Neutral Citation Number: [2024] EAT 70

Case Nos: EA-2023-000250-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 March 2024

Before:

HIS HONOUR JUDGE AUERBACH

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Between:

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Appellant

- and –

(1) INTERSERVE GROUP LIMITED
(2) MR P MACFARLANE
(3) TILBURY DOUGLAS CONSTRUCTION LIMITED
(4) MR J NOLAN
(5) MS J WARRACK
(6) CADMAN HR LIMITED
(7) MS D CADMAN

Respondents

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The Appellant appeared in person
The Respondents did not appear and were not represented

Hearing date: 26 March 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal brings complaints including that she was subjected to detrimental treatment on grounds of having made protected disclosures and unfairly dismissed for the sole or principal reason of having made protected disclosures.

A draft list of issues identified a number of claimed protected disclosures on which the claimant relied (and the factual and legal issues between the parties relating to them). The claimant maintained that this list wrongly omitted a further set of claimed protected disclosures which were covered by her original particulars of claim. The tribunal determined that these further claimed disclosures were not covered by the original particulars of claim, and so the claimant required permission to amend, which the tribunal refused.

The tribunal erred in determining that the claimed protected disclosures in question were not sufficiently raised by the original particulars of claim, and so erred by effectively striking out that part of the claimant's case. On fair consideration of the particulars of claim as a whole, the claimed disclosures were sufficiently raised. While in their original form they required further particulars, some further particulars had been given by the time of the tribunal's decision. Permission to amend was not required. The EAT accordingly directed that the claimed protected disclosures in question, and the factual and legal issues relating to them, be added to the list of issues for trial.

HIS HONOUR JUDGE AUERBACH:

1. This matter is ongoing in the employment tribunal in Birmingham. I have been told by the appellant this morning that at present the full merits hearing is listed to take place over a number of days in September of this year.

2. On 19 February 2022 the appellant, who I will refer to as the claimant, presented a claim form in the employment tribunal, acting in person. There were seven respondents, namely Interserve Group Limited, Julia Warrack, John Nolan, Tilbury Douglas Construction Limited, Paul Macfarlane, Cadman HR Limited and Debra Cadman.

3. It appears to be common ground that the claimant was employed by Interserve Group Limited, which I will call Interserve, from 6 January 2020 until she was dismissed with effect on 10 December 2021. Mr Nolan is, or was, the Interim Chief Architect of Interserve, Mr Moore its Principal Architect, and Ms Warrack its Group Chief Information Officer. Tilbury Douglas Construction Limited, which I will call Tilbury, is a wholly-owned subsidiary of Interserve. Mr Macfarlane is its HR director. Cadman HR is an HR consultancy of which Ms Cadman is the controlling shareholder and a director.

4. The claimant indicated in section 8 of the claim form in summary that she was claiming unfair dismissal, automatic unfair dismissal for the reason, or principal reason, of having made protected disclosures, detrimental treatment on the ground of protected disclosures, complaints under the **Equality Act 2010** by reference to the characteristics of sex and disability, and a complaint pursuant to sections 188 and following **Trade Union and Labour Relations (Consolidation) Act 1992**. Accompanying the claim form was a lengthy particulars of claim document; and on 5 March 2022 the claimant also sent the tribunal some further particulars.

5. The claims in the tribunal were and are defended by all of the respondents. The Interserve and Tilbury group of five respondents are represented by Mills & Reeve LLP and the Cadman pair of respondents by DAC Beachcroft LLP.

6. In very broad summary, the respondents' case is that there was a reorganisation leading to a redundancy situation at Interserve and a collective and individual consultation process in relation to which the services of Cadman were engaged. Mr Macfarlane had a role in the process as well. The respondents' broad case is that the claimant was dismissed by reason of redundancy. Her claims are disputed on their merits and there are time and other jurisdictional issues. The respondents dispute that the claimant made any protected disclosures; and, in any event, if she did, they dispute that she was subject to any detriment on grounds of having done so or dismissed for the reason, or principal reason, of having done so.

7. I do not, for the purposes of what I have to decide, need to go through all of the developments in the litigation in the tribunal hitherto. But, relevantly, I note that, following the entering of responses, there was a case management hearing before EJ Kelly on 28 July 2022 (the minute was sent on 8 August 2022). The tribunal directed a further preliminary hearing to take place on 31 January 2023 in two parts. The first part would consider whether the claimant was at the relevant times a disabled person. The tribunal granted an application by the claimant for that part, which would normally be a public hearing, to take place in private. The second part was to deal with case management issues. The agenda set out by Judge Kelly included to finish identifying the issues to which the claims gave rise and to establish whether the claimant required permission to amend and, if so, to decide whether to permit amendment.

8. The further preliminary hearing on 31 January 2023 was before EJ Wedderspoon. The claimant was in person. The Interserve and Tilbury respondents were represented by counsel and the Cadman respondents by a solicitor. A minute sent to the parties on 13 February 2023

recorded that in the first part of the hearing the tribunal had determined that the claimant was at the relevant times a disabled person. This appeal is not concerned with that decision.

9. The minute went on to record to following decision at paragraph 4:

> **"The claimant's application to amend her claim to include a claim of protected interest disclosure detriment was refused."**

10. Directions were given for the respondents to table a further draft list of issues and the claimant then to provide her points of dispute in relation to it. There was a narrative case management summary including the tribunal's reasons for the paragraph 4 decision. In summary, the judge decided that an issue which the claimant wanted included in the list of issues going forward was not reflected in the existing claim form and particulars, and so required an application to amend; and the judge went on to refuse permission to amend.

11. This appeal relates to that decision. The claimant, who is representing herself in the EAT, makes a number of criticisms of the judge's decision and reasoning in her grounds of appeal. She says that the judge misdescribed in her reasons the issue that she, the claimant, wanted including in the list of issues. She says that the judge should have concluded that the issue that she had wanted included, correctly described, was covered by her existing claim and particulars of claim and, therefore, did not require permission to amend and should have been added to the list of issues. The claimant says that by failing correctly to identify the issue that she had in mind and failing to identify that it was covered by her original claim form and particulars of claim, the judge effectively wrongly struck out part of her claim. The claimant also says that she was not properly on notice that this might happen, and that that the matter might be considered in that way during the course of the hearing on 31 January 2023.

12. By an order sealed on 8 July 2023 Judge Keith directed that the appeal should be considered at an all-parties preliminary hearing in the EAT. The two firms of solicitors between

them representing all of the respondents subsequently both indicated that they were not defending the appeal and did not wish to participate in that hearing.

13. In December 2023 the matter was referred to me. In the absence of the parties having together put forward proposed agreed terms for the disposal of the appeal by consent, I indicated that the preliminary hearing should remain listed but be converted to an appellant-only preliminary hearing. The Claimant had not sought ELAAS representation. The letter conveying my direction encouraged her to reconsider; but, as she was entitled to do, she subsequently confirmed that she did not wish to avail herself of the ELAAS scheme.

14. In February 2024 the claimant applied for an order anonymising her in respect of this appeal, which I granted by an order sealed in March 2024. As the respondents were not opposing the appeal and the claimant did not wish to take advantage of the ELAAS scheme, I also converted the then forthcoming preliminary hearing to a full appeal hearing. The solicitors for all of the respondents subsequently confirmed again that they did not wish to participate.

15. At that full appeal hearing today the claimant has appeared in person. I have a bundle of core documents, a supplementary bundle and an authorities bundle; and I have been referred to a number of emails sent by the claimant in the last few days leading up to this hearing, some of them attaching further documents including a draft of the order she seeks from the EAT. I have also read her written skeleton argument. During the course of this morning I have heard oral submissions and arguments from the claimant. She has presented her arguments to me with great clarity, and I have been assisted by hearing from her in person today.

16. Before I come to consider in more detail the decision of EJ Wedderspoon at the January 2023 hearing, which is the subject of this appeal, I need first to say something more about what happened at the earlier case-management hearing in July 2022 before Judge Kelly, and what followed it. In the run-up to the hearing before Judge Kelly the claimant sent the tribunal a

chronology document giving her account of various events that had occurred, in particular in the period leading up to her dismissal by Interserve. This included her lengthy and detailed account of what she said happened during the course of a consultation meeting on 3 November 2021 with Ms Cadman and Ms Warrack, during the course of which, on the claimant's account, without any prior context or warning, they both raised the subject of whistleblowing and said things that the claimant contends amounted to referring to her as a whistleblower.

17. In the minute of the preliminary hearing of 28 July 2022 Judge Kelly, after noting the broad background, indicated that there had been insufficient time at that hearing to discuss all of the issues to which the claims gave rise, but a number of them had been identified and were set out in the next part of the minute. The protected disclosures that the claimant claimed to have made, and on which she relied, were set out. These included a number of disclosures that she claimed she had made during the period of her employment with Interserve. However, the first paragraph, coming before those, at sub-paragraph 8A(i), read as follows:

> **"In Summer of 2018 onwards the Claimant made disclosures to the CFO of her previous employer, Vanessa Howlison at Highways England, and to agents of that organisation, KPMG. The respondents contest that this is pleaded and say an amendment is allowed. *The claimant will provide full details of the alleged disclosures to the respondent*."**

18. Plainly the judge meant to record that the respondents' position was that an amendment was *required*. A little further on the judge also identified the following issue of law:

> **"Can the Claimant rely on disclosures made to a previous employer in relation to a claim against a later employer?"**

19. The tribunal went on to set out in this same minute the claimant's case that she had been dismissed for the reason, or principal reason, of having made protected disclosures and subjected to detrimental treatment on various occasions on grounds of having done so. The alleged detrimental treatment was then listed out.

20. At the end of the same minute EJ Kelly set out her orders. These included orders in respect of the further preliminary hearing to take place on 31 January 2023 and the matters to be considered at that hearing, including, at paragraph 1.3.2: **"To finish identifying the issues"**, and at 1.3.3: **"To establish whether leave of the Tribunal is required for the Claimant to amend her claim and, if so, to decide if such leave should be given."**

21. Further on, Judge Kelly directed the claimant to provide certain further information to the respondents, including full details of the alleged public interest disclosures to Highways England, to include the dates, whether the disclosures were made orally or in writing, to supply copies of any written disclosures, to identify to whom they were made, what the qualifying disclosure was, and what part or parts of section 43B(1) **Employment Rights Act 1996** she said such disclosures fell under. Directions were also given with a view to seeking to get the parties to agree, so far as possible, a draft list of issues for consideration at the next hearing, and for the respondents to identify any matters which they contended would require permission to amend in order to be included in the list of issues.

22. It appears from copy emails that the claimant has provided to the EAT, that on 12 September 2022 she sent several emails to the respondents' solicitors, including forwarding to them copies of emails that she had sent in 2018 and 2019 by way of providing to them further information and copy documents relating to the protected disclosures that she claimed to have made in 2018 and 2019, and on which she was seeking to rely as part of the current claim.

23. In addition, having received the minute of Judge Kelly's hearing in August, on 15 September 2022 the claimant sent a document called "Corrections and Amendments", adding some replies in blue highlighting to points in Judge Kelly's minute. These included her annotations to Judge Kelly's description of the issues so far identified. In particular the claimant added some detail to the description given in Judge Kelly's minute, of the protected

disclosures that she claimed she had made to Highways England and/or KPMG, adding in particular some names of individuals to whom she said those disclosures had been made.

24. The claimant also referred to an interim relief judgment in her ongoing claims against Highways England, KPMG and others. This was a reference to the fact that the claimant did indeed have ongoing claims, against those respondents, in which she was claiming to have made protected disclosures, and to have been subject to detriment and/or dismissal on that account. The judgment she was referring to was a decision in that litigation in respect of an application for interim relief, which had been refused, the reasons for which included some account of the protected disclosures that the claimant claimed, in that case, to have made.

25. I come now to the decision of EJ Wedderspoon. In her case summary, which amounted to the reasons for the decision challenged by this appeal, she indicated that the tribunal had determined that one particular aspect, which the parties had disagreed as to whether it should be included in the list of issues, was not included in the claim form, and that the claimant should not be permitted to add it by way of amendment. She went on to summarise the parties' respective submissions.

26. Counsel for the Interserve and Tilbury respondents had submitted that an allegation that the claimant made a protected disclosure in 2018 to a previous employer had not been pleaded, and that the respondents would be prejudiced if the claimant was permitted to add it by way of amendment. The solicitor for the Cadman respondents agreed and also submitted that it was hard to see how it would be within the scope of section 47B of the **1996 Act**. The claimant submitted that the matter was covered by her original particulars of claim; and on the point of law she relied upon the decision of the EAT in **BP Plc v Elstone** [2010] ICR 879.

27. The judge continued as follows:

“12. When asked whether the claimant considered she might have been called a whistleblower because she alleged she had whistleblown to the relevant respondents in this claim and that formed part of her case before the Tribunal, the claimant disputed this.

13. The claimant’s pleaded case is set out at pages 32 and 33 of the bundle (pages 10 and 11 of 24 of the attachment to her ET1). It states “*So what were the Public Interest Disclosure Acts that Debra Cadman and Julia Warrack were referring to on 03/11/2021 (as even on 8/12/2021 when I tried to get come clarification ██████ : Interserve Group Limited, Julia Warrack, John Nolan, Tilbury Douglas Construction Limited, Paul MacFarlane, Cadman HR Limited, Debra Cadman their answers were not convincing and Debra Cadman became evasive in my view; even Julia Warrack admitted she remembered the conversation of 03/11/2021 differently (she said something like “all three of us seem to remember the conversation differently). As it had come out of the blue on 03/11/2021 I immediately thought Debra Cadman and Julia were referring to my Whistleblowing in a case which is on the internet. During the meeting on 9/12/2021, it appeared that they may have let slip such that they may have got this from dealing with people at the company in that case or people who had moved to work for Tilbury Douglas/Interserve Group – but it was not clear to me. My gut still thinks this is probably the reason they called me this..*”

14. Before the Tribunal, the claimant clarified she was called a whistleblower by Debra Cadman and Julia Warrack and that she believes this was because they had read the Tribunal judgement on the internet that described her as a whistleblower in her claim against a former employer in 2018.

15. The Tribunal determined that the claimant’s claim as she had now identified was not that she had made a public interest disclosure to her former employer so that she was subject to a detriment by Debra Cadman and Julia Warrack; but that they were suspected of reading an employment tribunal judgment which classified her as a whistleblower so that they caused her a detriment as calling her a whistleblower. The claimant had not pleaded nor identified at the hearing that she was alleging that by reason of the public interest disclosure made to a former employer she was subject to a detriment/dismissed. The text of the claimant contained in the claim form appeared by way of background; was not identified as a pleaded allegation of detriment arising from public disclosure and in order to make such a complaint, the claimant would need to amend.

16. The Tribunal determined that her claim was a new claim and a significant amendment. In the manner described to the Tribunal, the claimant’s allegation did not fit the public interest disclosure regime even taking a purposive approach. The Tribunal determined that an allegation that two colleagues may have read a judgment which described the claimant as a whistleblower in a previous employment and then referred to the claimant as such or the claimant had been dismissed does not meet the threshold tests set out in sections 43B, 47B or section 103A of the Employment Rights Act 1996. The claimant was not relying upon the public interest disclosure itself and suggesting there was a causative link to any detriment or dismissal but instead her case is that the reporting of the same in a Tribunal judgment caused her to be subject to a detriment or a dismissal.

17. The claimant has brought a number of claims in these proceedings including public interest disclosure detriment and automatic unfair dismissal. The

> **claimant has redress against these respondents; in the absence of this allegation the claimant still has a number of claims to be determined. The Tribunal found that an amendment was required; the amendment was significant; it was being made some 11 months after the submission of the claim form. Further there is prejudice to the respondent who has to go to the time and expense of defending a weak claim. Furthermore, the allegation would require further time at trial to hear evidence as to the allegation and determine the same. On balance the prejudice is greater to the respondent (see Vaughan v Modality Limited UKEAT/0147/20 and Choudhury v Cerberus Security and Monitoring Services Limited (2002) EAT 172). In the circumstances the amendment was refused."**

28. In summary, the claimant's position is that she had sufficiently raised in her original particulars of claim that it was her case that, starting in the summer of 2018, at which time she was working for Highways England, she had made disclosures to Highways England and/or to KPMG in the latter half of 2018 and early 2019. Her case was, at least, that KPMG was an agent of Highways England, if not also an employer. She was seeking to have those earlier claimed disclosures included in the list of issues on the basis that Ms Cadman and Ms Warrack had learned of them through one route or another, including directly or indirectly because of the publication of the interim relief decision on the internet.

29. The claimant's case is that, in the course of the November 2021 meeting, they had referred to her as a whistleblower, and she sought to rely on this as evidence that they knew about her case that she had made protected disclosures to Highways England and/or KPMG. The case she wished to advance was that she had been subjected to detriments and/or unfairly dismissed by Interserve on grounds of, or for the principal reason of, those *previous* disclosures about which, on the claimant's case, Ms Cadman and Ms Warrack had become aware.

30. EJ Wedderspoon, it is apparent from her decision, did not consider that such a case was advanced by the original particulars of claim; and so she went on to consider whether an amendment should be permitted, which she then refused for reasons that she gave.

31. The claimant's primary challenge to that decision in her grounds of appeal is to the effect that EJ Wedderspoon erred by considering that the case was not, or not sufficiently advanced, in her original particulars of claim; and so, says the claimant, the judge effectively and wrongly by her decision, *de facto* struck out that part of her case.

32. In her grounds of appeal and her arguments, the claimant advances further challenges. She says that she was not properly on notice that EJ Wedderspoon might be considering or deciding whether effectively to strike out part of her claim, which, the claimant says, she would have expected to be considered only at a substantive preliminary hearing. She says that she did not, therefore, come fully prepared to argue the point, although she did argue it so far as she could. She says that she was not, however, permitted to develop her argument that no amendment was necessary by reference to her original particulars of claim, and she refers also to the chronology document that she had tabled in advance of the Judge Kelly hearing.

33. The claimant also says that EJ Wedderspoon misunderstood or misrepresented the nature of the case that she was seeking to advance as being merely to the effect that, having become aware of the litigation against Highways England, KPMG and others, through the interim relief decision being publicly available, her complaint was about being *referred to* as a whistleblower at the November meeting, whereas her complaint was that Ms Cadman and Ms Warrack in particular had been influenced by what they had learnt about her having (on the claimant's case) *in fact* been a whistleblower in connection with matters that she had raised with Highways England and with KPMG.

34. The claimant contends that it should have been considered that she had given sufficient particulars in her original claim form, bearing in mind that she was a litigant in person and that she was also mindful that the litigation against Highways England and KPMG was itself ongoing, in which the same protected disclosures were being claimed, that further information

could be obtained from the record of the interim relief decision, and, by the time of the Judge Wedderspoon hearing, had also been provided by way of the various emails that the claimant had provided to the respondents' solicitors in September 2022, and by way of the claimant's annotations to the order emerging from the Judge Kelly hearing.

35. The claimant says that there is a wider context of the importance of whistleblowing claims and of permitting them to be heard at trial as analogous to a form of discrimination claim; and she cited various authorities to me which she said supported that approach. She submitted that this was a further reason why EJ Wedderspoon erred by not treating what she had put in her particulars of claim and the subsequent information she had provided, as sufficient to enable these matters to be included in the list of issues.

36. I turn then to what the claimant wrote in her claim form and accompanying particulars so far as relevant to what I have to decide. In box 8 of the claim form, she identified in general terms, as I have already noted, that her complaints included detrimental treatment on grounds of protected disclosures and unfair dismissal for the reason, or principal reason, of having made protected disclosures.

37. In her accompanying particulars of claim document, at the foot of page 4 she wrote:

> **"Automatic Unfair Dismissal (and in the alternative unfair dismissal) the main reason for this dismissal was that I have raised Public Interest Disclosures and this is an unusual case because Debra Cadman referred to me as a Whistleblower without any clear context (out of the blue) and on 3/11/2021 and Julia Warrack agreed. They then both sought to act to cause me detrimental treatment and dismissed me in a meeting with them on 9/12/2021 giving one day's notice and asking me to hand over my work."**

38. Further on, in relation to the particulars of her case against Cadman HR and Ms Cadman, the claimant referred again to her case that Ms Cadman was specifically involved in the decision to dismiss her on 9 December 2021 with only one day's notice, and other detrimental treatment leading up to the dismissal, which the claimant asserted occurred because

Ms Cadman had identified her, as expressly stated on 3 November 2021, as a whistleblower, as well as because she was a woman. Further on in the particulars, on page 10, the claimant reiterated her case that Ms Warrack and Ms Cadman had dismissed her, as they considered her to be a whistleblower, and had caused her detrimental treatment.

39. There follows the passage cited by EJ Wedderspoon in part, which I will set out in full:

> **"So what were the Public Interest Disclosure Acts that Debra Cadman and Julia Warrack were referring to on 3/11/2021 (as even on 9/12/2021 when I tried to get some clarification their answers were not convincing and Debra Cadman became evasive, in my view: even Julia Warrack admitted she remembered the conversation of 3/11/2021 differently (she said something like, 'All three of us seem to remember the conversation differently').**
>
> **As it had come out of the blue on 3/11/2021 I immediately thought Debra Cadman and Julia Warrack were referring to my Whistleblowing in a Case which is on the internet. During the meeting of 9/12/2021 it appeared that they may have let slip such that they may have got this from dealing with people at the Company in that case or people who had moved to work with Tilbury Douglas/Interserve Group but it was not clear to me. My gut still thinks that this is probably the reason they called me this."**

40. The particulars went on to set out the claimant's case as to the protected disclosures she said she had made during the course of her time with Interserve.

41. It appears to me that on a fair, objective reading of this document as a whole, and taking account of the fact that the claimant is a litigant in person, she did advance in these passages her case: that in addition to the protected disclosures that she claimed to have made during her time with Interserve, she had made previous protected disclosures; that these previous disclosures were referred to in a decision in another case which was on the internet; that Ms Cadman and Ms Warrack knew about those previous disclosures, as evidenced by them having referred to her as a whistleblower at the 3 November meeting; and that she was subjected to detriments complained of on grounds of those previous protected disclosures, and dismissed for the reason, or principal reason, of having made them.

42. In particular, the foregoing passages indicate that the claimant was relying on what, on her account, was said at the 3 November meeting as, as it were, circumstantial evidence that Ms Cadman and Ms Warrack knew about what the claimant says were those previous disclosures in 2018 and 2019, to her previous employer(s), and had been adversely influenced by that knowledge. I think it is also clear that the claimant was saying that the publication of the material arising from the previous case on the internet was at least part of the explanation for how Ms Cadman and Ms Warrack came by their knowledge of what the claimant said were those previous disclosures. I think it is also clear from the statement in the first passage where the claimant states that they "then both sought to act to cause me detrimental treatment and dismiss me" that she was arguing that there was a causal link between the previous disclosures and the dismissal and at least some of the detrimental treatment complained of, in particular, on her case, the unusual decision to dismiss her with only a day's notice.

43. It certainly can be said that these passages in the original particulars of claim would require further more detailed *particulars* to be given, but those were the particulars which were essentially directed to be given by Judge Kelly, and which the claimant had sought to provide by the email correspondence that followed in September 2022, and also by way of her tabling annotations in September 2022 to the passage in the Judge Kelly minute describing this issue.

44. The authorities indicate that particulars of claim should be read fairly as a whole, bearing in mind that a litigant in person may not identify all of the details of their claim in the way that a lawyer would. It *is* necessary for the essential *factual* allegations to be made, such that the tribunal can see that all of the essential elements of the cause of action have been set out, even if further more detailed particulars of those factual allegations might be needed.

45. But in this case it appears to me that, on a fair reading, the particulars contained in the original claim form, read as a whole, did sufficiently cover the essential elements: asserting that

there had been previous protected disclosures, giving some information about those by reference to a previous tribunal case, asserting that those concerned had the requisite knowledge of those previous disclosures, and asserting that the decision to dismiss and at least some of the detrimental treatment complained of had been influenced by that knowledge. As I have said, more detailed particulars had been given by the time of the EJ Wedderspoon hearing, which themselves also clarified what the claimant was saying was the basis of her case in this regard.

46. I therefore conclude that the judge did err by not treating the claimant as having raised in her claim form an assertion that she had made prior protected disclosures to Highways England and/or KPMG which she contended were among the disclosures on grounds of which she had been subjected to detrimental treatment complained of and/or were the reason, or principal reason, why she was dismissed by Interserve. The judge, therefore, erred by not determining that those alleged protected disclosures, as further particularised by the time of the hearing before her, should be included among the claimed protected disclosures on which the claimant sought to rely, alongside the other claimed protected disclosures in the list of issues which would form the basis of the matters to be adjudicated at trial.

47. I consider that on any fair reading of the overall particulars of claim the judge would have been bound to determine that these previous claimed disclosures should be added to the list of claimed protected disclosures on the list of issues. Therefore, I do not need to remit that matter to the tribunal for further consideration.

48. I understand that the most recent list of issues produced by the tribunal is the one set out in the minute of a further case management hearing that took place in July 2023 before EJ Meichen. I will therefore direct that there be added to the claimed protected disclosures in that list of issues, the amended wording that the claimant proffered by way of her commentary on the EJ Kelly order, in which she provided some more detail of them, being as follows:

> **"ERA 43B(1), (a), (b), (d), (f) in summer of 2018 onwards the Claimant made disclosures to the CFO of her previous employer, Vanessa Howlison of Highways England, and to others such as the Senior Counter Fraud Officer, Ian Maddock, and his manager, Mark Byard – Health, Safety and Wellbeing Director (Safety, Engineering and Standards), Davin Crowley-Street the Chief Data Officer, and to KPMG."**

49. To this I would add the words suggested by the claimant in the draft order she tabled to me for today: **"The Claimant provided some details of the alleged disclosures to the Respondents on 12 September 2022."**

50. The matter will therefore go forward in the tribunal on the basis that those claimed protected disclosures are to be added to the list of issues for the full merits hearing.

51. In light of how the claimant has advanced her case I note also the following. The outcome of this appeal means that these matters fall to be added to the list of issues. But they are issues about which the tribunal has yet to make any findings of fact or determination of substance, in particular as to whether the claimant did, in fact and law, make such protected disclosures; as to any legal issues about whether, if she did, she is entitled as a matter of law to rely on them for the purposes of these claims; and as to any factual issues about whether, if she did, and if she is entitled in law to rely on them, she was subject to detriment on grounds of having done so and/or unfairly dismissed for the reason, or principal reason, of having done so. Consideration of all of those matters remains a matter for the tribunal at trial. These are not matters on which I can give any determination as part of my disposal of this appeal.

52. Similarly, I do not agree with the claimant that the respondents, by not defending this appeal, have conceded or admitted any such matters. They have left it to the EAT to decide, having heard only from the claimant, whether or not to uphold this appeal. But the appeal has related only to the scope of the issues that the tribunal should have allowed to go forward to a contested trial. The respondents' stance in relation to the appeal does not provide any basis for

an inference that they have made any factual or legal concession about the underlying, contested, complaints that I have decided are to be included in those going forward.

53. Finally, for completeness, I note that it is not necessary for me to adjudicate whether the claimant did or did not have fair notice that all of these matters might be considered at the hearing before EJ Wedderspoon, and/or of the possibility that EJ Wedderspoon might decide that this matter was not included in the original particulars of claim. That is because I have upheld the appeal in any event on the basis that the judge should have adjudicated that it was.