 48 of the ERA 1996 provides that a worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of section 47B.

Factual background

9. The Claimant is a mortgage underwriter. On 20 July 2015, he contracted with Rockstead Ltd ("Rockstead") for the provision of services whereby Rockstead would assign the Claimant to temporary placements as an underwriter working for its clients. The Claimant undertook a number of assignments for different clients of Rockstead prior to being assigned to the Respondent. The Respondent is a mortgage lender specialising in residential and buy-to-let mortgage products. In November 2016, the Respondent and Rockstead arranged for the provision of temporary underwriters to assist the Respondent in dealing with a backlog of mortgage applications.

10. The Claimant's temporary assignment with the Respondent began on 9 January 2017. Three other Rockstead consultants were already working for the Respondent. Their contact at Rockstead was Mr Robert Weatherill, an operations support manager. Mr Guy Todd, a senior underwriter employed by the Respondent, assisted the Claimant with day-to-day issues and queries. The Claimant's assignment was initially due to end on 31 January 2017, but this was extended by the Respondent to 28 February and then to 31 March.

11. On 13 March 2017, the Claimant had a meeting with Mr Todd at the Respondent's offices, where they were both working. The Claimant relied on what he said to Mr Todd in this meeting as constituting a disclosure protected by the provisions of Part IVA of the ERA 1996. The Employment Tribunal's findings of fact regarding this meeting were as follows:

a. The Claimant and Mr Todd had a conversation in the office, approximately 30 minutes prior to the meeting. Mr Cragg, another Rockstead consultant, was also present. Mr Todd thought that the Claimant had been rude and abrupt in response to a question that he had been asked. He therefore approached the Claimant and asked to have a word in a private office.

b. In the subsequent meeting, the Claimant was angry and frustrated. He made a number of complaints about the Respondent and said that if he was asked to extend his contract with the Respondent again then he would not want to.

c. There was a dispute between the Claimant and Mr Todd as to what was said by the Claimant in the meeting. It was, however, agreed that the Claimant had made some complaints about working for the Respondent. Those complaints included occasions on which work had allegedly been wrongly allocated to the Claimant or to other Rockstead consultants which the Claimant felt would be better dealt with by other

consultants. The Claimant also complained about his telephone not working and not being fixed despite him reporting it several times. The Tribunal also found that the Claimant had complained about the Respondent's IT systems and processing. He had experienced problems with the system "freezing", preventing him from processing cases, and he had recorded this in emails on a number of occasions.

d. The Claimant alleged that he had made further complaints to Mr Todd in the meeting. Specifically, the Claimant alleged that he had complained that inexperienced personnel were actively involved in reviewing cases without supervision and that he had reported concerns over the Respondent's lending practices, which he believed were in breach of relevant regulatory requirements. In particular, the Claimant said that he had reported his concern about the Respondent's practice of lending to applicants with a history of arrears or with County Court judgments (CCJs) against them. Mr Todd's evidence was that the Claimant did not raise any concerns about lending procedures, inexperienced personnel, the policy on lending to those with CCJs or the Financial Conduct Authority's (FCA's) "Treating Customers Fairly" principles. Mr Todd also gave evidence that the Claimant did not say in the meeting that he believed the Respondent had breached any regulations, code or policy.

e. The Employment Tribunal preferred the evidence of Mr Todd on these matters. It found on the balance of probabilities that the Claimant had not made the specific complaints about lending procedures, inexperienced personnel or lending to applicants with a poor credit history that he claimed he had done and that he had not raised any allegation that there had been a breach of FCA principles, regulations, code or policy.

12. The Employment Tribunal explained why it had reached this conclusion at paragraphs 32-38 of the Reasons:

> **"32. In reaching this conclusion we took into account Mr Todd's email summary of 27 March 2017 and the fact that Mr Todd's statement is consistent with this.**
>
> **33. In relation to the claimant's account, we noted first that at a meeting on 31 January 2017 with Mr Weatherill, the claimant said that the respondent had a nice culture and when asked about whistleblowing, he said there was nothing of concern. His account of the meeting itself was not consistent; new elements were introduced in his witness statement when compared with the account he gave of the meeting in his ET1 and the account he gave Mr Weatherill. Further, his evidence about other aspects of the meeting changed, including the date on which it took place, and the timing/location of the exchange with Mr Cragg.**
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> **34. We also took into account the evidence of Mr Weatherill as to what he was told by Mr Todd and by the claimant about what was said at the meeting. He discussed this with them both (separately) the following day. We noted the reference in his note on page 303 to having been told by Mr Todd that the claimant had made 'derogatory comments about [the respondent's] processes, practices and handling of regulatory matters'. However, Mr Weatherill's evidence, which we accept, was that Mr Todd did not mention any discussion regarding the respondent's lending practices specifically and that the claimant said his complaints about the respondent were about not meeting service standards (turnaround times) and his broken phone.**
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> **35. In addition, we took into account the fact that Mr Todd followed up after the meeting on complaints the claimant made. An email giving more detail about the work allocation complaint was sent by the claimant after the meeting at Mr Todd's request and was promptly responded to by Mr Todd in a manner that was supportive of the claimant's point of view. Similarly, immediately after the conversation with the claimant, Mr Todd went to the IT department to try to resolve the problems with the claimant's phone.**
>
> **36. Against that background, it seems very likely that if other serious issues have been raised as alleged by the claimant, Mr Todd would have asked the claimant for more details about them, followed them up or try to deal with them in some way, as he did the complaints about work allocation on the phone, but there is no evidence of this.**
>
> **37. Equally, it is clear that the claimant was comfortable following up after the meeting by sending an email with details of his complaint about work allocation to Mr Todd. If he had made other complaints as well, we might have expected it would mention them in the email, or to email Mr Todd separately about them. However, there was no such follow-up in writing by the claimant.**
>
> **38. For these reasons, we conclude on the balance of probabilities that the claimant did not make specific complaints about lending procedures, inexperienced personnel or lending to applicants with a history of CCJ's and did not say that he believed that there had been breaches of any FCA principles, regulations, code or policy."**

13. The Employment Tribunal made further factual findings about what happened after the meeting between the Claimant and Mr Todd. When Mr Todd went to the IT department to try to resolve the problem with the Claimant's phone, he spoke to an employee of the Respondent who told him that she was aware of the problem and had been trying to get it fixed. She said the Claimant had snapped at her and that she had been taken aback by this behaviour. She did not want to speak to the Claimant again. On the following day, 14 March 2017, Mr Todd was told by

A one of the other Rockstead consultants that the Claimant had been rude to another employee of the Respondent. This employee then told Mr Todd that the Claimant had spoken to her in what she described as a "particularly terrible" manner.

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14. The Tribunal found that later on 14 March 2017, Mr Todd reported to his line manager, Mr David Botting, that the Claimant had been derogatory about the Respondent and had been rude to Mr Cragg and to two members of the Respondent's staff. Mr Botting felt that the C Claimant's behaviour was not acceptable. He asked Mr Todd to speak to Mr Weatherill to request the Claimant's immediate removal from the project. Mr Todd telephoned Mr Weatherill to inform him of this. Mr Weatherill then attended the Respondent's offices and had a short meeting with D Mr Todd. Mr Todd explained that the reason for the termination of the Claimant's assignment was because the Claimant had been generally negative and dismissive about the Respondent and because Mr Todd and Mr Botting were unhappy at the way in which the Claimant had dealt with other staff. Mr Weatherill spoke to the Claimant in a meeting room and informed him of the E Respondent's decision to terminate his assignment immediately and about what he had been told by Mr Todd. The Claimant's belongings had already been collected from his desk and he was escorted out of the building immediately.

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15. The Employment Tribunal made the following findings about the reason for the termination of the Claimant's assignment:

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> **"46. We find that the reason the respondent decided to terminate the claimant's assignment was because of the claimant's attitude and manner in the meeting with Mr Todd on 13 March 2017 at which had been generally negative and dismissive about the respondent, including saying he would not want to extend his assignment with them, and because Mr Todd and Mr Botting were unhappy with the way in which the claimant had dealt with staff (Mr Cragg and two others).**
>
> **47. If the respondent decided to dismiss the claimant because of protected disclosures made during the meeting on 13 March 2017, it seems unlikely that Mr Todd would have followed up after the meeting on the work allocation and IT issues raised by the claimant."**

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16. At paragraphs 59-79 of the Reasons, the Employment Tribunal set out its conclusions on the individual aspects of the Claimant's claim by way of application of the law to its earlier factual findings. In respect of whether the Claimant had made any disclosure protected by section 43B(1) of the ERA 1996, the Tribunal reached the following conclusions:

> **"67. However, we also need to consider whether the claimant made a qualifying disclosure within the meaning of section 43B. The claimant said he disclosed information which was in the public interest which tended to show that the respondent had failed, was failing was likely to fail to comply with any legal obligation to which it was subject. He referred to Financial Conduct Authority principles for business and responsible lending rules.**
>
> **68. For the reasons set out above and on the balance of probabilities, we have found that the claimant did not make specific complaints to Mr Todd about lending procedures, inexperienced personnel or lending to applicants with a history of CCJs and did not say that he believed that there had been breaches of any FCA principles, regulations, code or policy.**
>
> **69. We have found that the claimant did make complaints to Mr Todd but that these concerned working practices and procedures more generally, such as problems of the system freezing, occasions on which work been wrongly allocated to him or to Rockstead consultants and the fact that the claimant's phone was not working and had not been fixed.**
>
> **70. The information which we have found that the claimant disclosed to Mr Todd did not tend to show the respondent had failed, was failing was likely to fail to comply with any legal obligation to which it was subject. The complaints made by the claimant were complaints about problems he had experienced when working for the respondent arising from IT and systems issues and work allocation. These did not amount to qualifying or protected disclosures. In reaching this conclusion we have had in mind that it is for the claimant to prove on the balance of probabilities that he made a protected disclosure. We do not consider that he has done so."**

17. The Employment Tribunal nonetheless went on to consider whether the Claimant was subjected to any detriment by the Respondent and what were the grounds for any such detriment. The Tribunal accepted that the two matters about which the Claimant complained, which were the early termination of his assignment and the manner of his removal from the office on 14 March 2017, were both detriments. The Tribunal then considered the reason why the Respondent had subjected the Claimant to those detriments. It concluded:

> **"77. We found these decisions were taken by Mr Todd and Mr Botting not because of any information provided by the claimant in the meeting on 13 March 2017 but because of the claimant's manner in the meeting which was generally negative and dismissive about the respondent and because Mr Todd and Mr Botting were unhappy with the way in which the claimant had dealt with staff (Mr Cragg and two others).**
>
> **78. Therefore, if we had found the claimant had made any protected disclosures on 13 March 2017, we would not conclude that he was subjected to any detriment by the respondent on the ground of those disclosures."**

18. I was provided with a copy of the eleven principles which are set out in the FCA's handbook, including the requirement to treat customers "fairly". The principles are expressed at a high level of generality and are as follows:

> **"1. A firm must conduct its business with integrity.**
>
> **2. A firm must conduct its business with due skill, care and diligence.**
>
> **3. A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.**
>
> **4. A firm must maintain adequate financial resources.**
>
> **5. A firm must observe proper standards of market conduct.**
>
> **6. A firm must pay due regard to the interests of its customers and treat them fairly.**
>
> **7. A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.**
>
> **8. A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.**
>
> **9. A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.**
>
> **10. A firm must arrange adequate protection for clients' assets when it is responsible for them.**
>
> **11. A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice."**

The Grounds of Appeal

19. The Claimant's Appeal to this Tribunal sought to raise some nine grounds of appeal against the decision of the Employment Tribunal. The Appeal was considered at the sift stage by the then President, Simler J, who considered that there was no reasonable basis for the appeal to proceed. The Claimant sought a hearing under Rule 3(10) of the Employment Appeal Tribunal Rules. At that hearing, Her Honour Judge Eady QC considered that three of the grounds should be permitted to proceed and rejected the others. The three grounds on which the Appeal proceeded were:

a. that the Employment Tribunal reached a perverse finding about what the Claimant had disclosed to Mr Todd (Ground 1);

b. that the Employment Tribunal erred in law in failing to consider whether, even on the findings it had made about what the Claimant had disclosed, he had established that this was information which tended to show a failure to comply with a legal obligation (Ground 2);

c. that the Employment Tribunal had erred in law in its approach to the issue of causation (Ground 3).

Ground 1 – perversity

20. The Claimant submits that the Employment Tribunal made perverse findings of fact in rejecting his case about what he had raised with Mr Todd at the meeting on 13 March 2017. I have set out in some detail at paragraphs 10-11 above the Tribunal's factual conclusions on this issue. The basis of the Claimant's Appeal is what appears at paragraph 34 of the Employment Tribunal's Reasons. The reference there is to a lengthy email sent to the Claimant by Mr Weatherill on the afternoon of 23 March 2017. In that email, Mr Weatherill summarised a meeting he had with the Claimant earlier that day to discuss the termination of the Claimant's assignment with the Respondent. In that email, Mr Weatherill wrote the following:

> **"… We have shared with you today our Clients [sic] view of the situation, including but not limited to the following:-**
>
> **Objection to you voicing issue with the manner in which they operate; your derogatory comments about their processes, practises [sic] and handling of regulatory matters**
>
> **Being disruptive in the workplace resulting in a negative impact this has on productivity and performance, coupled with short remaining tenure of their need for your services**
>
> **Their request that you be removed immediately from the project and their site…"**

21. The Claimant contends that Mr Weatherill's reference in this email to the Respondent having objected to the Claimant making derogatory comments about the Respondent's "handling of regulatory matters" demonstrates that the Claimant did indeed raise with Mr Todd on 13 March

2017, contrary to the Tribunal's finding at paragraph 38 of the Reasons, one or more complaints about the Respondent's failure to comply with regulatory requirements.

22. It is the function of the Employment Tribunal to establish the relevant facts. An appeal to this Tribunal against the judgment of the Employment Tribunal is not by way of re-hearing. The appeal is limited to issues of law. An error of law will, however, be established where the Employment Tribunal has made perverse findings of fact. In the leading case of *Yeboah v Crofton* [2002] IRLR 634, Mummery LJ said at [93]:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care"…"**

23. I accept Mr Laddie's submission that the Employment Tribunal in this case engaged in a comprehensive and careful assessment of all the evidence before it regarding what had happened at the meeting between Mr Todd and the Claimant on 13 March 2017, including Mr Weatherill's email of 23 March 2017. The Employment Tribunal's reasoning on this issue alone covers 21 paragraphs of its decision. In my judgment, it is not permissible to unravel the conclusion ultimately reached by the Tribunal about what the Claimant said at the meeting on 13 March 2017 by focusing on its treatment of a single piece of evidence, which was at best hearsay evidence from ten days after the relevant events recording in summary form what Mr Weatherill had been told by the Respondent. This was by no means the whole of the picture before the Employment Tribunal about what had occurred at the meeting on 13 March. The Tribunal had before it, and took into account, the evidence of both Mr Todd and the Claimant, as well as other contemporaneous material such as the emails written by the Claimant and Mr Todd on 13 March, immediately after the meeting.

24. The Employment Tribunal specifically addressed, at paragraph 34 of its Reasons, the issue of any inconsistency between the content of Mr Weatherill's email of 23 March 2017 and the Respondent's case. Insofar as the content of the email was inconsistent with Mr Weatherill's evidence, the Tribunal was entitled to resolve any such inconsistency by accepting Mr Weatherill's evidence regarding what he had been told by Mr Todd.

25. It was the Tribunal's function in this case to make findings of fact and to resolve, where necessary to do so, disputes of evidence. In my judgment, it was not an error of law for this Tribunal to reach the factual findings that it did about what the Claimant had said to Mr Todd at the meeting on 13 March 2017. Had the Tribunal not referred at all to Mr Weatherill's email of 23 March in its analysis of the evidence, then the position might be different. However, the Tribunal expressly took into account the particular passage now relied on by the Claimant, which was only one part of the evidence before it about what had occurred. Its factual conclusions about what was, and what was not, raised by the Claimant at the meeting on 13 March were ones that were reasonably open to it on the evidence before it. This Ground of Appeal fails.

Ground 3 – causation

26. By this Ground of Appeal, the Claimant seeks to overturn the Employment Tribunal's finding that the two detriments about which he complained – the termination of his assignment and the manner of his exit from the Respondent's office – were not caused by anything said by him to Mr Todd at the meeting on 13 March 2017. As the Claimant has failed on the perversity challenge to the Tribunal's factual findings then, as Mr Laddie correctly submitted, this issue becomes dispositive of the Appeal if the Claimant's arguments on it fail. It is therefore convenient to deal with this Ground next.

27. The Employment Tribunal's findings on this issue are contained in paragraphs 46-47 and 77 of the Reasons. The Tribunal found that the relevant action was taken because of the Claimant's manner in the meeting with Mr Todd and because the Respondent's managers were unhappy with the way in which the Claimant had dealt with other members of staff. It expressly found that the Respondent's actions were not taken because of any information provided by the Claimant in the meeting on 13 March 2017.

28. In **Fecitt & Others v NHS Manchester** [2011] EWCA Civ 1190, [2012] ICR 372 at [45], Elias LJ held that a claimant alleging a breach of section 47B of the ERA 1996 can succeed "if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." The Claimant submitted that the Employment Tribunal was guilty of what he said was a "monumental shortcoming" in failing to refer to the Court of Appeal's decision in **Fecitt** at all in its Reasons, and in particular in respect of this point. He submitted that his manner at the meeting on 13 March 2017 was inevitably interwoven with the complaints that he had made and was directly connected with what he had said. It was, he submitted, impossible to sever what he said from how he had said it. On his case, the Tribunal, having accepted that his manner at the meeting on 13 March 2017 had a material influence on the Respondent's actions, should – subject to issues raised by the third Ground of Appeal – have upheld his claim.

29. The apparent difficulty for the Claimant here is that it is established that a tribunal may legitimately draw a distinction between the information disclosed by a claimant and the manner of his doing so when determining the reason for his treatment. In **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500, this Tribunal reviewed several authorities on this issue and reached the following conclusions:

"49. First, as a matter of statutory construction, section 47B of ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. A protected disclosure is "any disclosure of information" which in the reasonable belief of the employee tends to show the existence of one of the state of affairs specified in section 43B(1) of ERA, e.g. that a criminal offence has been or is being committed or that a person is failing or is likely to fail to comply with a legal obligation or that a miscarriage of justice has occurred, is occurring or is likely to occur. There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed.

50. Secondly, that distinction accords with the existing case law which recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself. In Bolton School v Evans [2007] ICR 641, the Court of Appeal recognised a distinction between disclosing information – in that case, that the school's computer system was not secure - and the fact that the employee hacked into the computer system in order to demonstrate that the system was not secure. Disciplining the employee on the ground that he had engaged in unauthorised misconduct by hacking into the computer system did not involve subjecting the employee to a detriment on the grounds that he had made a protected disclosure. The conduct, although related to the disclosure, was separable from it. The Court of Appeal noted, however, that a "tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself" (see the comments of Buxton LJ at [2007] ICR 641 at paragraph 18).

51. The Employment Appeal Tribunal reached a similar conclusion in Martin v Devonshires Solicitors [2011] ICR 352. That case concerned discrimination contrary to section 4 of the Sex Discrimination Act 1975 (essentially victimisation of a person for doing a protected act) rather than the provisions governing protected disclosures under ERA. The principle is, however, similar. The appellant in that case had made allegations of sex discrimination against two partners in the firm of solicitors involved. The statements were in fact untrue. However, the appellant, who had mental health difficulties, did not appreciate that they were untrue. The fact that the appellant had done protected acts, in that case making complaints of sex discrimination, formed part of the facts leading to her dismissal. The reason why the employer dismissed the appellant, however, was not the making of those complaints but rather the fact that the complaints involved false allegations which were serious, that they were repeated, that the appellant refused to accept that they were untrue and that she had a mental condition which was likely to lead to unacceptably disruptive conduct in future. The reason for the dismissal was that the appellant was mentally ill and the management problems to which that gave rise. The Employment Appeal Tribunal accepted that the reason for the dismissal constituted:

"a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."

52. Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did."

> **"54. … In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did. In considering that question a tribunal will bear in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph of 22 of the decision in Martin v Devonshire Solicitors [2007] ICR 352 that:**
>
> **"Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to 'ordinary' unreasonable behaviour as [sic] that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."**

30. The last of these passages in the judgment of this Tribunal in **Panayiotou** assumes some importance in the present case. The issue, I apprehend, is whether the factors relied on by the employer as having caused the treatment complained of are properly to be treated as separable from the making of the disclosures themselves. Even if the manner in which the worker makes the disclosure is unreasonable, e.g. by the use of intemperate language, that may not be sufficient to separate the behaviour of the worker in making the disclosure from the fact of the disclosure itself. The Claimant contends that his manner in the meeting was not capable of severance, for these purposes, from the complaints that he made. It is therefore important to set out what the Employment Tribunal found in this regard:

a. the Claimant's tone in the meeting on 13 March 2017 was "angry and frustrated" (paragraph 22 of the Reasons);
b. on 14 March, Mr Todd told Mr Botting that the Claimant had been "derogatory about the Respondent" (paragraph 41 of the Reasons);
c. the Claimant had been "generally negative and dismissive" about the Respondent in the meeting on 13 March (paragraph 77 of the Reasons).

31. I do not consider that these factual findings made by the Employment Tribunal, which are in the most general of terms, indicate that the Claimant's behaviour at the meeting with Mr Todd

on 13 March 2017 was found by the Tribunal to be anything other than, at worst, "ordinary" unreasonable behaviour of the kind described by this Tribunal in the passage from the decision in **Martin v Devonshire Solicitors** [2007] ICR 352 which is cited in **Panayiotou** at [54]. The Employment Tribunal did not make findings to the effect that the Claimant's behaviour when making his complaints had been "offensive or abusive" (see **Panayiotou** at [49]). The Tribunal when reaching its conclusion on causation did not explain why the type of behaviour that it found had occurred at the meeting (i.e. being "angry and frustrated" and "generally negative and dismissive about the Respondent") was properly and genuinely separable from the making of the Claimant's complaints at that meeting. I reject Mr Laddie's submission that the Employment Tribunal's conclusion on causation was **Meek** compliant in this regard (see **Meek v City of Birmingham** [1987] IRLR 250, CA). As the authorities to which I have referred demonstrate, it is important to set out the basis upon which such a distinction (which I accept is one that is not wrong in principle) is being drawn, because the authorities show that an employer's reliance on "ordinary" unreasonable behaviour in the manner of undertaking the act giving rise to statutory protection may be sufficient to establish liability. The Employment Tribunal did not do this, albeit it was addressing the causation issue only for the sake of completeness having already found that the Claimant had not made any qualifying disclosures. In failing to set out why, on the facts of this case, the way in which the Claimant disclosed information to the Respondent was separable from the disclosures themselves, the Tribunal erred in law.

32. In reaching this conclusion, I have not lost sight of the Employment Tribunal's findings of fact regarding the Claimant's unacceptable behaviour towards three other members of staff and its conclusion about the part that behaviour played in the Respondent's decisions. However, it is clear from the Tribunal's findings that this behaviour was not the only reason for the detriments complained of by the Claimant. If the Claimant did make disclosures to the

Respondent which qualified for protection, then it is apparent from the Tribunal's findings at paragraph 77 of the Reasons that the way in which he made those disclosures played a more than trivial role (see **Fecitt** at [45]) in the Respondent's decision to terminate his assignment.

33. It therefore becomes necessary to address the remaining Ground of Appeal.

Ground 2 – whether on the Tribunal's findings the Claimant raised qualifying disclosures

34. The Employment Tribunal's findings of fact regarding the complaints made by the Claimant in the meeting with Mr Todd are set out at paragraphs 23-24 of the Reasons and again at paragraph 69. The complaints found to have been made were:

a. that work had been wrongly allocated to the Claimant or to other Rockstead consultants which the Claimant considered would be better dealt with by other consultants;

b. that the Claimant's phone did not work and had not been fixed despite his requests;

c. that the Claimant had experienced problems with the Respondent's IT systems, preventing him from processing customer cases.

35. The Claimant placed some reliance on what the Employment Tribunal had said in the concluding sentence of paragraph 34 of the Reasons and contended that he had complained to Mr Todd about failures regarding "service standards" (although he said that he had not used those exact words) and "turnaround times". I do not, however, consider that this is a correct reading of the Employment Tribunal's findings about what had been raised in the meeting on 13 March 2017. In the last sentence of paragraph 34, the Tribunal was recording what Mr Weatherill's evidence was regarding what the Claimant had subsequently told him had been raised in the meeting. The Tribunal was not in that sentence finding as a fact that the Claimant had actually

made any such complaints to Mr Todd. Such a reading of paragraph 34 is also inconsistent with what appears at paragraphs 69-70 of the Reasons.

36. The Employment Tribunal went on at paragraph 70 of the Reasons to conclude that the Claimant's complaints about IT and systems issues and about work allocation did not amount to qualifying disclosures. The Claimant contends that he had a firm belief that these matters amounted to a breach of a legal obligation to which the Respondent was subject and that he did by raising them with Mr Todd make disclosures qualifying for protection under Part IVA of the ERA 1996. He submitted that the Employment Tribunal had fallen into error in failing to recognise that the matters he raised with Mr Todd amounted to protected disclosures. In particular, the Claimant submitted that the problems with the Respondent's IT system had been such as to cause the collapse of purchasing chains, which he submitted was a breach of one or more of the FCA principles that I have set out above. It was this aspect of the Employment Tribunal's findings regarding what had been disclosed to Mr Todd, rather than the complaints regarding the Claimant's telephone not working and the allocation of work between consultants, on which the Claimant focused his submissions.

37. Mr Laddie submitted that paragraph 70 of the Employment Tribunal's reasons demonstrated that it had addressed the issue of whether the Claimant had made any qualifying disclosures. The Tribunal had there stated in terms that the information disclosed to Mr Todd "did not tend to show that the respondent has failed, was failing or was likely to fail to comply with any legal obligation to which it was subject" and that the complaints raised by the Claimant about the IT and systems issues did not amount to qualifying disclosures. Mr Laddie accepted that the Tribunal had misstated the statutory formula at paragraph 70 of the Reasons, because it referred to whether the disclosures made "did not tend to show" that the Respondent had failed,

was failing or was likely to fail to comply with any legal obligation to which it was subject. The statute only requires that the worker has a reasonable belief that the disclosures tend to show those things. But Mr Laddie submitted that this misstatement of the statutory test was not material because it was not open to the Employment Tribunal to conclude, on the basis of its factual findings, that a qualifying disclosure had been made. Mr Laddie further submitted that it was important not to read paragraph 70 of the Reasons in isolation, but to look back at the earlier factual findings of the Employment Tribunal. In particular, he submitted that paragraph 24 of the Reasons was significant because it set out the Employment Tribunal's factual finding about what had been disclosed to Mr Todd and that the Tribunal there found that the Claimant had not alleged to Mr Todd that he believed that there had been a breach of any FCA principles, regulations, code or policy.

38. Mr Laddie accepted that the Claimant had specifically referred in his ET1 to raising "processing problems" with Mr Todd at the meeting on 13 March 2017 and that he had also made reference elsewhere in his grounds of claim to the Respondent having "a poorly functioning computer system". However, he pointed out that the Claimant had not alleged in his ET1, his witness statement or in his written submissions to the Employment Tribunal that the problems with the respondent's IT system which he had raised with Mr Todd had caused mortgage offers to fall through and the collapse of purchasing chains. He submitted that this argument was being raised for the first time before this Tribunal. Mr Laddie submitted that the disclosure found to have been made to Mr Todd by the Claimant was not capable of amounting to a qualifying disclosure, because it was not capable of being reasonably believed to constitute a breach of a legal obligation to which the Respondent was subject.

39. There are two stages in assessing whether a disclosure of information relating to a breach or potential breach of a legal obligation qualifies for protection under the statute. The first is at the point in time when the disclosure is made and the second is before the Employment Tribunal; a different level of specificity is required at each stage. I was referred to a number of authorities dealing with this issue. In **Fincham v HM Prison Service**, EAT/0925/01/RN, this Tribunal stated at [33] that, "there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employers [sic] is relying." In **Bolton School v Evans** [2006] IRLR 500, this Tribunal noted at [41] that the claimant had not identified any specific legal obligation which was likely to be breached but that "it would have been obvious to all concerned" that the unauthorised disclosure of sensitive information about pupils could give rise to a potential legal liability.

40. **Eiger Securities LLP v Korshunova** [2017] IRLR 115 was a case which Mr Laddie submitted involved the second stage of the assessment, namely the identification of the relevant legal obligation before the tribunal. In that case, the tribunal had found in the claimant's favour. This Tribunal allowed the employer's appeal on the basis that the tribunal had failed to identify the legal obligation which the claimant believed to have been breached:

> **"46. In my judgment it is not obvious that not informing a client of the identity of the person whom they are dealing if the employee is trading from another person's computer is, as in Bolton, plainly a breach of a legal obligation. That being so, in order to fall within ERA section 43B(1)(b), as explained in Blackbay the ET should have identified the source of the legal obligation to which the Claimant believed Mr Ashton or the Respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment the ET failed to decide whether and if so what legal obligation the Claimant believed to have been breached.**
>
> **47. The decision of the ET as to the nature of the legal obligation the Claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with. Whilst the judgment of the ET has to be read as a whole without applying a fine tooth comb to it to detect faults, in my judgment on a fair reading, this ET failed to identify a legal as opposed to a moral or lesser obligation which the Claimant believed had been broken by Mr Ashton."**

The reference to **Blackbay** is to the judgment of this Tribunal in **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416 at [98] where it was stated:

> **"Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation…"**

41. In **Arjomand-Sissan v East London Healthcare NHS Trust**, UKEAT/0122/17/BA, this Tribunal considered several of the leading authorities and referred to the specificity required at each stage of the analysis (see at [26-28]). At [60-62], this Tribunal held as follows:

> **"60. In its section on the law, the ET also correctly noted the authorities which make clear, in respect of section 43B(1)(b), that the disclosure does not need to identify in strict legal language the legal obligation on which the whistleblower is relying; and that the potential legal liability may be obvious and/or a matter of common sense from the information provided: paragraphs 16 to 17 citing Fincham and Bolton School. That the ET took the same correct approach in respect of the other categories in section 43B(1) is apparent e.g. from the 'common sense' approach which it took in reaching its conclusion that disclosures 3 and 18 were protected: paragraphs 49 and 128.**
>
> **61. These examples equally demonstrate that the ET did not confuse the specificity which is required (i) within the disclosure and (ii) before the tribunal…**
>
> **62. In any event, I see no basis on which the ET could have come to any different conclusion on the material and case before it. As to section 43B(1)(b), the Claimant's case was that it was 'obvious' that the information tended to show breach of a legal obligation (Schedule) and/or that in his reasonable belief it tended to show data protection breaches (POC and FBP). An assertion of obviousness has to be tested against the ability to identify, before the Tribunal, the legal obligation(s) in question. The ET rightly concluded that the letter did not refer explicitly or implicitly to breach of data protection legislation; nor was any breach of legal obligation obvious. There was nothing in the case before the Tribunal which provided anything more specific."**

42. Mr Laddie submitted in respect of the first stage of the analysis that the disclosure made by the Claimant to Mr Todd regarding the Respondent's IT systems had nothing close to the kind of specificity required, except in an obvious case (which this was not) to alert the person receiving the information disclosed to a breach or potential breach of a legal obligation.

43. In my judgment, Mr Laddie's submissions on this issue are well-founded. It is important to focus on what the Employment Tribunal found that the Claimant had said to Mr Todd on 13 March 2017 in this regard. At paragraph 24 of the Reasons, the Tribunal found that the Claimant told Mr Todd that he had experienced problems with the Respondent's IT system "freezing"

preventing him from processing customer cases. There is no finding of fact made by the Employment Tribunal that the information disclosed to Mr Todd by the Claimant was anything more than this. In my judgment, it cannot be said that a disclosure to an employer of this type of common IT problem encountered by an employee obviously identified a breach or potential breach of a legal obligation, including (on the assumption they do constitute a legal obligation for this purpose) any of the FCA's principles set out in its handbook. Nor, on the Employment Tribunal's findings, did the Claimant identify any relevant legal obligation with any degree of specificity during the meeting on 13 March 2017. The Employment Tribunal found, at paragraphs 31 and 68 of the Reasons, that the Claimant had not said to Mr Todd that he believed there to have been breaches of any FCA principles, regulations, code or policy. The Tribunal found that the Claimant made a general complaint about the poor quality of the Respondent's IT systems.

44. In my judgment, it is not possible, on the facts found by the Employment Tribunal, to say either that the Claimant made a disclosure covered by section 43B(1)(b) of the ERA 1996 where the breach of legal obligation was obvious, or that he identified, sufficiently or at all, within the disclosure itself the legal obligation said to have been breached. The Tribunal's findings were that the Claimant had complained about "working practices and procedures more generally".

45. That conclusion is sufficient to dispose of the Appeal, on the basis that there was no material error of law in the Employment Tribunal's finding that the Claimant had not made a qualifying disclosure. However, I consider that Mr Laddie's submission on the second aspect of this issue is also well-founded. Mr Laddie submitted that the Claimant had not explained, whether before the Employment Tribunal or before this Tribunal, how the disclosure of information by him to Mr Todd on 13 March 2017 (on the factual basis found by the Employment Tribunal) was capable of demonstrating a breach of any legal obligation, an issue going to the objective reasonableness of the Claimant's belief (see **Eiger Securities** at [47]). He submitted that the

Claimant had not set out how the FCA's principles amounted to a legal obligation upon the Respondent, rather than being, as Mr Laddie put it in his skeleton argument, "principles of good regulation but not independent legal obligations". I accept these criticisms of the Claimant's arguments. The Claimant has not identified how a breach of the FCA's principles amounts to a breach of a legal obligation on the Respondent rather than e.g. being undesirable or a breach of guidance (see **Eiger Securities** at [46-47], cited above). That the Respondent's own literature may refer to the "Treating Customers Fairly (TCF) principles" as being part of the applicable "laws and regulations" does not in and of itself establish that compliance with the principles amounts to a legal obligation. I also accept Mr Laddie's submission that the Claimant's contention that the Respondent's IT problems were causing purchasing chains to fall through was not raised as a potential consequence before the Employment Tribunal. The highest that the Claimant's argument was put in his written submissions to the Employment Tribunal was that as a result of the IT issues, "customers were either not properly communicated to [sic] and/or suffered excessive delays in receiving their mortgage funds."

46. For those reasons, I reject this Ground of Appeal. It is not, therefore, necessary to go on to address Mr Laddie's alternative submission that it is inconceivable that any Employment Tribunal properly directing itself could have found that the Claimant reasonably believed that the making of the disclosures found by the Tribunal to have been made in this case was in the public interest. This was not a matter about which the Employment Tribunal made any findings of fact or reached any conclusions. I prefer to express no view on the point in those circumstances, given that it is not material to the outcome of the Appeal.

Conclusion

47. The Employment Tribunal did not make perverse findings of fact about what matters had been disclosed to the Respondent by the Claimant prior to the detriments complained of. There

was no material error of law in the Tribunal's conclusion that the complaints that it found had been made by the Claimant did not amount to qualifying disclosures under section 43B of the ERA 1996. In those circumstances, any error in the Employment Tribunal's analysis on causation had no effect on the outcome. The Appeal is dismissed.