Case No: EA-2020-000295-RN (Previously UKEATPA/0313/20/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 September 2021

Before:

HIS HONOUR JUDGE JAMES TAYLER

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Between:

MRS M FITZMAURICE	**Appellant**
- and -	
LUTON IRISH FORUM	**respondent**

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Mr Patrick Halliday for the **Appellant**
Mr Shane Crawford (instructed by Irwin Mitchell LLP) for the **respondent**

Hearing date: 16 September 2021

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JUDGMENT

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The employment tribunal erred in its approach to causation in the protected disclosure detriment claim and failed to properly analyse whether the making of the protected disclosures was properly severable from ancillary matters.

HIS HONOUR JUDGE TAYLER:

1. This is an appeal against a judgment of the employment tribunal sitting at Watford from 20 to 30 January 2020, excluding 24 January 2020; Employment Judge Manley sitting with lay members. The judgment was sent to the parties on 10 February 2020.

2. The respondent is a small charity that provides support to the Irish community and people from disadvantaged groups. The claimant commenced work for the respondent on 1 October 2005, first as an Advice and Outreach Welfare Adviser, and latterly as Welfare Caseworker.

3. The Tribunal held that the claimant raised a number of concerns about health and safety issues in 2014 and, more extensively, in 2016 and 2017. The Tribunal accepted that some constituted protected disclosures. In 2017, the claimant also raised concerns during the course of a grievance hearing (predominantly about the Claimant's pay), in respect of the respondent's use of its reserve funds to pay for a newly-recruited role. Further disclosures were found by the Tribunal to have been made on 31 July 2017 and 25 August 2017. The Tribunal set out its conclusion about what happened on 31 July 2017 at paras. 42 and 43 of its decision:

> "42. The tribunal must decide, on all the evidence before it, what happened on 31 July. There are difficulties with the witnesses' evidence, partly because of the passage of time between the incident and the first statements and also up to this hearing. It seems to the tribunal that all witnesses are doing their best to recall what was said.
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> 43. Doing the best we can, the tribunal finds, on the balance of probabilities, that the claimant did say that she was going to the Charity Commission, that trustees might lose their houses and that she made the Hitler's Henchman comment. There are several reasons for this. The most contemporary statements are those of Ms Sylvester and Ms Curtis. The claimant could give no reason for those witnesses to make up such a version of events. She said they were trustworthy people that she was friendly with. She had already prepared a draft complaint to the Charity Commission so it is not unlikely she might had referred to going to the Charity Commission. Both Ms Sylvester and Ms Curtis clearly remember the mention of losing of houses; they said that to Ms Hanley and repeated it in their statements."

4. The Tribunal set out its conclusion about what happened on 17 July 2017 at para. 46:

> 46. We turn to 25 August 2017, when there was a further conversation in the kitchen when the claimant mentioned her concerns about finances and the Charity Commission and so on to Ms Sylvester and Ms Curtis. Ms Curtis does not mention this in her September statement but Ms Sylvester did and again she suggests that she felt it was a threat. Given our findings in relation to 31 July, it is likely that this occurred in the way described by Ms Sylvester.

5. As a result of what had been said by the claimant on 31 July 2017, disciplinary proceedings were instigated against her. It was the claimant's case in the ET that the instigation and continuance of those disciplinary proceedings was done on the ground that she had made protected disclosures, that her treatment involved a fundamental breach of her employment contract, in response to which she had resigned, and so had been constructively dismissed. This gave rise to claims of ordinary unfair dismissal and automatically unfair dismissal. The claimant contended that the reason or principal reason for her dismissal was the making of the protected disclosures. I was told that the claim pursuant to section 103A of the **Employment Rights Act 1996** ("ERA") would not be pursued for pragmatic reasons.

6. The appeal is brought on the basis that the ET misapplied the test for determining whether the instigation and continuance of the disciplinary proceedings was done on the ground that the claimant had made protected disclosures and/or that the determination that the making of the protected disclosures was not a reason for instituting the disciplinary proceedings was perverse. It is contended that the errors in respect of causation in the protected disclosure claims has knock-on effects in respect of the claim of constructive unfair dismissal.

The Law

7. A worker is protected from being subject to detriment done on the ground that the worker has made a protected disclosure pursuant to s47B **ERA**:

> "47B Protected disclosures.
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> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

8. In determining whether treatment is done on the ground of making a protected disclosure, the test to be applied is whether the making of the protected disclosure was a material cause of the detriment; see **Fecitt and Others v NHS Manchester** [2012] IRLR 64, at paras. 43 to 45:

> "43. It follows that, in my judgment, there is nothing in the tribunal's decision which is inconsistent with the approach to the standard of proof adumbrated by the EAT. Strictly, therefore, Mr Linden's second point, challenging the EAT's analysis of causation, does not arise for determination and I will deal with it briefly. Suffice it to say that I agree with the submissions of Ms Romney, counsel for the claimants, that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. I agree with Mr Linden that *Igen* is not strictly applicable since it has an EU context. However, the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing.
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> 44. I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in *Kuzel v Roche Products Ltd* [2008] IRLR 530 at paragraph 48, in the context of a protected disclosure claim:
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> > 'Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs the risk of complicating rather than clarifying the legal concepts.'
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> 45. In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."

9. There can be a distinction to be made between treatment that results from the making of a protected disclosure itself as opposed to the manner in which the protected disclosure was made, things that were done at the same time as the disclosure and/or the consequences of the disclosure. In the context of a victimisation claim, this issue was considered by the Employment Appeal Tribunal ("EAT") in **Martin v Devonshire Solicitors** [2011] ICR 352. The same approach was adopted in the context of public interest disclosure cases in **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500, at paras. 49 to 54:

> "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.
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> 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).
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> 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.

53. That conclusion is not, in my judgment, altered by the decision in *Woodhouse v West North West Homes Leeds Ltd* [2013] IRLR 773. That case involved alleged victimisation. The appellant had lodged a series of grievances alleging racially discriminatory conduct against himself. The grievances had been investigated and ruled to be unfounded. The appellant, however, remained of the view that he had been subjected to racially discriminatory conduct and the fact that his grievances had been rejected reinforced that conclusion in his mind. The employer decided to dismiss the appellant. The appellant had always done his job properly and there were no doubts about his abilities when performing his job and that was not the reason for the dismissal. Rather, the tribunal found that the reason for the dismissal was that the employer considered that the appellant was convinced that the managers were treating him in a racially discriminatory fashion and so concluded that he, the employee, had lost trust and confidence in the employment relationship. The Employment Appeal Tribunal considered that, on the facts, there were no features which were separable from the fact of making the grievances. The features relied upon by the employer involved a view of the appellant's subjective state of mind and the possibility that he may make further complaints in future. In reality, the Employment Appeal Tribunal considered that, on an analysis of the tribunal's findings the reason for the dismissal, described in terms of a loss of confidence and trust by the employee in the employment relationship, was the fact that the appellant had made complaints of racial discrimination. The factors relied upon were not therefore properly separable on the facts of that case from the doing of the protected acts.

> 54. The Employment Appeal Tribunal in Woodhouse suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional. 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 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."

10. The test is whether the factors other than the making of the protected disclosure can properly be treated as being separable from the making of the protected disclosure. The appellate authorities have made it clear that the analysis must be carried out with considerable care because of the possible in-roads into the protection offered to whistle-blowers by severing protected disclosures from ancillary matters.

11. The Tribunal directed itself as to the law from para. 62 of the decision. At para. 70 the Tribunal correctly directed itself as to the approach to be adopted to causation in public interest detriment claims. The Tribunal noted that it had to consider whether the disclosure materially influenced the occurrence of the detriment. The Tribunal also correctly noted that the burden is on the employer to establish the grounds upon which any act, or deliberate failure to act, was done. However, the ET did not direct itself to the relevant law in respect of distinguishing between the making of a protected disclosure and the manner in which it is made, things done at the time that it is made, the circumstances in which it is made; or the consequences of it being made. The Tribunal did not direct itself as to the need to consider with great care whether surrounding circumstances could

properly be treated as separable from the making of a protected disclosure.

12. The core of the reasoning of the Tribunal on the question of whether the claimant's treatment was done on the ground that she had made protected disclosures, is at paras. 93 to 94 of the Judgment:

> "93. The respondent has satisfied the tribunal that the reason for starting the disciplinary process was the concerns raised by Ms Sylvester and Ms Curtis about the claimant's comments on 31 July and 25 August. Our findings of fact make it clear that we find that there is no conspiracy; that the words reported to have been said were in fact said. On any account, that has a potential to lead to a disciplinary investigation. Even if those words were not said, there was still enough information to lead a reasonable respondent to conduct an investigation into the allegation. Given the claimant's own evidence about the time over which health and safety concerns had been raised by her, there is no explanation for the respondent to begin disciplinary proceedings when it did, except for the allegations about the claimant's conduct. There is no evidence that the respondent was at all concerned by the claimant raising those concerns.
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> 94. There were three reasons initially for the disciplinary proceedings. The first related to the Ms Brennan issue which had no connection at all with any of the disclosures. The comments about the Charity Commission guidelines which included the reference to the possibility of trustees losing their houses, could amount to a disclosure but that was only one of the disciplinary matters. The tribunal finds that the respondent was much more concerned about the way in which that concern was raised rather than the fact of the claimant raising it. The Hitler's henchman comment that we have found as a fact was made, has no connection at all to any of the disclosures. The disciplinary proceedings were not initiated or pursued on the ground of any of the disclosures found by the tribunal." [my emphasis]

13. The Tribunal found that the reason the disciplinary process was commenced was concerns made by Ms Sylvester and Ms Curtis about comments made by the claimant on 31 July and 25 August 2017. That of itself did not determine the issue as it was accepted, and found as fact by the Tribunal, that some of the things said by the claimant on those occasions had included the making of protected disclosures. The Tribunal stated at para. 94 that there were three reasons for commencing disciplinary proceedings: the first related to an issue with a Ms Brennan which had nothing to do with the disclosures; the third was a comment that the claimant had made at a meeting on 31st July 2017, in which she had referred to a Polish colleague as being a "Hitler henchman", that had nothing to do with the protected disclosures.

14. The Tribunal stated that the comments made about the use of the trust's funding, with reference to the possibility of trustees losing their houses could amount to a protected disclosure, but then went on to state "… but that was only one of the disciplinary matters". The Tribunal in the final paragraph of the Judgment stated that the disciplinary proceedings were not instituted or pursued on the grounds of any of the disclosures. That, on the face of it, does not fit with what was earlier stated in the judgment. At para. 100, the Tribunal stated:

> "100. Issue 8.4 "Basing the case against her on complaints about her having raised issues and complaints about the alleged risk to health and safety which constitute her alleged protected disclosures". The tribunal has already answered these questions. There is no connection between the public interest disclosures as found by the tribunal and the disciplinary proceedings. Whilst some of the comments made by the claimant on 31 July and 25 August constituted disclosures, others did not and were part of the reason for the disciplinary proceedings being brought." [my emphasis]

15. The Tribunal stated that there was no connection between the public interest disclosures found by the Tribunal and the disciplinary procedures. However, the Tribunal also found that the claimant was dismissed because of what had been said on 31 July and 25 August 2017 and that some of the comments made by the claimant on those occasions constituted protected disclosures, whereas others did not. At para. 107, the Tribunal stated that the disclosures were not the cause of any actions taken by the respondent.

16. In analysing the judgment as a whole, I have had in mind the guidance of the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, in particular what is stated by Lord Justice Popplewell at paras. 57 and (more particularly) 58. The presumption where the tribunal has properly directed itself as to law is that it will have correctly applied the law to the facts. That presumption should only be rebutted if the EAT is driven to the conclusion that the tribunal must, although having properly directed itself, have failed to properly apply the legal test.

17. With considerable regret, I am drawn to the conclusion that the Tribunal has failed to apply the correct legal test. There is much in paras. 93, 94 and 100 that suggests that the Tribunal was seeking to ascertain whether the making of the protected disclosure was **the** reason for the treatment and failed to appreciate that if the making of the protected disclosure was **a** material factor in the occurrence of the detriment, that was sufficient for the claim to be made out.

18. I have considered the matter with great care, particularly in the light of the correct self-direction by the Tribunal as to the causation test. However, when one reads paras. 93 and 94, I am driven to the conclusion that the Tribunal had in mind not only the issue of causation, but also the question of whether there was properly separable conduct that could have been the reason for the treatment of the claimant. In respect of that matter, the Tribunal had not given itself the proper direction as to the law and had not carefully analysed precisely where any dividing line fell between the making of the disclosure and the manner of its making, including the claimant's suggestion of possible contact with the Charity Commissioners and the consequences that could have for the trustees, including the possibility of them losing their homes.

19. Overall, I am persuaded that the Tribunal did not apply the correct legal test in determining whether the claimant had been subject to detriment done on the ground that she had made protected disclosures. I am not persuaded by Mr Halliday's argument that this necessarily leads to the conclusion that the making of the disclosures was a factor in the institution and continuation of the disciplinary procedures. I do not consider it can be said that there is only one possible answer to that question, particularly as this may be a case in which, on proper analysis, the Tribunal could conclude that there is surrounding conduct that is properly separable from the making of the protected disclosures themselves.

20. Similarly, while I accept it is arguable that, if the making of the protected disclosure was a factor in the instigation and continuance of disciplinary proceedings, this could give rise to a breach of the implied term of trust and confidence, I do not consider that there is only one possible determination of that issue. That is a matter that will have to be considered by the Tribunal, together with the question of whether the disciplinary proceedings were instituted because of conduct that is properly separable from the making of the protected disclosures.

21. This is a decision I reach with regret. It is clear that, on the findings of fact of the Tribunal, the claimant was guilty of conduct of a serious nature, particularly in respect of the comment that the Tribunal found as fact she had made about one of her Polish colleagues. This raises very significant questions about the likely outcome on remission. The claimant still has hurdles to overcome in respect of whether a public interest detriment claim is within time, and whether any detriments established to have been done on the ground that she had made protected disclosures would give rise to a claim of constructive dismissal. Even if constructive dismissal could be established there would be issues about whether dismissal would have occurred in any event by reason of the respondent properly instituting disciplinary proceedings in respect of matters excluding the public interest disclosures, and/or whether the claimant contributed to or, possibly, caused her dismissal. The parties should consider carefully whether a further hearing is in their interests, or whether the dispute can be resolved in any other manner.

22. The claimant no longer pursues an automatic unfair dismissal claim. I consider that, irrespective of the pragmatic reasons for doing so, it was a sensible decision as it is hard to see how it could be said, on the findings that the Tribunal made, even if the protected disclosures were a factor in the institution and continuance of disciplinary proceedings, it was the reason (or principle reason) for any conduct that could found a claim of constructive dismissal.

23. This is a case in which the Tribunal made extensive findings of fact. The considerable majority of those findings have not been subject to challenge. On remission, the Tribunal will have to consider a relatively limited compass of the dispute; namely, whether the making of the protected disclosures was a material factor in the institution and continuance of disciplinary proceedings; whether any detriment claim is in time, and/or whether any actions taken in response to the protected disclosures could give rise to a claim of constructive dismissal.

24. I consider it would be proportionate to remit the matter to the same Tribunal, if possible. This will limit additional costs. I see no reason to doubt the professionalism of the Tribunal, However, I appreciate that there may be practical reasons that will prevent this being possible. I do not know whether the employment judge, who I believe has retired, sits in retirement. Accordingly, it will be for the Regional Employment Judge to determine whether it is practicable for the matter to be heard before the same Tribunal, or whether a new panel is required.