Neutral Citation Number: [2023] EAT 96

Case No: EA-2022-000157-RN

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 July 2023

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**MRS R KEALY** **Appellant**

**- and -**

**WESTFIELD COMMUNITY DEVELOPMENT ASSOCIATION**

**Respondent**

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**Mr N Bidnell-Edwards** (instructed by Lawson West Solicitors Ltd) for the **Appellant**
No attendance for the **Respondent**

Hearing date: 27 April 2023

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# JUDGMENT

## SUMMARY

### WHISTLEBLOWING, PROTECTED DISCLOSURES; UNFAIR DISMISSAL

The employment tribunal failed properly to analyse claims of protected disclosure detriment and dismissal. The employment tribunal failed to take the required steps of determining whether there were qualifying disclosures and, if so, whether they were protected. The employment tribunal conflated elements of the tests for whether there were qualifying disclosures provided for by section 43B **ERA** with those that determine whether any qualifying disclosures were protected by operation of section 43C or G **ERA**. The findings of the employment tribunal were unsafe and all claims were remitted for rehearing by a differently constituted employment tribunal.

**HIS HONOUR JUDGE JAMES TAYLER**

1. This appeal once again demonstrates the vital importance of structured decision making, particularly when dealing with protected disclosure claims. The statutory provisions that deal with protected disclosures are somewhat complex but should not prove problematic if they are analysed carefully and logically. The appeal also demonstrates that things can go wrong if a list of issues is adopted that does not fit properly with the statutory provisions.

2. The appeal challenges a judgment of Employment Judge Blackwell, sitting with members, after a hearing on 27, 28 and 29 September 2021, with days in chambers on 3 November 2021 and 20 December 2021. The judgment was sent to the parties on 11 January 2022.

3. The respondent is a charity operating a large community centre providing educational services. It includes a nursery. The claimant began employment with the respondent as an Early Years Co-ordinator on 1 October 2016.

4. The claimant asserted that she made 9 protected disclosures. Disclosures 1-4 related to Early Years Pupil Premium funds, and Disability Access Funds that the claimant asserted were not being spent (the funds disclosures). It appears that disclosures 1-3 were made to the respondent and disclosure 4 was made externally. Disclosures 5-9 related to a breakdown in the heating at the nursery (the heating disclosures). These disclosures appear to have been made externally, including to Ofsted.

5. The heating disclosures were also asserted to involve the claimant, in circumstances in which there was no health and safety representative or safety committee at her place of work, bringing to the respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

6. The claimant asserted that as a result of the disclosures she was subject to 7 detriments. The claimant asserted that she resigned on 4 December 2019 as a result of having been subjected to detriments 1-6. Detriment 7 post-dated her resignation.

7. The claimant brought a claim asserting protected disclosure detriment and dismissal, health and safety detriment and dismissal, dismissal for assertion of a statutory right and constructive unfair

dismissal.

8. The employment tribunal dismissed all of the claims.

9. The claimant submitted grounds of appeal dated 21 February 2022. Judge Keith permitted the appeal to proceed to a full hearing by an Order dated 16 June 2022. On application from the respondent Judge Keith made a **Burns/Barke** Order sealed on 14 September 2022 requesting that the employment tribunal answer 7 questions. The employment tribunal met on 4 October 2022 and provided their answers to the questions on 6 October 2022. Having considered the response of the employment tribunal the claimant applied to add a further ground of appeal. The application was permitted by an Order of Eady J (P) sealed on 1 March 2023.

10. On 15 March 2023, the respondent wrote stating that the did not wish "to resist the appeal any further and incur further costs in doing so" but stating that if the appeal was successful, they intended to defend the claim in the employment tribunal. The claimant presented a proposed consent order and asked the respondent to consent to the claimant's claims being remitted to a differently constituted employment tribunal. The respondent wrote to the EAT on 3 April 2023 stating that the draft was agreed save that the order should state that the judgement was overturned rather than reversed.

11. The matter was considered by Mathew Gulick DHCJ who refused to make the order because it lacked clarity as to the error of law, if any, the parties agreed had been made and the confusion that this might cause to the employment tribunal on remission. He stated:

> "This is, in my view, a paradigm case in which there should be a hearing rather than an endorsement of the proposed consent order on the papers because it is "necessary for the matter to be heard by the EAT to determine whether there is a good reason for making the proposed order" (EAT Practice Direction Para 17.3)

12. The respondent thereafter stated that they were withdrawing from the appeal process and that it was for the claimant to establish any error of law. The respondent stated that they rely on their response and would not attend the hearing.

13. Accordingly, I have heard the appeal in their absence but considered their response in reaching my decision.

14. I consider it helpful to approach the appeal by considering the claim of protected disclosure detriment, health and safety detriment and then constructive unfair dismissal, including the claims that any dismissal was automatically unfair.

**Protected disclosure detriment**

15. There are two essential terms to consider in deciding whether there has been a protected disclosure. There must be a "qualifying disclosure". The term qualifying disclosure concerns the nature of the disclosure that is made. The qualifying disclosure must become a "protected disclosure". The term protected disclosure concerns the person to whom the disclosure is made. But it is not quite as simple as that, because there are additional requirements about the disclosure itself if the disclosure is made to certain persons. In every case it is necessary to analyse first whether there is a qualifying disclosure and then ask whether it has become a protected disclosure. The answer to the second question is usually straightforward because the paradigm example of a protected disclosure is one where the disclosure is made to an employer by a worker, in which case there is no additional requirement in respect of the nature of the disclosure. However, where the disclosure is made to others than a worker's employer the situation can be more complex.

16. The regime defining protected disclosures is a little complex, but the statute provides a clear map to follow. The destination will be reached safely if none of the waymarks are skipped.

17. The starting point is section 43A **Employment Rights Act 1996** ("**ERA**"):

> 43A. Meaning of "protected disclosure".
>
> 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 43G.

18. The statute makes it clear that whomever the disclosure is made to, one must first consider whether there is a qualifying disclosure. The additional requirements for disclosures to certain persons only need be considered once it has been established that there has been a qualifying disclosure.

19. The term "qualifying disclosure" is defined by section 43B **ERA**:

> 43B.— Disclosures qualifying for protection.

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed 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 one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
>
> (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
>
> (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
>
> (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
>
> (5) In this Part "the relevant failure" , in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

20. The matters that the disclosure must in the reasonable belief of the worker tend to show, are set out at section 43B(1)(a)-(f) **ERA**, for example that a criminal offence has been committed, referred to as "wrongdoing" by Underhill LJ in **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731, is defined rather less elegantly by section 43B(5) **ERA** as "the relevant failure".

21. Section 43B **ERA** sets out a number of steps that must be taken in deciding whether a qualifying disclosure has been made. The steps were summarised by HHJ Auerbach in **Williams v**

**Michelle Brown** AM UKEAT/0044/19/OO:

> "9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

22. Once a qualifying disclosure is established, the next stage is to consider whether it is a protected disclosure. I shall limit my consideration to the two grounds on which the disclosures in this case were said to have been protected disclosures.

23. Section 43C **ERA** provides for disclosure to the worker's employer:

> 43C.— Disclosure to employer or other responsible person.
>
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure
>
> (a) to his employer, or

24. Section 43G **ERA** provides, so far as is relevant:

> 43G.— Disclosure in other cases.
>
> (1) A qualifying disclosure is made in accordance with this section if
>
> (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
>
> (2) The conditions referred to in subsection (1)(d) are— …
>
> (c) that the worker has previously made a disclosure of substantially the same information—
>
> (i) to his employer, or …
>
> (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

> (a) the identity of the person to whom the disclosure is made,
>
> (b) the seriousness of the relevant failure,
>
> (c) whether the relevant failure is continuing or is likely to occur in the future,
>
> (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
>
> (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
>
> (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
>
> (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

25. Without wishing to state the obvious, before one considers the additional requirements set out in section 43G **ERA** there must already have been a determination that there was a qualifying disclosure for the purposes of section 43B **ERA**, in that there has been a disclosure of information that the worker reasonably believed tended to show a relevant failure and reasonably believed was made in the public interest. Only once a qualifying disclosure has been established does one consider whether it constitutes a protected disclosure pursuant to section 43G **ERA**.

26. Section 43G **ERA** adds a number of requirements in respect of a disclosure in addition to those necessary for it to be a qualifying disclosure including that:

26.1. the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true

26.2. the disclosure is not made for purposes of personal gain

26.3. in all the circumstances of the case, it is reasonable to make the disclosure

27. The additional requirement that the worker reasonably believes that the information disclosed,

and any allegation contained in it, are substantially true contrasts with the more limited requirement that the worker reasonably believes that the information tends to show a relevant failure required at the stage of determining whether there was a qualifying disclosure. This point was made by HHJ Serota QC in **Darnton v University of Surrey** [2003] ICR 615:

> 30. However, it is clear from the wording of the statute that the standard of belief in the truth of what is disclosed cannot be such as to require the employee making a qualifying disclosure, under section 43B , to hold the belief that both the factual basis of the disclosure and what it tends to show are "substantially true". Parliament has not sought to import into section 43B a requirement that the worker must hold the belief that the information and allegation disclosed are substantially true. Parliament has distinguished between sections 43F, 43G and 43G , in which there is such a requirement, and section 43B in which there is not. There is no justification, in our opinion, for importing words which Parliament chose not to enact into section 43B.

28. It may seem surprising that a higher standard of belief must be held in respect of the relevant failure when making a disclosure to a person other than a worker's employer. But on analysis, the distinction is not surprising. A worker may not be able to assess whether information that is disclosed tends to show a relevant failure if it came from a third party, and might even doubt it is correct, but feel that if true it is so important it should be disclosed to her employer. It is not surprising that such a worker would fall within the protection if the disclosure was made to her employer but a higher standard, requiring a reasonable belief in the truth of the information and any allegation contained in it may be required when it is made to a third party. In **Soh v Imperial College of Science, Technology and Medicine** UKEAT/0350/14/DM HHJ Richardson noted:

> 47. There is, as Mr Catherwood submitted to us, a distinction between saying, "I believe X is true", and, "I believe that this information tends to show X is true". There will be circumstances in which a worker passes on to an employer information provided by a third party that the worker is not in a position to assess. So long as the worker reasonably believes that the information tends to show a state of affairs identified in s 43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision.

29. It is important to note, that the requirement under section 43G **ERA** is not that the information disclosed, and any allegation contained in it, are substantially true, but that the worker reasonably believes that to be the case.

30. In this case the list of issues was confused. When dealing with the protected disclosure detriment claims it asked the following questions:

> 1. Did the Claimant make a protected disclosure of information? Specifically, **do the following amount to protected disclosures**:
>
> [alleged disclosures 1-4 set out at 1a to 1d]
>
> e. The Claimant **also relies on the following disclosures on the basis that they show the health and safety of the children and staff was being, or could be endangered**:
>
> [alleged disclosures 5-9 set out at 1f to 1j]
>
> 2. **To the extent that the disclosures were not to the Claimant's employer, do the disclosures qualify under Section 43G ERA 1996**?
>
> 3. If so, **did that disclosure relate to one of the issues specified in s43B ERA 1996?** The Claimant relies of s.43 (1) (a)(b) (d) and (e)
>
> 4. If so, **did the Claimant have a reasonable belief in the truth of her disclosure?**
>
> 5. If so, **did the Claimant have a reasonable belief that the disclosure was made in the public interest?**
>
> 6. If the Claimant did make a **qualifying protected disclosure**, did the Respondent subject the Claimant to the following detriments:
>
> [alleged disclosures 5-9 set out at 1f to 1j]

31. The agreed issues were a bad starting point for the employment tribunal. It gave rise to a number of difficulties:

31.1. Issue 1 appears to conflate all of the questions necessary to determine whether a disclosure is a protected disclosure – i.e. the five questions necessary to determine whether a disclosure is a qualifying disclosure and also the questions necessary to determine whether such a qualifying disclosure is converted into a protected disclosure depending on to whom it is made.

31.2. Issue 1e is not an alleged disclosure but a subheading

31.3. Issue 2 seems to cover all of the multiple questions that may arise under section 43G **ERA** where a qualifying disclosure has been made to an external party – it is

also not clear whether disclosures 1-3 were considered to have been made to the respondent or externally – including whether the chairman and trustee of the respondent were seen in some way as external to the respondent

31.4. Issue 3 incorrectly paraphrases the question of whether there is a disclosure of information which in the reasonable belief of the claimant tended to show a relevant failure so as to make it a qualifying disclosure

31.5. Issue 4 paraphrases the requirement in section 43G **ERA** that the claimant reasonably believes that the information disclosed, and any allegation contained in it, are substantially true, but appears to apply it to all of the disclosures including any that were made to the claimant's employer as well as those made externally

31.6. Issue 5 then goes back to the question of whether the claimant had a reasonable belief that the disclosures were made in the public interest which is a component of the question of whether there were qualifying disclosures

32. The list fails properly to identify the issues that arise in considering for each disclosure whether it was a qualifying disclosure and, if so, it a protected disclosure by operation of section 43C or 43G **ERA**.

33. The employment tribunal considered Issue 1 as follows:

> 13.1 1.a. We accept that the Claimant sent the report at pages 180 to 182 to Mr Peake and to Adams.
>
> 13.2. 1.c. We do not accept as a matter of fact that Mr Roberts told Mrs Kealy to produce a document to show how the money had been spent which had not been spent.
>
> 13.3. 1.d. We accept that that disclosure was made.
>
> 13.4. 1.e. We do not accept that the health and safety of the children and staff was being, or could be, endangered by the non-application of the funds. No evidence was advanced to support that contention.
>
> 13.5. 1.f. We accept that the disclosure was made.
>
> 13.6. 1.g. We accept that the disclosure was made in the form set out at pages 235 – 239.

> 13.7. 1.h. and 1.i. Given that there is no documentary evidence to support the allegations and our views on Mrs Kealy's credibility, we do not accept that these disclosures were made.
>
> 13.8. 1.j. Again, we prefer the evidence of Mr Roberts supported by Mr Smith that no such instruction was given. We accept that Mr Roberts asked Mrs Kealy to inform Ofsted that the paragraph quoted above at paragraph 3.26 of our findings of fact was wrong.

34. Despite the breadth of the issue, which appeared to include all of the myriad sub-issues in considering whether there were qualifying disclosures that became protected disclosures, the employment tribunal appears to have limited its consideration to whether there were disclosures of information. Issue 1e was answered although it is no more than a subheading where there was a change from the funds disclosures to the heating disclosures. There is no finding about disclosure 2. There appear to be findings that the disclosures of information relied on for disclosures 3, 7, 8 and 9 were not made. However, the consideration of disclosures 3 and 9 does not appear to relate to the question of whether there were disclosure of information but to the underlying facts. The disclosures of information that appear to have been rejected are not obviously subject of any of the grounds of appeal, but the grounds of appeal are themselves somewhat confused like the list of issues. To the extent there were findings that disclosure of information were not made the determination seems to have been founded on an overall assessment of the credibility of the claimant which I consider is unsafe for reasons to which I shall return.

35. The employment tribunal considered Issue 2 as follows:

> We accept that in relation to those disclosures that were not made to Westfield, the disclosures do qualify under Section 43G of the 1996 Act in that Mrs Kealy had made disclosures of substantially the same information to Westfield.

36. The question of whether the claimant had made a disclosure of substantially the same information to her employer before making it externally is one, but only one, of the requirements for a qualifying disclosure to become a protected disclosure by operation of section 43G **ERA**. There is no freestanding ground of appeal in respect of this apparent conflation of the various requirements of section 43G **ERA**.

37. The employment tribunal considered Issue 3 as follows:

> We accept that each of the disclosures relate to either failures under subsection (1)(b) or (d).

38. Accordingly, it appears that the employment tribunal accepted that there were disclosures of information that "related to" relevant failures. The issue incorrectly paraphrased the requirement that the worker reasonably believes that the information disclosed tends to show a relevant failure. That important element of determining whether there were qualifying disclosures was not considered.

39. The employment tribunal considered Issue 4 as follows:

> As to the allegations that Mrs Kealy was prevented from spending the allocated EYPP and DAF monies, we have found as a fact that that allegation is not true. As to the allegation that Mr Roberts instructed Mrs Kealy to prepare a report wrongly stating that those funds had been applied to a particular purpose, again we have found as a fact that that allegation is not true. Thus, she could not have had a reasonable belief in the truth of her disclosures.
>
> 17. Turning now to the allegations concerning the problems with the heating, we accept that there are elements of the disclosure beginning at page 235 that are true. But they are undermined by Mrs Kealy's statement to Ofsted that nothing was being done with the heating failure. We therefore do not accept that Mrs Kealy had a reasonable belief in the truth of the totality of any of her disclosures.

40. These findings involve two non sequiturs. The employment tribunal held that because the funds disclosures were not true the claimant could not "have had a reasonable belief in the truth of her disclosures". Section 43G **ERA** could have been drafted to include a requirement the worker believes that the information disclosed, and any allegation contained in it, are true; but instead Parliament applied a somewhat lower threshold that the worker "reasonably believes that the information disclosed, and any allegation contained in it, are substantially true". While that is a higher threshold than the requirement in section 43B **ERA** that the worker reasonably believes that the information disclosed tends to show a relevant failure, it is still based on a reasonable belief in truth rather than objective truth. A person can reasonably believe that something is true even if it proves to be false. Furthermore, insofar as some of the disclosures were to the claimant's employer (which appears to be the case) 43G **ERA** did not apply.

41. The employment tribunal concluded that the heating disclosures were partially true but went on to hold that they were "undermined" by her "statement to Ofsted that nothing was being done with the heating failure". Whatever the claimant said to Ofsted about remedying the heating defect that did not necessarily prevent her from having a reasonable belief that the information disclosed in the heating disclosures, and any allegation contained in it, were substantially true. I shall come back to the safety of the conclusion that the claimant told Ofsted that nothing was being done about the heating problems.

42. The failures in the analysis of Issue 4 are the basis of the challenge in ground 1 of the Notice of Appeal, which I uphold.

43. The employment tribunal did not consider Issue 5, whether the claimant reasonably believed that the disclosures were made in the public interest, in the original decision. As explained above that requirement is a component of a disclosure being a qualifying disclosure. However, the employment tribunal did refer to the issue in its answers to one of the questions asked under the **Burns/Barke** procedure stating that:

> Paragraph 17 concerns the alleged disclosures relating to the heating problems which began on 12 November 2019. We accept that there was an alleged earlier disclosure to Leicestershire County Council on 14 November. We are not saying that that could not be a Protected Disclosure but that it was tarred by the same brush as all of the disclosures, namely that its purpose was to undermine Mr Roberts and thus the Claimant could not have believed at the time the disclosure was made that the disclosure was in the public interest.

44. That analysis confused the question of whether the claimant had a reasonable belief that the disclosure was made in the public interest with her motive for making the disclosure: see **Chesterton** at paragraph 30. This is challenged by ground 5 of the Notice of Appeal, which I uphold.

**Other protected disclosure issues**

45. In the light of my above conclusions, I do not consider that the assertion that the decision about disclosures 5 and 6 is not **Meek** compliant, in ground 4a of the Notice of Appeal, adds anything of significance.

46. The employment tribunal stated, in respect of the asserted detriment that the respondent failed

to respond to the claimant's grievance, that "given that Mrs Kealy had by then resigned, we do not consider Westfield's failure to respond to her grievance amounted to a detriment". This also is a non-sequitur. There is no reason why failure to respond to a grievance after employment has ended cannot potentially be detrimental. I also accept that the reasoning is insufficient to be **Meek** compliant as asserted at ground 4c of the Notice of Appeal.

**Constructive dismissal**

47. The employment tribunal made an overarching assessment of the credibility of the claimant that impacted on all of her claims:

> 4. In our view, the outcome of all the issues in this case turn on the credibility of Mrs Kealy against that of Mr Roberts, the two Trustees, Mr Smith and Mr Adams and, finally, Ms Hutchings, the Office and Finance Manager.

48. One of the key components of this assessment was the conclusion that the claimant had told Ofsted that the respondent had not done anything to resolve the heating issues:

> 10. The next major factual issue is the circumstances surrounding the failure of the heating in November 2019. As we have found in our findings of fact, Mrs Kealy went out of her way to be obstructive. We particularly note the evidence of Mr Adams in relation to the placing of the thermometers by Mrs Kealy/Ms Farmer. There is also a further major conflict of evidence concerning what Mrs Kealy told Ofsted about the heating and in particular the paragraph recorded at paragraph 3.26 of our findings of fact, namely that Ofsted had said:
>
> > "It is of extreme concern that you have done nothing to ensure that children's health and wellbeing is not affected by the broken heating system. It is of further concern that you have continued to provide care knowing this, and have done nothing to resolve the issue."
>
> 11. Mrs Kealy denied making that statement to Ofsted. We do not believe her. It seems inconceivable to us that a Regulator would have recorded such a damning statement and followed it with a six-week suspension had Mrs Kealy not informed them what is recorded in that paragraph.
>
> 12. Thus, we have an employee who is both deliberately undermining her Line Manager and acting against the interests of her employer.

49. The employment tribunal accepted at paragraph 3.20 that the claimant had submitted a document to Ofsted on 18 November 2019. In that document the claimant had set out steps that had been taken by the respondent to seek to deal with the heating issues. I consider that on the basis of

these inconsistent findings on an issue that the employment tribunal found to be of such significance to the totality of its factual findings ground 3 of the Notice of Appeal, that asserts perversity, is made out.

**Health and safety detriment and dismissal**

50. The employment tribunal relied on its findings in respect of the constructive dismissal claim. The reasoning was extremely brief. The employment tribunal held when considering the detriment claim:

> 38. We accept that Mrs Kealy did inform Mr Roberts about the problems with the heating. We also accept that the failure of heating was potentially harmful.

51. When dealing with the dismissal claim the employment tribunal stated:

> 40. We accept that Mrs Kealy did inform Mr Roberts of the failure of the heating system and that that is capable of falling within the meaning of subsection (1)(c) of Section 44.

52. It thus appears that the employment tribunal accepted, in principle, that the claimant had brought to the respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety for the purposes of section 44(1)(c) **ERA**.

53. In considering the detriment claim the employment tribunal went on to state:

> 41. As to the alleged detriments relied upon in issue 18, namely paragraphs 52 – 60, we rely on the findings of fact that we have made above in relation to constructive unfair dismissal.

54. In respect of the dismissal claim the employment tribunal stated:

> 38. We accept that Mrs Kealy did inform Mr Roberts about the problems with the heating. We also accept that the failure of heating was potentially harmful. However, given our findings of fact, we cannot see any causative connection whatsoever between Mrs Kealy's resignation and her reporting of the failure of the heating system.

55. I consider that it was insufficient to simply read across the findings from the constructive dismissal claim considering the differing statutory tests and the burden placed on the respondent to show the reason for any act or failure to act by section 48(2) **ERA**. I consider that ground 2 of the

Notice of Appeal and the related **Meek** ground, 4(b), are made out.

**Disposal**

56. I consider that the matter must be remitted to a newly constituted employment tribunal for a full rehearing. My conclusions in respect of the specific errors of law and the assertions of perversity and lack of **Meek** compliance are such the facts should be found anew as was accepted by the parties to be the appropriate disposal of the appeal.