

Neutral Citation Number: [2026] EAT 27

Case No: EA-2023-000502-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 February 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

Between:

(1) BANK OF AFRICA UNITED KINGDOM PLC
(2) MR HOUSSAM EL HAK MORSSI BARAKAT
(3) MR RALPH SNEDDEN

-and-

MS N TAHRI HASSANI

Appellants

Respondent

Mr Matthew Sheridan (instructed by Doyle Clayton) for the **Appellants**
The **Respondent** appeared in person

Hearing dates: 28-30 October 2025

JUDGMENT

SUMMARY

Whistleblowing; contracts of employment

The claimant was employed by the first respondent's parent company, BMCE Bank of Africa ("BMCE") from March 2013. In September 2016, she was seconded by BMCE to work for the first respondent in London in the role of Head of Human Resources. The secondment arrangement was regulated by a Secondment Agreement and Secondment Letter, both of which stated that the claimant remained an employee of BMCE during the secondment.

The secondment was brought to an end in 2021, and the claimant returned to a position with BMCE. She brought complaints against the first respondent and two of its employees of sex discrimination, race discrimination, harassment, victimisation, whistleblowing detriment, ordinary unfair dismissal and automatically unfair dismissal for the reason of whistleblowing.

The Tribunal found that the claimant's employment had transferred to the first respondent on 8 January 2021 and that she had thereafter been subjected to various detriments by the respondents. The respondents appealed against those conclusions on a number of grounds.

Held:

- (1) The conclusion that the contract of employment had transferred was wrong in law. On the facts found by the Tribunal, the only possible conclusion was that the contract remained with BMCE. Accordingly, the complaint of automatically unfair dismissal against the first respondent should have been dismissed.
- (2) The Tribunal had also erred in its conclusions about key aspects of the whistleblowing detriment claims. The part of its judgment that found the whistleblowing detriment complaint would also be set aside, and that aspect of the claim would be remitted to a differently constituted Tribunal to determine of new.

THE HON. LORD FAIRLEY (PRESIDENT)

Introduction

1. This is an appeal against a judgment of a full Tribunal at the London Central Employment Tribunal (Employment Judge Emery, Mr R Baber and Ms Z Darmas) dated 6 April 2023. I will refer to the parties, as they were described below, as the claimant and the respondents. The respondents appeal against paragraphs 1, 2 and 3 of the Tribunal’s judgment. There is no cross-appeal.

2. The respondents were represented by Mr Sheridan who also appeared below. The claimant represented herself before the Tribunal and continued to do so in this appeal.

Overview and key facts

3. The claimant was employed by the first respondent’s parent company, BMCE Bank of Africa (“BMCE”) from March 2013. In September 2016, she was seconded by BMCE to work for the first respondent in London in the role of Head of Human Resources.

4. The secondment arrangement was regulated by (a) a Secondment Agreement between BMCE and the claimant dated 13 July 2016; and (b) a Secondment Letter dated 28 September 2016 from BMCE to the claimant and signed by her on 29 September 2016.

5. The Secondment Agreement stated *inter alia*:

“It is expressly agreed that this agreement does not create any employment relationship between [the claimant] and [the first respondent]. [The claimant] remains a [BMCE] staff member. At the end of the secondment., she will return to a position at least similar to the one she had at the time of her secondment.”

During the secondment, the claimant was instructed by BMCE to report to the CEO of the first respondent. She remained subject to a duty to comply with all reasonable and lawful instructions of BMCE.

6. The Secondment Letter stated:

“During the secondment you will remain employed by BMCE and your current terms of employment will remain unchanged, save as set out in this letter. At the end of the secondment BMCE currently intends that you will return to your current position on the terms applying prior to the secondment, or a suitable alternative if that rule no longer exists. However, this may change according to the needs of the business at that time.”

7. Throughout her secondment, the claimant regularly reported to Mr Mohammed Agoumi, a senior director of BMCE. Mr Agoumi was also chair of the first respondent’s remuneration and nomination committee until late 2020 and a member of its board until June 2021.

8. At the start of the claimant’s secondment, the first respondent’s CEO was Mr Afrine, with whom the claimant appears to have enjoyed a good working relationship. At some point thereafter, the role of CEO of the first respondent was taken over by the second respondent, Mr Houssam Barakat.

9. In around March 2019 the claimant contacted Mr Agoumi to highlight issues she had identified with training on regulatory risks and internal governance within the first respondent. A remediation plan was put in place, but did not progress smoothly. In an email dated 11 April 2019 the claimant highlighted issues with FCA compliance and, on 30 September 2019, she sent a further email to Mr Barakat to stress that compliance processes were not being suitably addressed.

10. Mr Barakat was required by the board of the first respondent to undertake coaching. On 5 November 2019, the claimant sent an email to Mr Agoumi highlighting the view of the coach, which the claimant shared, that there were serious regulatory issues with Mr Barakat’s skills and with FCA compliance.

11. On 23 December 2019, the claimant asked for an urgent board meeting by telephone conference. In the course of that meeting, she raised concerns about the behaviour and performance of the first respondent’s Chief Operating Officer (“COO”) and suggested that he be put on garden

leave. A further meeting took place on 24 December 2019 at which there was further discussion about how the issue with the COO should be dealt with.

12. On 27 December 2019, the claimant sent an email to Mr Barakat saying that the third respondent, Mr Snedden, was undermining the first respondent's governance by resisting putting the COO on garden leave pending an investigation.

13. The claimant submitted that, in an email dated 31 December 2019 she raised further concerns about regulatory issues.

14. The claimant's working relationship with Mr Barakat deteriorated. The Tribunal found that:

“Mr Barakat attempted to dismiss the claimant on 14 January 2020 because of the culmination of issues she had raised in her email of 30th September 2019, the events and email of 23rd December 2019, her email of 23rd December 2019, what she said at the meeting on 24 December 2019 and her email of 31 December 2019, all of which were the claimant stating and reiterating that there were compliance failings at a senior level, and all of which contradicted Mr Barakat's and / or Mr Snedden and other Board members points of view.” (ET § 288)

...

“Senior Board Members and Mr Barakat were unhappy with the stance taken by the claimant over the COO's garden leave, the issues the claimant raised from 23 - 31 December 2019. At this stage Mr Barakat believed that he was able to dismiss the claimant from her role with the 1st respondent and he tried to do so in early January 2020. The claimant's dismissal was vetoed by Mr Agoumi” (ET § 290)

...

“... there was a continuing wish to dismiss the claimant by Mr Barakat and Mr Snedden from January 2020, and the only reason the claimant remained in role during 2020 was because she had the support of Mr Agoumi.” (ET § 294)

“At this stage the claimant was seen by the parties as protected by the terms of the Secondment Agreement and Secondment Letter, both of which made clear she was an employee of BMCE Africa; it was only BMCE Africa represented by Mr Agoumi who could take the decision to terminate the secondment, and this was accepted by all respondents.” (ET § 295)

15. On 6 January 2021, an incident occurred between the claimant and one of the first respondent's employees, Mr Kouhen, regarding “a relatively trivial issue” over a software upgrade for HR / payroll

tools (ET § 148). The claimant reacted badly to this incident and raised her voice. On 8 January 2021, she sent an email to Mr Agoumi and Mr Barakat in which she stated:

“Whatever manoeuvres or plans have been and continue to be made against me and my role, I will not resign... however the incessant harassment (including intimidation and threats) and discrimination that I have been subjected to...is preventing performing my role in a healthy and normal manner... Pending a decision from the parent company on my role within [the 1st respondent] please note that I am no longer able to hold one-to-one meetings with Mr Barakat.”

16. Mr Barakat referred the 8 January 2021 email to Mr Agoumi, stating:

“I can no longer accept such behaviour...I must stop her behaviour and I am afraid I will have to terminate her expatriate contract.”

17. The Tribunal accepted that Mr Barakat again tried to “dismiss” the claimant on 8 January 2021. It did not conclude, however, that she was dismissed on that date. Instead, she was signed off work with a medical certificate between 14 January and 15 April 2021. During her absence, an external audit of the first respondent’s business began. The audit was carried out by a consultancy organisation called Ocreus.

18. The audit was still ongoing when the claimant returned to work on 15 April 2021. The Tribunal found that negative comments were made to Ocreus about the claimant by Mr Barakat and Mr Snedden. In particular, it found that Mr Barakat and Mr Snedden told Ocreus that the claimant was not supporting compliance and regulatory requirements and that her temperament was questionable.

At ET § 326, the Tribunal stated:

“We concluded that the issues of temperament and skills were used as a convenient excuse to mask the reason for critical comments about her; that Mr Barakat was concerned about her previous acts of whistleblowing, which she had reiterated on 8 January, and which he was concerned she would shortly repeat to Ocreus. By telling Ocreus that the claimant was a problem causing compliance issues and would be dismissed, Mr Barakat was ensuring that her criticism of regulatory failings would not be heard by Ocreus.”

19. At a meeting of the first respondent’s remuneration committee on 22 April 2021, the committee approved a decision attributed to Mr Barakat “in respect of the termination of [the

claimant's] expatriation contract". Mr Barakat was noted to have expressed dissatisfaction with her performance and "proposed her termination".

20. The claimant was put on "garden leave" by Mr Barakat from 26 April 2021, and the secondment arrangement was ultimately brought to an end in September 2021. After the secondment came to an end, the claimant returned immediately to a role within BMCE.

21. On 9 and 30 September 2021, the claimant brought complaints against these respondents of sex discrimination, race discrimination, harassment, victimisation, whistleblowing detriment, ordinary unfair dismissal and automatically unfair dismissal for the reason of whistleblowing contrary to section 103A of the **Employment Rights Act, 1996** ("ERA")

22. The whistleblowing complaints were wide-ranging and relied upon allegations that, between 2018 and 2020, the claimant had made fifteen protected disclosures and had, in consequence, been subjected to nine separate detriments.

23. The Tribunal heard evidence and submissions about all of the complaints over a 14 day hearing in August and September 2022. Following a day of deliberations in December 2022, it issued a reserved Judgment dated April 2023 in which it concluded that the claimant:

- a) became an employee of the first respondent on 8 January 2021;
- b) made seven protected disclosures during her secondment;
- c) suffered five detriments on the ground of having made those disclosures; and
- d) had been automatically unfairly dismissed by the first respondent contrary to section 103A **ERA**

The remaining complaints were all dismissed.

24. The five whistleblowing detriments to which the Tribunal found the claimant had been subjected (Judgment, paragraph 3) were:

- (a) attempting to terminate her contract on 8 January 2021;
- (b) deciding on 26 April 2021 to terminate her contract;
- (c) placing her on garden leave from 26 April 2021;
- (d) unfairly levelling criticism of her performance to Ocreus in early 2021; and
- (e) dismissing her.

25. The Tribunal's reasons are lengthy. The grounds of appeal are similarly lengthy. In summary, the respondents seek to challenge the Tribunal's conclusions that:

- a) the claimant became an employee of the first respondent (ground 1);
- b) the claimant's secondment was terminated by the second respondent on the ground that she had made protected disclosures (ground 2);
- c) three of the alleged disclosures relied upon by the claimant (numbered 3, 11 and 13) were protected (grounds 3, 4 and 5);
- d) the protected disclosures made by the claimant materially influenced an aspect of detriment 5 – the removal of the claimant's laptop (ground 6); and
- e) placing the claimant on garden leave (detriment 5) amounted to a detriment (ground 7).

26. I heard extensive submissions on these grounds over three days. In the following analysis, I have set out my conclusions in relation to each of the grounds of appeal. For reasons that will become apparent, it has been possible to deal with some of the grounds relatively briefly. Where that is the case, I have not recorded or summarised the parties' submissions in detail, but have taken those submissions fully into account.

Ground 1

The Tribunal's reasons

27. The claimant's pleaded case was that, notwithstanding the terms of the Secondment Agreement and Secondment Letter, she became an employee of the first respondent as soon as her secondment from BMCE to the first respondent commenced in 2016. The Tribunal ultimately rejected that position and concluded instead that the contractual documents accurately reflected reality of the situation from the start of the secondment until 8 January 2021.

28. At ET § 188, the Tribunal noted and summarised the guidance given by the EAT in **Clark v. Harney, Westwood and Riegels** [2021] IRLR 528. It noted *inter alia* that if the written agreements accurately reflect the intention of the parties at the start of a relationship, any suggestion that the identity of the employer changed at some point thereafter required consideration of when and how that had happened. It mentioned novation as one possible scenario. The Tribunal also noted that in **Dynasystems for Trade and General Consulting Limited v. Moseley** UKEAT/0091/17/BA, Langstaff J accepted (at paragraph [35]) that “a seamless stream of events - all of which are consistent, one with the other” could be good evidence of what was initially agreed.

29. The key section of the Tribunal’s reasoning on the issue of the identity of the claimant’s employer after 6 January 2021 is seen at ET § 407 to 411:

“407. We accept that the starting point is that there was a contract of employment between the claimant and BMCE Africa, [and] that the Secondment Agreement and Secondment letter varied her contract with BMCE Africa for the period of secondment. We accept that for most of the relationship the claimant and BMCE Africa, and the 1st and 2nd respondents, intended to rely on the Secondment Agreement (incorporating the additional terms within the Secondment Letter). We accept also that the claimant received continuing secondee benefits, [and] private health insurance from BMCE Africa. We accept also that the claimant moved back to a role at BMCE Africa, which the respondents argue shows the Secondment Agreement remained in force.

408. We concluded however that by his actions from early January 2021 Mr Barakat demonstrated that he was not prepared to allow any conduct or performance issues relating to the claimant to be dealt with by BMCE Africa. Mr Barakat wanted to exert control over the activities of the claimant, but he was prevented from doing so by Mr Agoumi. Mr Agoumi was on the board of the 1st respondent but he was also BMCE Africa’s representative, he required the claimant continue certain activities including her compliance functions, and he did not allow Mr Barakat to take unilateral action against the claimant. This was consistent with the terms of the Secondment Agreement, that BMCE Africa would retain responsibility for conduct and performance issues.

409. Mr Agoumi was forced to step back from many of his responsibilities following regulatory intervention from July 2020 and by early 2021 he had much less influence over the actions of Mr Barakat. By beginning January 2021, we concluded that BMCE Africa exercised no influence over any of the claimant’s working life with the 1st respondent, contrary to the terms of the Secondment Agreement and Secondment Letter. All Mr Agoumi could do was to persuade Mr Barakat not to dismiss the claimant rather than instruct him not to do so. We

concluded that Mr Barakat agreed not to dismiss the claimant in early January because having the claimant off work for several months suited his plans.

410. We concluded that by 6 January 2021 BMCE Africa had effectively rescinded its control over the claimant under the terms of the Secondment Agreement and Secondment Letter and had passed this control to Mr Barakat in his role as CEO of the 1st respondent. Mr Barakat was then able to seek her dismissal and was able to do so ignoring the terms set out in the Secondment Agreement and Secondment Letter.

411. We concluded that in taking over these functions, Mr Barakat ensured that the 1st respondent stepped into the shoes of the employer. The claimant was already totally integrated into the 1st respondent's structure, she received her work instructions from Mr Barakat. He took over conduct, performance, and termination of her contract with the 1st respondent, it was his decision. BMCE Africa appears to have had no say over this decision.

412. In reaching this decision we considered the fact that the claimant has returned to a role at BMCE Africa; but this decision does not contradict the fact that from early January 2021 BMCE Africa had relinquished control over all decisions relating to the claimant's role with the 1st respondent to Mr Barakat.

413. We concluded therefore that neither BMC Africa nor the 1st respondent acted 'seamlessly and consistently' as though BMCE Africa remained the employer.

414. We concluded therefore that by Mr Barakat's actions and BMCE Africa's failure to act, they intended for the first respondent to take over significant functions of the employer, including conduct, performance, and termination. By removing BMCE Africa from all significant responsibilities and giving them to Mr Barakat and the 1st respondent to make this decision, on 8 January 2021 the claimant became the 1st respondent's employee.

Respondent submissions

30. For the first respondent, Mr Sheridan submitted that the Tribunal's conclusion that the claimant's contract of employment passed from BMCE to the first respondent on 8 January 2021 was not reached on any recognisable legal basis.

31. If what the Tribunal had in mind was some form of novation of the employment contract, that would have required the consent of all three parties. The Tribunal's reasons at ET § 407 to 414 focussed entirely, however, upon BMCE's agent, Mr Agoumi, having "effectively rescinded its control over the claimant" and upon the first respondent (in the form of Mr Barakat) having assumed

control over her. That was not a sound basis in law on which a contract of employment could pass from one employer to another, nor was it ever the basis on which the claimant had pleaded her case.

Claimant submissions

32. The claimant submitted that it was clear to everyone that she was employed by the first respondent and that Mr Barakat was therefore able to terminate her contract. When Mr Agoumi was chair of the remuneration committee, he was able to prevent Mr Barakat from implementing a dismissal. The Tribunal had not erred.

Analysis and decision

33. Confusion has, at times, arisen in this case by a failure to distinguish between the secondment arrangement on the one hand and the claimant's employment contract on the other. Particularly in the claimant's oral submissions in the appeal it seemed that the distinction between the two was often overlooked. She frequently spoke of decisions or efforts to "terminate" her without explaining whether what she was describing was the ending of the secondment arrangement or a termination of her employment contract.

34. As a matter of law, however, the distinction between these issues is important for a number of reasons. Termination of a secondment arrangement would not, of itself, usually form a basis for a complaint of automatically unfair dismissal under section 103A **ERA** because there would have been no dismissal. The distinction is also important for the purpose of defining the alleged detriments and the suggested route to liability of each of the respondents in respect of such detriments.

35. The Tribunal recognised the distinction between the secondment arrangement and the employment contract. I agree, however, with counsel for the respondents that, on the findings of fact made by it, the Tribunal erred in law in its conclusion that the role of "employer" under the contract between the claimant and BMCE transferred to the first respondent on 8 January 2021.

36. There may, of course, be situations where the identity of the employer in an employment relationship can change by the operation of law. A transfer of an undertaking pursuant to the **Transfer of Undertakings (Protection of Employment) Regulations, 2006** is an obvious example. As a matter of common law contract, however, the rights and obligations under a contract of employment may not be transferred by only one party to the agreement. As the first respondent correctly submits, therefore, any change to the *status quo* in early 2021 would have required an express or implied novation of the contract between the claimant and BMCE to substitute the first respondent as her employer. Such a novation would inevitably have required the consent of the claimant, BMCE and the first respondent.

37. Nothing in the Tribunal’s findings of fact suggests that any party ever applied its mind to an express novation of the claimant’s employment contract. Instead, the Tribunal appears to have relied (at ET § 410 to 412) upon its conclusions that, by 6 January 2021, BCME had “rescinded its control” over the claimant (ET § 410), and had thus “relinquished control” to Mr Barakat as CEO of the first respondent (ET § 410) of all decisions relating to the performance and the termination of her contract (ET § 411). This, the Tribunal concluded, allowed Mr Barakat to ensure that the first respondent “stepped into the shoes of the employer” (ET§ 411). It concluded, in summary, that a combination of Mr Barakat’s actions and BMCE’s inertia led to the claimant becoming the first respondent’s employee (ET § 414).

38. The Tribunal’s analysis thus relies entirely upon the premise that the identity of an employer under a contract of employment may be changed without reference to the employee. That proposition is unsupported by any authority, and is wrong in law. Were it correct, any employer could divest itself of its contractual and statutory obligations to an employee simply by purporting to “relinquish control” of the employee to a third party. Whatever may have been the subjective intentions of BMCE

and the first respondent in early January 2021, those intentions were not sufficient in law to novate the contract.

39. At ET § 413, the Tribunal also appears to have misunderstood the passage at paragraph 35 of **Dynasystems** to which it had directed itself. Whilst Langstaff J accepted the potential significance of a seamless and consistent pattern of behaviour, he did so only on the basis that such a pattern could have evidential significance as proof of what parties had agreed at the inception of an employment relationship. **Dynasystems** is not authority for any wider proposition that a written employment contract which is found to reflect the reality of the parties' intentions may be changed at a later date without reference to one of those parties.

40. It is also impossible to reconcile the Tribunal's conclusion that BMCE entirely relinquished responsibility for the claimant with its findings of fact at ET§ 155 to 158. Within those findings, the Tribunal plainly accepted that, in the period after 8 January 2021, Mr Agoumi continued to interact with Mr Barakat about the management of the claimant's secondment and agreed with Mr Barakat *inter alia* that she should be permitted to take 3 months leave of absence from mid-January 2021 (ET§ 156 to 158).

41. For these reasons, the Tribunal plainly erred in law in its conclusions that the claimant's employment transferred to the first respondent on 8 January 2021. That error has a direct effect on paragraphs 1 and 2 of the Tribunal's Judgment and an indirect effect on paragraph 3. I will return to this below when considering disposal.

Ground 2

42. In ground 2, the respondents submit that the Tribunal's conclusion that Mr Barakat decided to terminate the claimant's secondment in 2021 because she had made protected disclosures was perverse. One obvious difficulty with this ground is that the Tribunal made no such finding. Rather, it concluded that Mr Barakat terminated her contract of employment.

43. The submissions in support of this ground were lengthy and convoluted and what follows is only a brief summary. They all related to the Tribunal's conclusions on causation.

44. First, it was submitted that the Tribunal had not found that any protected disclosure was made after December 2019. There was, therefore, more than a year between the last protected act and the first of the proven detriments (the attempted dismissal on 8 January 2021). The Tribunal's conclusion on causation depended to a significant degree, therefore, upon its finding that Mr Barakat had tried to dismiss the claimant in January 2020 but had been prevented from doing so by Mr Agoumi. That latter finding had been made without it being part of the claimant's case and in circumstances when it had never been put to Mr Barakat. There was an obvious alternative trigger for the events of January 2021, and that was the claimant's behaviour on 6 January 2021.

45. The conclusion on causation was also said to rest on a number of other perverse findings, including that: (a) there was unhappiness at the claimant's email of 30 September 2019; (b) Mr Barakat and other senior board members were unhappy at the suggestion that the COO be put on garden leave; (c) Mr Snedden had wished to remove the claimant in the summer of 2020; (d) termination of the secondment was to prevent the claimant from making disclosures to Ocreus; and (e) that the events of January 2021 were facilitated by Mr Agoumi's removal from the first respondent's board.

46. The meticulous examination of the parts of the evidence which underpinned these submissions and the extent to which those same submissions had also been made before the Tribunal pointed strongly to this ground being no more than an attempt to re-try the case on its facts. The attack on the Tribunal's reasons was, for the most part directed at inferences drawn by it from primary findings of fact. In the substantial volume of evidence heard by the Tribunal, there was clearly some evidence for each of the impugned conclusions on causation, and I was not ultimately persuaded that

those conclusions could be said to reach the very high standard required for success in a perversity argument.

47. In any event, my decision as to the disposal of the appeal as a result of the grounds that succeed (see below under “Disposal”) rendered the appeal in relation to causation academic.

Grounds 3, 4 and 5

48. In grounds 3, 4 and 5, the respondents seek to challenge the Tribunal’s conclusions that the disclosures numbered 3, 11 and 13 in the list of issues were “protected” for the purposes of the claimant’s complaints under section 47B ERA.

49. The Tribunal found that disclosure 3 was contained in the email sent by the claimant on 11 April 2019. Disclosure 11 was made by her at the meeting on 24 December 2019 (and was found to be simply a repetition of disclosure 10 which she had made during the conference call on 23 December 2019). Disclosure 13 was said to be contained in her email dated 31 December 2019.

50. It is important to recognise, however, that the Tribunal ultimately found that the claimant made a total of seven protected disclosures (numbered 3, 4, 8, 10, 11, 12 and 13 on the list of issues) and was subjected to five different detriments (numbered 3, 4, 5, 6 and 9 and set out at paragraph 3 of the Judgment). On a careful analysis of its reasons, the Tribunal concluded that the reason (or “ground”) for each of the proven detriments was a combination of protected disclosures. In the case of each proven detriment, whilst part of the ground for it may have included one or more of the disclosures numbered 3, 11 and 13, it also included other protected disclosures. In relation to each of the proven detriments, therefore, a material contributory factor was at least one other protected disclosure that is not the subject of any challenge in this appeal.

51. By way of example, detriment 3 was described as an attempt by the second respondent on 8 January 2021 to have the claimant dismissed, and detriment 4 was described as a decision by the

second respondent on 26 April 2021 to dismiss her. At ET § 291 and 309, however, the Tribunal concluded that the reason for each of those actions by Mr Barakat was a combination of disclosures 4, 10, 11 and 13. Even if the respondents were successfully to challenge the Tribunal's conclusions about disclosures 11 and 13, the disclosures numbered 4 and 10 were still found by the Tribunal to be "decisive" and thus material in the mind of Mr Barakat. A similar point can be made in relation to the Tribunal's reasons about the causation of detriment 5 (ET § 316), detriment 6 (ET § 326) and detriment 9 (ET § 340).

52. On the face of matters, therefore, each of these three grounds is academic. Even if the Tribunal erred in its conclusions that disclosures 3, 11 and 13 were protected, other protected disclosures that are not the subject of challenge in this appeal were also material and causal to each of the established detriments. Applying **Fecitt and others v NHS Manchester** [2012] ICR 372 the Tribunal's conclusion on liability in the section 47B complaint would be unaffected even if these grounds were to succeed.

53. I have, nevertheless, also considered the basis on which each of these three grounds was argued before me. As will be seen below, they ultimately have a bearing upon disposal.

Ground 3 – disclosure 3

54. At ET § 207 to 218, the Tribunal considered the terms of the email sent by the claimant on 11 April 2019. Within the email, the claimant stated that the first respondent was failing to comply with its legal duties in relation to compliance. As the Tribunal noted (ET § 209)

“We concluded that the claimant was raising very clearly the 1st respondent's continuing failure to adhere to the remediation plan. The claimant was stating that Paris was not regulatory compliant at the time, and that this could only be rectified with changes to the reporting structure and increased support for Paris.”

The Tribunal concluded that the email contained sufficient factual content and specificity to qualify as a protected disclosure, and that the reason the claimant wrote it was that she considered it necessary to highlight to senior decision makers the regulatory problems that were not being addressed.

55. The respondents submit, however, that the Tribunal erred in failing to consider whether the claimant reasonably believed that the information disclosed by her in the email of 11 April 2019 tended to show a breach of a legal obligation (ERA section 43B(1)). The Tribunal does not expressly mention that part of the statutory test either in its self-directions on the law (ET § 187) or in its analysis of the disclosure itself (ET § 207 to 217). It expressly addressed the issue of reasonable belief only in the context of the claimant’s belief that the disclosure was in the public interest (ET § 216).

56. It is important, however, not to read the Tribunal’s reasons as if they were a conveyancing document. Read as a whole and in context, ET § 212 to 214 plainly address the substance of whether the claimant reasonably believed that the information disclosed by her in the email tended to show a breach of a regulatory requirement. In particular, at ET § 212, the Tribunal asked itself whether the information in the 11 April 2019 email tended to show a breach of such a requirement. At ET § 213, it accepted that it did. At ET § 214, it noted that the claimant’s belief was “genuine”. It did not expressly use the word “reasonable” to describe the claimant’s belief but that is implicit in the earlier conclusion at ET § 213.

57. I do not consider, therefore, that third ground of appeal discloses any material error in the Tribunal’s reasoning about disclosure 3.

Ground 4 – disclosure 11

58. The Tribunal found that, in the course of the conference call with the second and third respondents on 23 December 2019, the claimant made allegations of misconduct against the first respondent’s Chief Operating Officer (“COO”), and raised compliance issues (ET § 242 to 254). The things said by her on this conference call were found by the Tribunal to amount to protected disclosures (disclosure 10). That conclusion is not challenged in this appeal.

59. At ET § 255 to 259, the Tribunal found that the claimant repeated the same allegations at a meeting with the second and third respondents the following day, 24 December 2019 (disclosure 11).

The respondents challenge that finding as perverse. They submit that the respondent's witnesses denied that the allegations had been repeated on 24 December 2018, and the claimant's evidence was that she could not remember whether or not she had repeated the 23 December 2019 allegations on the following day.

60. When this passage of the Tribunal's reasons is read as a whole, it is clear that its conclusion that the allegations were repeated was an inference drawn from the primary facts recorded by it at ET § 255 to 257 that: (a) there was a discussion between the claimant and the third respondent about the need for a witness to the COO's conduct; (b) there was discussion about whether or not the COO should be put on garden leave; and (c) the meeting quickly became heated. At ET § 258 and 259, the Tribunal stated:

258. We concluded that during this exchange the claimant repeated the central thrust of her concern that there was a regulatory implication in not putting the COO on garden leave and undertaking an investigation. The claimant emphasized the seriousness of the issues.

259. We concluded that the claimant repeated her disclosure of the day before and that this... qualifies as a public interest disclosure for the same reasons as [disclosure 10]"

61. The inferences drawn by the Tribunal at ET § 258 and 259 were open to it and were not perverse. It is, in any event, immaterial whether the same disclosure was made by the claimant once or more than once.

Ground 5 – disclosure 13

62. In ground 5, the respondents advance a challenge of a different kind to the conclusion that disclosure 13 was protected. Disclosure 13 was said to be contained in an email from the claimant dated 31 December 2019. A copy of that email was produced to the Tribunal and had been redacted in parts. The position taken by the first respondent in advance of the hearing and at the hearing itself was that the redacted sections contained references to discussions for the purposes of obtaining legal advice, and were therefore privileged. There having been no waiver of that privilege, the redacted

sections of the letter could not be relied upon as containing a protected disclosure. That position had been accepted by solicitors who had formerly acted for the claimant. It was submitted that the unredacted sections of the letter did not contain anything capable of qualifying for protection.

63. Before the Tribunal, however, the claimant is said to have departed from the position previously agreed by her solicitors and submitted that the redacted sections referred to regulatory compliance issues. At ET § 271, of its Reasons, the Tribunal appeared to accept that position, stating: “We accept that the redacted part of the email refers to a regulatory reference.”

64. The short point taken by the respondents is that, before drawing such a conclusion, it was incumbent upon the Tribunal to consider and rule on the objection on the ground of privilege that had been taken. Procedurally, it was a material error for the Tribunal not to have done so. That error was then compounded by the Tribunal making a finding of fact about what was behind the redactions without ever having seen an unredacted version of the document.

65. The claimant submitted that the letter contained other unredacted material which amounted to protected disclosures. This included the need to investigate certain conduct issues as a FCA requirement. Any reliance on the redacted section made no difference as the unredacted sections of the letter alone contained protected disclosures.

66. I agree with the submission for the respondents that it was a procedural error by the Tribunal not to invite submissions on the issue of privilege and then rule on the objection made by the first respondent. I also agree that it was an error for the Tribunal to speculate as to what information the redacted part of the letter contained without ever having seen an unredacted version of the email.

67. Whilst I have some sympathy with the claimant’s position that the letter may have contained other protected material, I am unable to tell from the Tribunal’s reasons the extent to which its

erroneous reliance upon the redacted section affected or was material to its conclusion that the email contained protected material.

68. I have concluded, therefore, that this ground is well-founded in principle. I will return to the effect of that conclusion below when I consider disposal.

Ground 6

69. In ground 6, the respondents argue that it was perverse of the Tribunal to find that removal of the claimant's laptop when she was placed on garden leave was a detriment in circumstances where (a) removal of the laptop had been pleaded by her as a separate detriment; and (b) it was common ground in the evidence before the Tribunal that any worker who was placed on garden leave had their laptop removed.

70. The list of alleged detriments recorded by the Tribunal in the list of issues at ET§ 2 records alleged detriment 5 as: "Placing the Claimant on garden leave with effect from 26 April 2021 and removing her company laptop." The focus of the Tribunal's reasons on this issue, however, (ET§ 311 to 318) was all upon the issue of why the claimant was put on garden leave. The removal of her laptop is noted as being a consequence of that, but removal of the laptop was not ultimately treated by the Tribunal as a separate "stand alone" detriment. That was reflected in paragraph 3 of the Judgment which makes no reference at all to removal of the laptop as a separate act of whistleblowing detriment.

71. The fundamental difficulty with this ground, therefore, is that it does not challenge any part of the Tribunal's Judgment. On the most generous reading of it, it is simply an appeal against a non-material part of the reasons. Since the role of this Tribunal is confined to correcting errors of law in Judgments, this ground is bound to fail.

Ground 7

72. In ground 7, the appellant submits that it was perverse and / or an error of law for the Tribunal to conclude that placing the claimant on garden leave on 26 April 2021 was a detriment.

73. At ET § 186(3), the Tribunal gave correct self-directions that (i) a detriment will exist where, objectively, a reasonable worker would take the view that the treatment in question was detrimental (**MOD v. Jeremiah** [1980] ICR 13; **Shamoon v. Chief Constable of the RUC** [2003] ICR 337); and (ii) an unjustified sense of grievance cannot amount to a detriment (**Deer v. University of Oxford** [2015] EWCA Civ. 52).

74. Its conclusion (at ET § 317) that placing the claimant on garden leave was a detriment in terms of section 47B **ERA** was pre-eminently a question of fact for the Tribunal as an industrial jury. There is no merit in the suggestion that it erred in law or in the submission that its conclusion was perverse.

Disposal

75. Grounds 1 and 5 succeed. Grounds 2, 3, 4, 6 and 7 are dismissed. Having regard to the grounds of appeal that have succeeded, disposal is complex.

76. In paragraph 1 of its Judgment, the Tribunal declared that the claimant was an employee of the first respondent from 8 January 2021. That conclusion was erroneous in law, and paragraph 1 of the Judgment must, therefore, be set aside.

77. In paragraph 2 of the Judgment, the Tribunal appears to have sustained the section 103A **ERA** automatically unfair dismissal complaint against the first respondent. Such a claim can only be made against an employer. As such, it is wholly dependent upon same erroneous conclusion that the claimant's contract transferred to the first respondent on 8 January 2021. Paragraph 2 of the Judgment must also, therefore, be set aside. On the findings of fact made by the Tribunal, the only possible and legally correct conclusion open to it was that BMCE continued to be the claimant's employer

throughout the secondment. As a result, the only conclusion open to the Tribunal was that the complaint against the first respondent under section 103A **ERA** had to fail because the first respondent was not her employer and could not therefore be liable under that section for dismissing her unfairly. I will therefore substitute a Judgment dismissing the section 103A **ERA** complaint against the first respondent.

78. In paragraph 3 of its Judgment, the Tribunal sustained parts of the section 47B **ERA** detriment complaints. Three of the five detriments found by the Tribunal to have been established related to steps taken by Mr Barakat to terminate the claimant’s employment in January and April 2021. Each of those detriments which the Tribunal found to be established was also predicated upon the same erroneous hypothesis that the first respondent was the claimant’s employer at the relevant time. The Tribunal’s conclusions about those detriments are, therefore, tainted by the same error as affects paragraphs 1 and 2.

79. Once the “transferred employment” hypothesis is shown to be wrong, however, the legal basis on which any of the respondents was found liable under section 47B **ERA** also becomes much less clear. The Tribunal seems to have recognised this issue and touched on it very briefly at ET § 388 stating:

“We conclude... that the claimant was, at the date of dismissal, an employee of the 1st respondent. If she was not an employee, she was a worker of the 1st respondent.”

80. Having concluded that the claimant’s employment contract transferred to the first respondent on 8 January 2021, the Tribunal did not need to consider the possibility that the first respondent may not have been the claimant’s “employer” in terms of section 230 **ERA** at the time of any of the proven detriments. As, however, the “transferred employment” hypothesis was wrong in law, there was no basis to conclude that the first respondent was the claimant’s “employer” in terms of section 230 **ERA**. The only other grounds on which any respondent could be liable under section 47B would

therefore be (a) if the first respondent met the extended definition of “employer” under section 43K ERA or (b) if the person (or persons) who subjected the claimant to detriment was / were acting as agent of BMCE and with BMCE’s authority (per section 47B(1A)(b) ERA). These routes to potential liability raise potentially complex factual questions that were never explored below in spite of being raised (if only by implication) in the list of issues.

81. A final difficulty with paragraph 3 of the Tribunal’s judgment is that it does not distinguish between the respondents. Instead, it appears to assume that all three respondents were equally responsible for all five detriments. That, however, is not apparent from the findings of fact. Whilst the third respondent, Mr Snedden, is implicated to some extent in the detriment of having made negative comments about the claimant to Ocreus, it is far from clear what role the Tribunal considered he played in any of the other four detriments. It is also unclear how the Tribunal considered that Mr Barakat’s thought processes in relation to the Ocreus detriment (described at ET § 326) could be imputed to Mr Snedden such that the actions of Mr Snedden were “on the ground” of the claimant having made protected disclosures. On that latter point, it may be important to note that a “composite approach” to liability - combining the act of one employee with the motive of another - is unacceptable in principle in complaints under section 47B ERA (see **Reynolds v. CLFIS (UK) Ltd** [2015] ICR 1010, **Malik v. Cenkos Securities plc** UKEAT/0100/17 (unreported) 17 January 2018 and **Henderson v. GCRM Limited** [2026] ICR 101).

82. Having regard to the number and materiality of these difficulties, I have concluded that all of paragraph 3 of the Tribunal’s Judgment should also be set aside. In contrast to the section 103A complaint, however, I am unable to say that only one outcome is possible in the section 47B complaint. It follows that the section 47B complaint must be remitted. I have also come to the view that a remit to the same Tribunal would not be appropriate. That is unfortunate, especially as the claimant may have no ongoing financial loss now that she has returned to a role with BMCE and her

claims may, therefore, be of limited value in financial terms. The cost of a remit to a different Tribunal is, therefore, a consideration that I have taken into account. Ultimately, however, I do not consider that it would be possible, were the matter remitted to the same Tribunal, for it to revisit all of its previously expressed conclusions about the evidence without there being a perception of possible unfairness.

83. It does not follow, however, that all parts of the section 47B complaint must be re-heard. In the absence of any cross-appeal against those parts of the section 47B complaints that were rejected by the Tribunal, the disputed issues have been significantly narrowed. The new Tribunal assigned to hear the remit should, therefore, treat protected disclosures 3, 4, 8 and 10 to 12 as having been established.

84. In light of my conclusion under ground 5 above, the Tribunal should hear such evidence and submissions as it considers necessary about alleged disclosure 13, and should rule upon the first respondent's admissibility objection before reaching any conclusion about whether or not the email, read as a whole, contained a protected disclosure.

85. The Tribunal should also hear evidence, of new, about each of the claimed detriments 3, 4, 5, 6 and 9 in light of my conclusion under ground 1 that the claimant's contract of employment remained with BMCE throughout the secondment.

86. The issue of causation is very closely tied up with such conclusions as the new Tribunal may form on the issue of detriments. Finally, therefore, the Tribunal should hear such evidence as it considers necessary on causation in relation to all established detriments before determining liability in the section 47B complaint of new.