Neutral Citation Number: [2024] EAT 173

Case No: EA-2023-000420-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 November 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR DECLAN DUREY

Appellant

- and –

SOUTH CENTRAL AMBULANCE SERVICE NHS FOUNDATION TRUST

Respondent

- and –

PROTECT

Intervener

- -
- -

Michael Avient (instructed by direct public access) for the **Appellant**
Christopher Milsom (instructed by DAC Beachcroft LLP) for the **Respondent**
Betsan Criddle KC (instructed by Bates Wells & Braithwaite LLP) for the **Intervener**

Hearing dates: 12 and 13 September 2024

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JUDGMENT

SUMMARY

PROTECTED DISCLOSURES

The claimant in the employment tribunal was unsuccessful in his complaints that he had been subjected to detrimental treatment during employment on the ground of having made protected disclosures, and associated complaints of constructive unfair dismissal and wrongful dismissal.

The tribunal did not err in its approach to deciding whether one of the claimed disclosures, disclosure 2, amounted in law to a qualifying disclosure, and hence, a protected disclosure.

Adequacy-of-reasons and perversity challenges to the tribunal's conclusions that the claimant had in any event not been subjected to detrimental treatment, as claimed, because of disclosure 2, nor because of disclosure 9 (which the tribunal found *was* a protected disclosure) also failed.

Nor did the tribunal err by failing sufficiently to address the claimant's case regarding the conduct of the respondent during the final months of his employment, after he began a period of sickness absence, including as to what he said was the last straw precipitating his resignation.

A perversity challenge to the tribunal's approach to criticisms made by the claimant of aspects of the content of the respondent's witness statements and how witnesses gave their evidence, also failed.

The respondent raised in a cross-appeal an issue of law, as to whether the employment tribunal has the power to make an award for non-pecuniary losses in respect of a whistleblowing-detriment claim. However, the tribunal did not err in law in not deciding that question. Nor was the EAT persuaded that the wording of section 21 **Employment Tribunals Act 1996** enabled it to determine the issue in this case. Alternatively, if it did have the power to do so, this was not an appropriate case in which to exercise that power. **Harrod v Ministry of Defence** [1981] ICR 8 followed. **Rolls Royce plc v Unite the Union** [2009] EWCA Civ 387; [2010] 1 WLR 318 (CA) and **Hutcheson v Popdog Limited** [2011] EWCA Civ 1580; [2012] 1 WLR 782 considered and applied.

Both the appeal and the cross-appeal were therefore dismissed.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal complained that he had been subjected to detriments on the ground of having made protected disclosures, was unfairly constructively dismissed for the reason or principal reason that he had made protected disclosures, and was wrongfully dismissed. In a reserved decision following a multi-day hearing at Reading before EJ Gumbiti-Zimuto, Mr P Hough and Mr B Osborne, the tribunal dismissed all of his complaints.

2. The claimant appealed. The respondent's Answer put forward a cross-appeal in respect of the question of whether, as a matter of law, an employment tribunal has the power to make an award of compensation for injury to feelings in respect of detrimental treatment on the ground of having made protected disclosures, contending that there is no such power. At a rule 6(16) hearing the cross-appeal was directed to proceed to the same full hearing as the appeal, but on the basis that the question of whether it should be entertained would be considered at that hearing.

3. In the run-up to the hearing the whistleblowing charity, Protect, applied to intervene on the substantive issue of law raised by the cross-appeal. I granted that application by consent.

4. At the hearing Mr Avient of counsel appeared for the claimant acting pro bono on a direct access basis. The respondent was represented by Mr Milsom of counsel. Ms Criddle KC appeared on behalf of Protect. I am grateful to all of them for the high quality of their submissions, and their co-operative approach which ensured that this wide-ranging hearing was completed to time.

Protected Disclosures – The Statutory Framework

5. By virtue of sections 43A and 43C **Employment Rights Act 1996** a protected disclosure includes a qualifying disclosure made by a worker to his employer. Section 43B(1) provides:

> **"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."**

6. Section 47B(1) provides:

> "**A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

7. Section 48(1A) provides

> **"A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."**

8. Section 103A provides:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

The Facts

9. I take the following summary of the salient facts from the tribunal's decision, undisputed documents, and matters confirmed to me as not in dispute.

10. The claimant was employed by the respondent ambulance trust as a student paramedic from February 2015. He had a clinical placement with the respondent in the September 2015 cohort of students undertaking the Foundation Degree (FdSc) in Paramedic Emergency Care with Oxford Brookes University (OBU) in a programme approved by the Health and Care Professions Council (HCPC). This was an abridged course for students, like the claimant, who had some previous

practical experience. Having completed the course, from 1 August 2016 the claimant remained with the respondent as a registered paramedic.

11. The claimant claimed that he had made protected disclosures to the respondent on a number of occasions during his employment. For the purposes of this appeal I need only consider (claimed) disclosures 2 and 9. Disclosure 2 was an email sent by the claimant on 31 August 2015. The tribunal made findings about this disclosure and the events leading up to it in the following passage.

> **"9. In July 2015 OBU and the respondent agreed changes to the FdSc course which meant that students would be granted supernumerary status whilst undertaking the academic components of the programme, in hospital placement and a minimum of 225 hours whilst working for the respondent. This was a reduction in supernumerary hours from 750.**
>
> **10. OBU is accountable to the HCPC for delivery of the FdSc, any changes to the FdSc by OBU are to be reported. Minor changes may be reported in OBU's annual reporting, major changes are to be reported sooner on the Major Change Form. OBU did not consider that it was a major change.**
>
> **11. On 30 July 2015 students on the claimant's course were invited to attend a meeting with Mr Catterall and managers from the respondent where the students were informed that changes had been made to the FdSc course. The students were told that changes to the course meant there would be a cut in the number of front-line supernumerary training hours from 750 down to a minimum of 225. The claimant asked if the HCPC had signed off on the changes. The reply stated that the position of the OBU was that any changes to this aspect of the course could be notified to the HCPC retrospectively. There was no mention by the claimant or anyone else that the changes would mean the student could not practise safely. Mr Catterall told the claimant that HCPC give guidance and it is not necessary to get their agreement to the change.**
>
> **12. On 12 August 2015 the claimant wrote to Ms Caroline Robertson, Universities and Practice Education Team Manager about the reduction in supernumerary practice placement ambulance hours. Ms Robertson forwarded a copy of the letter to Mr Catterall and they agreed that Mr Catterall would reply to the claimant's concerns. Mr Catterall responded to the claimant on 14 August 2015. In his letter Mr Catterall tried to reassure the claimant that the *"internal appraisal concluded that because students' total hours in placement would remain at 750 with a paramedic registrant, our lack of specification as to whether these would be supervised or supernumerary would not impact on compliance with the HCPC SET's and graduate eligibility for registration as a paramedic."***
>
> **13. On 19 August 2015 Ms Robertson sent an email to Senior Operational Managers and her team, it was forwarded to others including Clinical Mentors and Team Leaders. The email read as follows:**
>
> > **"RE: Update on SCAS internal student paramedics undertaking the 1 year FdSc at Oxford Brookes**
> >
> > **As you may be aware, SCAS staff have been attending Oxford Brookes University's FdSc since 2008. Recently, Oxford Brookes, Health Education Thames Valley and**

> **SCAS have agreed to slightly alter the way in which SCAS staff achieve their hours. This recognises their existing operational experience and also supports the additional opportunities being afforded to staff. This September's 1 year cohort will therefore undertake the following:**
> **1) Attendance of all University teaching days.**
> **2) Supernumerary Hospital placements circa 84hours**
> **3) Supernumerary ambulance placements circa 225 hours**
> **4) Supervised ambulance placements (1:1 with a registrant) circa 446 hours**
> **5) Study time**
>
> **The Curriculum laid out by the College of Paramedics states;**
>
> **"The College of Paramedics accepts that any employing organisation during the transition (2015-2019) period to level 6/SCQF level 10 may continue to develop "in-house" staff to paramedic status. These individuals may not require 100 percent supernumerary placements due to their existing clinical experience. A guide of 225 hours supernumerary per year of clinical practice development will be deemed as sufficient, this equates to 30% of the 750 of a full-time HEI student paramedic" Paramedic Curriculum Guidance – 3rd Edition Revised (2015)**
>
> **Staff will be allocated a team and will, as in previous years, undertake their placement hours with registrants within that team. However, any hours undertaken within other teams or even on other stations would also count towards their hours providing that these hours were with a registrant. Scheduling will endeavour to avoid internal students being placed on a vehicle with an external student (whose hours will continue to be supernumerary) however, should this situation arise, it would need to be managed pragmatically.**
>
> **Both OBU and Health Education Thames Valley are supportive of the above decision however, if you have any queries, please do not hesitate to contact me."**

14. The claimant considers that the email trivialised the matters he complained of which he considered to be wrongful conduct. Although the email did come to the attention of the claimant the email was not intended to filter down to the Student Paramedics, it was intended to ensure that the operational management team had the information they needed to know about practice placements.

15. On 29 August 2015 Ms Robertson sent the claimant an email in which she suggested, given the extent of his queries and concerns, that the matter is dealt with as a grievance and offered to meet informally to discuss his concerns in the first instance. Ms Robertson asked the claimant whether he would prefer to defer to the January 2016 cohort. Ms Robertson explains her thought process as being that if the claimant deferred, he could see how the new system bedded in and hopefully it would allay his concerns. The claimant rejected the offer to explore his concerns by way of a grievance and informed Ms Robertson that he intended to raise his concerns under the Whistleblowing Policy with Professor David Williams and also rejected the idea of deferral to the January 2016 cohort.

16. On 31 August 2015 the claimant wrote to Professor David Williams, Non-Executive Director, and at the relevant time, whistleblowing lead on the Trust Board, in the following terms:

> **"Please find attached documents pertinent to concerns raised following a meeting with South Central Ambulance Service managers on 30 July 2015. I am referring this matter to you under Section 7.7.1 of the Trust's Whistleblowing Policy.**
>
> **I have a more than reasonable belief that proposed changes to practice placements of Internal Student Paramedics this year are inappropriate, pose a threat to patients and the reputation of the Trust. Students have been informed that the Health and Care Professions Council have not been notified and have not approved major**

> **changes to their degree programme. In failing to inform the HCPC, I believe that the trust is failing to meet it's legal obligations. Further obligations to respond to the cohorts individual and collective concerns have also not been met.**
>
> **Attempts have been made to conceal the events of the past month or so. Ignorance of the concerns of staff that failing to notify the HCPC poses a risk to the public, is, in my view, unethical at best. Before completing and forwarding an 'Education Provider Concern Form' to the Director of Education at the HCPC, I must exhaust internal procedures. Practice Placements begin in October. I would be grateful if you could investigate and respond to all these concerns comprehensively as a matter of urgency.**
>
> **I have enclosed relevant documents to assist you with your investigation. A swift response would be appreciated so that I may be able to determine the Trust's final position on this matter. Please be advised that any undue delay will leave me with no option but to notify the Education Committee so they can assess the changes and ensure protection of the public, my colleagues and I. I look forward to hearing from you soon."**

The claimant's email was accompanied by 7 attachments."

12. Thereafter Professor Williams met the HR Director, Sharon Walters, who explained that the overall number of 750 placement hours would not alter, and that 225 hours would now be supernumerary and 525 supervised, each student working with a qualified paramedic. "It was also explained that this would have positive implications for the workforce because there would be more staff available to respond to emergency calls." [17] Professor Williams agreed that an independent impartial investigating officer should be appointed to look into the claimant's concerns.

13. In September 2015 Ms Walters was succeeded by Melanie Saunders. The Assistant Director of Education, Ian Teague, identified a former employee, Liz Lee, as a suitable investigator. On 9 October he informed the claimant that an independent investigator had been appointed. Mrs Lee was given terms of reference on 21 October. She reported to Professor Williams on 21 December 2015.

14. Meantime, the claimant had started on the FdSc in September 2015. On 18 September 2015 Matthew Catterall (Paramedic Programme Lead at OBU) received a copy of the claimant's email to Professor Williams of 31 August 2015. He emailed the claimant stating that the Programme Team took his concerns seriously, and that OBU had explored the legal and regulatory perspectives before making the changes, which would be notified to the HCPC through annual reporting. He invited

the claimant to a meeting to discuss his concerns and they met on 30 September 2015.

15. As to events in 2016 the tribunal found as follows.

> **"24. On 14 January 2016 the claimant was informed that the report by Mrs Lee had been received and that the Trust was working through it to determine what actions to take in response to the recommendations. There was no further communication about this issue until the claimant enquired as to the position in May 2016.**
>
> **25. On 26 May 2016 the claimant sent an email and letter to Professor Williams stating that the Professor had been in receipt of Mrs Lee's report for four months and given the delay in detailing what action had been taken by the respondent and the continuing failure to comply with its legal obligations, the claimant would refer the matter to the relevant external authorities.**
>
> **26. On 31 May 2016 Professor Williams wrote to the claimant to advise him of the outcome of the investigation by summarising the conclusions. Under the respondent's procedure the claimant was not entitled to a copy of the report and he was not provided with a copy of the investigation report."**

16. In March 2017, owing to the extent of his sickness absence, the claimant was invited to a first formal sickness review meeting. He did not attend. He received a disciplinary warning and the review was escalated to stage 2. The tribunal continued:

> **"28. On 29 March 2017, the claimant sent a letter to Ms Judith Macmillan (HR Manager, Northern Operations) appealing the outcome of the first formal review meeting on 18 March 2017. The claimant's letter stated that he had made a protected disclosure under the whistleblowing policy in August 2015. In his letter the claimant asked a number of questions about that issue. This was brought to the attention of Ms Dymond (Assistant Director of HR Operations).**
>
> **29. In his letter dated 29 March 2017 the claimant had asked four specific questions about his protected disclosures, Ms Dymond states that she did not know the information to answer the questions in detail. Ms Dymond discovered that the claimant had raised concerns, that an independent investigation had been commissioned, that Professor Williams had considered the contents of the investigation report and relayed the outcome to the claimant. Ms Dymond's understanding was that the claimant had received, over two years previously, answers to his concerns relating to the reduction in supernumerary hours for Student Paramedic's practice placements from September 2015. The whistleblowing investigation had concluded 2 years ago and given the time lapse Ms Dymond considered that it was inappropriate to reopen dialogue on this matter.**
>
> **30. The claimant successfully appealed against the first formal review in April 2017.**
>
> **31. In November 2017 the claimant again raised issues referring to the letter of 29 March 2017 making it clear that he was expecting a response from Ms Dymond who he had been told was looking into the matters raised in the letter.**
>
> **32. On 18 December 2017 Ms Dymond sent an email to the claimant, attaching a letter in response to his recent communications. In the letter Ms Dymond stated that**

> **the claimant's whistleblowing concerns had been handled by Professor Williams and the Director of HR in 2015; that she had not been involved in that process and had no knowledge of the concerns the claimant had raised until earlier in 2017. The letter included the following**
>
> > **"Having reviewed your papers and your most recent letters, I can see that in the letter dated 31 May, you were given responses to the questions that you appear to continue to raise and in addition were offered the opportunity to meet with Melanie Saunders should you have continued to have any remaining concerns. Having consulted with Melanie I understand you did not arrange such a meeting.**
> > **…**
> > **Considering the above and the time that has elapsed since the response to your protected disclosure, we consider this matter to be closed." "**

17. From around September 2017 through to April 2018 the claimant was involved in supporting a colleague, referred to as "colleague X", including at disciplinary hearings.

18. The tribunal made findings of fact about claimed disclosure 9 in the following passage.

> **"53. Ms Penny Jann is a human resources consultant. In September 2018 she was appointed to conduct a formal investigation into two grievances which had been raised by employees of the respondent. As part of the investigation of those grievances, Ms Jann met with the claimant on 25 September 2018. Ms Jann was investigating a grievance made by a trade union representative, PM, against Ms Kinton and a counter grievance made Ms Kinton against PM. Both grievances alleged inappropriate behaviour during disciplinary hearings or internal meetings. As part of her investigation Ms Jann was asked to meet with the claimant.**
>
> **54. The meeting with the claimant lasted almost two hours. Ms Jann did not recall precisely what might or might not have been said by the claimant during their meeting. Ms Jann says, the claimant saw it as an opportunity to re-visit the issues he had with Colleague X's disciplinary hearing, and he read out a script that had been presented by him at the disciplinary hearing. The claimant was keen to impress upon her "how well he believed he had presented Colleague X's case at the disciplinary hearing". The claimant focused on what he considered to be shortcomings in the handling of the disciplinary process. The claimant complained about the way he had been treated in the disciplinary process when accompanying Colleague X, which had caused him to become so stressed that he had become unwell.**
>
> **55. On reviewing her notes Ms Jann does not have a record of all the matters allegedly raised by the claimant, however her notes are not verbatim, she also states that the notes do not record the claimant's alleged disclosures with the clarity that he now alleges he made them. Some of the alleged disclosures were mentioned at various junctures and were intertwined throughout the course of the meeting. The matters that the claimant raised focused on the shortcomings he believed existed in the disciplinary hearing process.**
>
> **56. Ms Jann's investigation was kept confidential she reported only to the Investigation Commissioners, Stephen Scales and Philip Smith. She did not show anyone other than them the hearing notes. The matters raised by the claimant focussed on how the information was presented to the panel hearing the disciplinary issue rather than the actions of the HR Adviser in relation to that hearing."**

19. The claimant reported to a Clinical Operations Manager, Kerry Gregory. The tribunal made the following pertinent findings about certain matters in which she was involved.

> **"72. In around November 2018 Mrs Gregory became aware that the claimant was allegedly living in his mobile home a converted ambulance at Didcot Ambulance Station. The claimant says that this is factually incorrect. Mrs Gregory ask a Team Leader, H, to have an informal conversation with the claimant. The purpose of the conversation was to check on the claimant's welfare and to ask him to stop parking as he was doing. On the 19 November the claimant received a voicemail from H explaining the concern and inviting a discussion with the claimant. On 20 November 2018 the claimant declined the invitation to discuss the situation and wrote an email in reply to H setting out his position and also pointing out that he had received racist comments about his Irish nationality and travellers. Following this email Mrs Gregory invited the claimant to attend a meeting on the 6 December 2018. The claimant declined the invitation in an email sent on 29 November 2018 explaining his reasons as well as setting out what he said was the "the most appropriate steps to ensure swift conclusion of this matter." Mrs Gregory sent an email to the claimant the following day stating that she wanted to meet with the claimant "to discuss the numerous issues which are of a complex nature and communication via email is not appropriate for these matters." She informed the claimant that he had been stood down on the 6 December 2018 so that she could meet with the claimant at Didcot at 16:00hrs.**
>
> **73. On the 4 December 2018 the claimant raised a grievance in respect of Mrs Gregory's action in having him stood down and instructing him to meet with her at Didcot.**
>
> **74. The claimant's meeting with Mrs Gregory could not take place on 6 December 2018 because a Team Leader was not available to attend the meeting and the claimant was told that the meeting could take place on 13 December 2018. The claimant wrote an email to the Ms Saunders stating that he would not be attending the meeting with Mrs Gregory because she was the subject of a grievance.**
>
> **75. On 13 December 2018 the claimant attended a grievance meeting with Mr Ludlow Johnson, the Equality and Diversity manager at the Trust. During the meeting the claimant received a call from EOC to attend a job. The claimant stated that he was in a meeting with Mr Ludlow and would be available in the next 20-30 minutes. 15 minutes later a call was made to the station asking the claimant to contact EOC to explain the reason for his meeting with Mr Ludlow. Mr Ludlow called EOC after the meeting and was told that Mrs Gregory had insisted that they are told the details of the meeting."**

20. The final section of the findings of fact related to events from 14 February to 31 July 2019.

> **"84. The claimant overslept on 14 February 2019 and awoke to find that he had a missed calls and a voicemail from Thames Valley (TV) Police asking the claimant to contact them. The claimant contacted the TV Police and they explained to him that that a welfare call had been made by the Trust and they would send a police officer to see him. The claimant sent a text message to the scheduling department notifying them of his absence.**
>
> **85. Mrs Gregory had contacted the police after the claimant failed to turn up for**

duty as scheduled and attempts to contact him had been unsuccessful. Mrs Gregory explained that normally, if attempts to contact the individual by phone are unsuccessful, a manager of the respondent would attend the individual's home address to conduct a welfare check in-person, in the claimant's case that was not possible because the claimant lived in his mobile home a converted ambulance and had not informed the respondent where he parked. Alternatively, a manager or HR Advisor would contact the individual's next of kin but in the claimant's case his next of kin were based in Northern Ireland. So when it reached approximately 11am and there had still been no contact from the claimant, Mrs Gregory states that she became particularly concerned.

86. After taking advice from the respondent's safeguarding team Mrs Gregory contacted the police. Mrs Gregory states that she thought it justified to do so in the circumstances and only did so intending to be supportive of the claimant. When she made the call to the police Mrs Gregory was acting in the capacity of Tactical Commander and in that role, such issues fall into her remit if they occur in one of the four Northern Oxfordshire stations.

87. From the 14 February 2019 the claimant was off sick and did not return to work before his employment came to an end.

88. The claimant lodged a grievance complaining of bullying and harassment on 14 February 2019. There was a discussion with the claimant about his grievance and a change to the claimant's line management arrangements pending the outcome of the grievance process. The claimant initially indicated that he was prepared to engage with a mediation process.

89. During his sickness absence the claimant relocated to Ireland. By May 2019, the claimant failed to engage with the respondent's attempts to progress mediation and resolve his grievance, and at times he chose to ignore the respondent's correspondence. The respondent invited the claimant to attend a meeting to discuss his continuing absence and how it could support the claimant in returning to full contractual duties: the Claimant had been assessed as fit to attend meetings by Occupational Health. The claimant ignored the respondent's correspondence.

90. The claimant eventually declined to attend a meeting at all; expressed significant concern about the respondent's attempts to contact him; requested that the respondent refrain from contacting him and stated that instead he would await independent and impartial adjudication from an Employment Tribunal.

91. On 31 July 2019, the claimant resigned without notice with immediate effect due to "the conduct of the Trust"."

The Employment Tribunal's Decision

21. The introductory parts of the tribunal's reasons included the following passage:

"3. The claimant robustly criticises the way that the respondent's witness statements have been prepared by the respondent's solicitors and says it is not possible to discern where the personal voice of the witness ends, and the drafting voice of the solicitor begins. Having considered the criticisms that are made of the respondent's solicitor we have concluded that there is no evidence of any improper conduct by the respondent's solicitor in the preparation of the witness statements.

4. Further we have not been persuaded that such criticism as can properly be made

> **of the way that the witness statements have been drafted, set against the way that the witnesses gave their evidence, establishes that the witness statements have been prepared in a way that has "infected or distorted the true evidence that the witness was capable of giving."**
>
> **5. The claimant makes specific criticisms of the evidence given by the respondent's witnesses in cross examination he asks us to strike out the response and says that no weight whatsoever should be given to the witness statements produced for the witnesses put forward by the respondent. We do not agree there is either a basis to strike out the claim or disallow the respondent's witness's evidence. They are to be assessed critically along with the claimant's evidence. The application to strike out the response is dismissed."**

22. After the findings of fact, and a section setting out the tribunal's self-direction as to the law (which is not impugned by the grounds of appeal) there was a lengthy concluding section, headed: "Protected disclosures and detriments", beginning as follows:

> **"104. For the reasons we set out below, other than in respect of disclosure 2 and disclosure 9, the claimant's disclosures were not protected disclosures because in all instances, other than the claimant's asserted belief to that effect, the disclosures are not in the reasonable belief of the claimant made in the public interest."**

23. There then followed sections in which the tribunal set out its conclusions, in overall chronological sequence, in relation both to each of the claimed protected disclosures and to each of the allegations of conduct said to have been because of one or more protected disclosures.

24. Claimed disclosure 2 was considered in the following passage:

> **"114. The claimant stated that the health and safety of patients is forefront in the minds of all employees. The stated role of the HCPC as regulator is also the safety of patients. The claimant knew that patient safety was in the public interest. Bringing to the attention the Trust a potential failure to ensure HCPC approval was obtained for the 'major change' in the course would necessarily therefore have been made in the public interest. The respondent says that the claimant has not established that he had reasonable belief that his disclosure was in the public interest.**
>
> **115. The information conveyed demonstrates the claimant's knowledge of the requirement for major changes to be notified to the HCPC. Therefore, the claimant held the subjective belief that agreement of the HCPC was required and viewed objectively he could reasonably have held that belief. The respondent contends that the claimant in fact has made any reference to a legal obligation.**
>
> **116. The claimant's case is put as follows: understanding the consequences of the potential failure to ensure paramedics were correctly trained to a standard agreed by the HCPC, he believed the information tended to show that (i) the safety of patients could be endangered and (ii) could lead to a breach of the respondent's legal duty of care to its patients. The claimant says, given the circumstances and facts, he reasonably believed that there would be such a relevant failure.**

> **117. The respondent takes issue with this analysis making several points as follows. That the letter does not set out any specific legal obligation. The respondent states that the claimant's rationale that patient safety would be endangered by the change is eccentric. He does not suggest that there is any endangerment during the course of the supervision period. Instead, and notwithstanding successful completion of the Course and annual confirmation that the registrant is fit to practice, he points to the risk that the removal of the additional 525 mandatory supernumerary hours paramedics would be unfit to practice. The respondent says that the Tribunal "has been given thin gruel from the claimant as to the reasonableness of belief necessary for s43B ERA 1996." The respondent says that "the claimant's approach to this issue is characterised by belligerence such that there is little room for a reasonable belief as to the alleged wrongdoing particularly given his "insider" knowledge." The counterintuitive effects of the conclusion that there was a reasonable belief in the endangerment of health and safety when the change in hours was brought about to release the constraints on delivery of paramedic care to patients and thereby avoid endangering patient safety: to endanger the very patient safety the reduction in supernumerary hours was designed to protect. The respondent says that the claimant has failed to satisfy show that the disclosure was in the public interest.**
>
> **118. In respect of the letter of the 31 August 2015 the Tribunal is satisfied that the was a disclosure of information, namely that there had been a change to practise placements that had not been reported to the HCPC and that the change posed a danger to patients. The Tribunal is not satisfied that the claimant had a reasonable belief that was the case. The claimant had been informed about the reason for the change and the considerations given before making it. At best the claimant might not have believed what he was told but he did not have a reasonable basis for concluding it was wrong. Without a reasonable basis for dismissing the respondent's explanation we cannot be satisfied that the disclosure of information was in the public interest. We are not satisfied that the disclosure was a protected disclosure."**

25. The discussion of complaints of detrimental treatment following that disclosure included the following passage.

> **"126. The claimant alleges that he was subjected to a detriment because the respondent deliberately failed to act in commissioning an investigation into the claimant's concerns until Mr Ian Teague informed the claimant in an email on 9 October 2015 that the respondent had appointed an independent investigating officer. The Tribunal consider that there was a delay from 31 August to 9 October. The Tribunal do not consider that there was any detriment to the claimant in the delay, the delay was not so extensive as to be a detriment in itself and further the issue was not so urgent that action was required to be expedited. There was no requirement to carry out an investigation it was something that was determined upon by the respondent. The time taken to appoint the independent investigator was the time taken, there was no deliberate delay, the delay was not because the claimant had made a disclosure.**
>
> **127. The claimant says that the respondent undertook a protracted process in addressing his concerns, failed to regularly update him on the progress or outcome of the investigation and did not give him sight of the report as at 27 May 2016. The claimant is correct that once the Independent Investigation was commissioned it was treated as being for Professor Williams, the claimant was not kept informed and he was not provided with a copy of the report. There was no obligation on the part of the respondent to do so. We have no evidence that in a comparable situation an**

> **employee was or would have been updated in the way that the claimant says that he was not. Professor Williams only updated the claimant when the investigation process had been concluded on 14 January 2016 to tell him that it had concluded, and it was not until much later that he wrote to him with an outcome on 31 May 2016. Professor Williams summarised the findings of the investigating officer, the lessons learned, and the steps being taken by the respondent. The claimant was invited to meet with Ms Saunders if he had remaining concerns but did not choose to do so. The claimant did not write to Professor Williams requesting a copy of the investigation report. The Tribunal do not consider that the claimant was subjected to any detriment in respect of the way that the respondent dealt with the Investigation Report. It was not unusual, in the sense that it was not out of step with how the process was envisaged to operate or had operated in other cases, there is no evidence of that."**

26. A further complaint of detrimental treatment was addressed in the following paragraph.

> **"128. The claimant says that on 18 December 2017 Ms Dymond failed to take his complaint seriously, trivialised the complaint by asserting, "I can see that in the letter dated 31 May, you were given responses to the questions that you appear to continue to raise… we now consider this matter closed." The Tribunal is of the view that this was a not a detriment. Firstly, we do not consider that Ms Dymond trivialised the claimant's complaint. Secondly, we consider that the approach taken by Ms Dymond was one that she was entitled to take where the claimant's concerns had been dealt with. It wouldn't have been appropriate to keep resurrecting the same issues, the respondent was of the view that the case had been concluded in May 2016. Ms Dymond wanted to close the issue down because there had been an independent investigation into the claimant's concerns, from which there had been learning points identified and actioned. Her view was that there was no benefit in allowing the claimant to resurrect his concerns and likewise no further recourse under the Whistleblowing Policy for him to raise the same concerns again. We are of the view that there was no detriment to the claimant in this issue. In any event we do not consider that any detriment that there might have been to the claimant was because he made a protected disclosure. The reasons for Ms Dymond's approach was because she was of the view that the matter had been dealt with and it was not appropriate to continue to raise the same issues."**

27. As for claimed disclosure 9 the tribunal concluded as follows.

> **"153. Disclosure 9: The claimant contends that on the 25 September 2018 he informed Ms Jann about a number of matters during her investigation. The claimant relies on a list of seventeen acts or omissions by the respondent in the way it had dealt with the investigation into events around the matters giving rise to the disciplinary proceedings against Colleague X. The claimant states that these matters tended to show that the health or safety of service users of the respondent had been or was being endangered.**
>
> **154. The Tribunal is satisfied that in respect of the claimant's assertion that "an audit of a 999-call revealed that the call handler did not manage the clinical situation safely to reach a safe and appropriate outcome" the claimant made a disclosure of facts that in the reasonable belief of the claimant tended to show that the health or safety of service users of the respondent had been or was being endangered. We are satisfied that such a disclosure was in the public interest."**

28. Further conclusions in relation to matters complained of as detrimental treatment on the ground of protected disclosures included the following.

> **"164. On 19 November 2018 Mrs Gregory invited the claimant to attend an informal meeting after he had raised serious concerns about behaviour towards him. The claimant declined the invitation. Mrs Gregory subsequently arranged for the claimant to be stood down from his duties so he could attend that meeting despite the claimant having already declined. The claimant complains that this was a detriment. The claimant also complains that the Director of Human Resources and Organisational Development failed to prevent a future occurrence of the conduct complained of in the formal grievance dated 4 December 2018 when by email dated 13 December 2018 Mrs Gregory reiterated her intention to stand down the claimant from his duties to meet her.**
>
> **165. In respect of this incident which arose from the claimant having been left a voicemail message by a Team Leader about his vehicle, a motorhome made from a converted decommissioned Ambulance, being at Didcot Ambulance Station "almost permanently". The claimant's response was to ask why he was being targeted. The claimant then received an invitation to an informal meeting from Mrs Gregory. The claimant declined to attend the proposed meeting. Mrs Gregory then caused the claimant to be stood down from emergency ambulance duties to enable him to attend the meeting.**
>
> **166. Mrs Gregory states that the intention was to have a discussion with the claimant about parking his vehicle at Didcot and to request that the claimant stop parking his vehicle in the way that he had been doing. The claimant however wrote a lengthy email to the Team Leader which raised a number of concerns, the email was forwarded to Mrs Gregory and it was this that led her to contact the claimant about a meeting to gain an insight into his concerns. Mrs Gregory states that when the claimant declined to meet with her she stood him down from duty so that she could meet with him to explain that she took his concerns seriously and to be supportive of him.**
>
> **167. The Tribunal consider that there is no detriment here. The claimant was given a reasonable request by his manager to meet with her in order to discus matters which she was concerned with that arose from his expressed concerns. The intention was to be supportive."**

29. The final paragraphs of this section, and the decision as a whole, were as follows.

> **"175. On 14 February 2019, the claimant was absent from work. The claimant learned from Thames Valley police that (i) the respondent had contacted Thames Valley Police and (ii) Mrs Gregory told the police officer that one of the reasons why Thames Valley Police were contacted was because the claimant "was living in a van". This is in substance accepted by the respondent. The claimant was understood to be living in his Motorhome at the time. We do not consider that there was any detriment in this contact with the police. The reason for the contact was out of concern for the claimant's welfare. The reason that the contact with the police was made was not in any sense related to the fact that the claimant had made the alleged protected disclosures.**
>
> **176. The claimant was not fit for work due to the stress 9 February 2017 - 4 July 2017, 26 April 2018 – 25 August 2018, and 14 February 2019 – 27 May 2019. The Tribunal do not consider that the claimant's absence was due to any misconduct by**

> **the respondent.**
>
> **177. The claimant complains that the respondent failed to (i) take any steps or any adequate steps to identify perpetrators or instigators of detrimental treatment of the claimant. (ii) Prevent or adequately prevent the condoning of detrimental treatment of the complaint (iii) meaningfully attempt to resolve the claimant complaints of detrimental treatment. For the reasons set out above we do not consider that there is any justification for such complaints.**
>
> **178. The claimant's complaint that he was subjected detriments because he made protected disclosures is not well founded and is dismissed.**
>
> **179. The claimant, to claim constructive dismissal, must establish that there was an actual or anticipatory fundamental breach of contract on the part of the employer. The matters that the claimant relies upon as a breach of contract are set out above. We have not found that there is conduct that amounts to a breach of contract by the respondent. We have not been able to conclude that the respondent's breach caused the claimant to resign. We have not concluded that the claimant was dismissed. The claimant's complaints of unfair dismissal and wrongful dismissal are not well founded and are dismissed."**

The Grounds of Appeal, Discussion, Conclusions

30. There are five numbered grounds of appeal, which I will consider in turn.

Ground 1

31. This ground relates to disclosure 2. The headline ground is expressed as follows.

> **"As regards Disclosure 2, in finding the Claimant did not have a reasonable belief as regards the disclosure information, the Tribunal made errors of law in:**
> **a. Failing to apply the correct test as to "tends to show":**
> **b. Substituting its view for that of the Claimant; and**
> **c. Conflating the issues as to whether the claimant had a reasonable belief and the Respondent's asserted position as to the reason for the change in supernumerary hours."**

32. In more detail, the ground contends that the tribunal erred at [118] by failing to consider whether the claimant reasonably believed that the information "tends to show" a state of affairs within section 43B(1)(d). It wrongly applied the higher test of whether he reasonably believed that the information *does* show that state of affairs. Mr Avient cited **Twist DX Ltd v Armes**, UKEAT/0030/20, 23 October 2020 at [66].

33. Secondly, it is said that the tribunal failed to recognise that there may be more than one reasonable view, and substituted its view for that of the claimant, which was the wrong approach

(**Twist** at [69] – [70]). Mr Avient submitted that the tribunal wrongly relied at [118] on the respondent's explanation as to why the change would benefit patient care, but there was no finding that this explanation was given to the claimant *prior* to the disclosure. He also argued that the tribunal failed to take into account, in deciding whether the claimant's view was reasonable, that its findings plainly showed that he was aware of the role of the HCPC in relation to patient-safety issues.

34. Further, it is contended that the tribunal's conclusion "flew in the face" of the evidence the tribunal had, that Mrs Lee's report concluded that the proposed change should have been reported to the HCPC as a major change. In oral argument Mr Avient accepted that the report came in point of time after the disclosure, and so was not within the knowledge of the claimant when he made it; but he argued that its contents supported the conclusion that the claimant's concern was reasonable.

35. The tribunal is also said to have erred by relying on the respondent's explanation that the change had the aim of making more paramedic care available to respond to emergency calls. It is submitted that it was not open to the tribunal to conclude that the claimant's reasonable belief was "countered or overwhelmed" by the respondent's assertion as to the greater good.

36. My conclusions on this ground follow.

37. The tribunal considered with care at [114] – [118] how each of the parties put their case in relation to disclosure 2. The tribunal accepted that it contained information about the proposed changes to practice placements and the fact that there had not been prior notification of them to the HCPC. The claimant's case was that that information tended to show that patient safety was likely to be endangered (section 43B(1)(d)), because the HCPC was the custodian of patient safety and should have been notified of this change in advance. It was also his case that, *because* he reasonably believed that the safety of patients was at risk, he *also* reasonably believed that his disclosure was made in the public interest. Unsurprisingly, it does not appear to have been

controversial that, in this case, these two aspects stood or fell hand in hand – and that approach is reflected in the tribunal's interchangeable references to patient safety and public safety.

38. It was also the claimant's case before the tribunal that he reasonably believed at the time that the respondent was under a legal obligation to give advance notification to the HCPC (section 43B(1)(b)). Mr Avient, however, confirmed that the appeal is confined to a challenge to the tribunal's approach to the patient-safety plank of his case, so I do not need to consider that other plank further.

39. The respondent's case, on the patient-safety plank, as discussed at [117], was that the claimant did not *reasonably* believe that patient safety was at risk, because (a) he was not suggesting that there would be any danger to public safety during the course of the supervision period, but rather that, upon completion of the course, the trainees would be inadequately trained, and so unfit to practice; and (b) the very purpose of the change was to release constraints on delivery of paramedic care to patients and thereby to *avoid* endangering patient safety. Hence it was also the respondent's case that the claimant did not *reasonably* believe that his disclosure was made in the public interest.

40. It appears to me that the tribunal correctly understood the respondent's challenge to be focussed not on whether the claimant had genuinely believed what he claimed, but on whether he had reasonably so believed. That is why it did not first separately consider whether the claimant did or did not subjectively hold the belief, but, at [118], went directly to the question of whether the belief was reasonable. The tribunal's conclusion was that the claimant did not reasonably believe that the making of the changes without prior notification to the HCPC posed a danger to patients, and, hence, he also did not reasonably believe that the disclosure was made in the public interest.

41. I turn, then, first, to the challenge relying upon the words "tends to show". These words can make a real difference in some cases, because, for example, an employee may reasonably believe

that a certain piece of evidence "tends" to support the conclusion that a certain state of affairs exists or is likely to occur, even though it would not be reasonable to believe that it definitely does exist.

42. In this case the tribunal did not overlook these words. It included them in its citation from section 43B at [92] and in its summary of the elements of a protected disclosure at [93]. It also used them again at [116]. But the claimant's case, and the dispute, did not materially turn on these words. In the letter itself the claimant asserted that he reasonably believed that the changes, and the failure to notify them to the HCPC, "pose a threat to patients" and "poses a risk to the public". It was, on his case, *the change itself*, coupled with the failure to notify the HCPC of it in advance, that gave rise to the risk. The tribunal did not find that he did not hold that belief. Its conclusion was simply that it was not reasonable for him to believe that the change gave rise to such a risk. Having regard to all of that, it did not err by failing to refer again to the "tends to show" element of the test at [118].

43. I will take together, because they overlap, the challenge to the effect that the tribunal substituted its own view in deciding whether the claimant's belief was reasonable, and the last limb of this ground, being that the tribunal erred by according preference to the respondent's view.

44. In **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979; [2018] ICR 731, which concerned the "public interest" strand of the definition, Underhill LJ (with whose speech Beatson and Black LJJ made concurring speeches) made a number of preliminary observations about how these provisions work, the first three of which were as follows:

> **"27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula* (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
>
> **28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable**

> **responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the *Wednesbury* approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.**
>
> **29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.**"

45. I draw out from this passage the following particular points. First, while noting, at [28], that the tribunal should be careful not to substitute its own view, Underhill LJ recognised that its own view may inform its thinking. I would for my part add that this is, I think, inevitable, because it is, in the nature of things, the tribunal which must decide the width of the range of views that it was reasonably open to a claimant to take, and whether the view that they took fell outside of that range. Secondly, while, as noted at [27], if the claimant did hold the requisite belief, the issue is then whether it was, at the time, reasonable for him to do so, at [29] Underhill LJ also noted that it may be open to the tribunal so to conclude by reference to factors that he did not himself, at the time, have in mind.

46. Taking the final strand of this challenge first, I do not think it was an error, as such, for the tribunal, when considering the reasonableness of the claimant's view that patient safety would be harmed by the change, to take into account the respondent's reasoning as to why it would *benefit* patient safety. Of course, the fact that a particular view can be reasonably held does not, of itself, necessarily mean that the opposing view cannot reasonably be held as well. But the tribunal had to

decide whether the claimant's belief was reasonably held, looking at the *overall* picture of what he knew, or could reasonably have been expected to appreciate, about these changes, at the time.

47. Turning to the challenge that the tribunal substituted its own view, it is well-established that the evaluation of questions such as whether such a view was reasonably held, is a task akin to the making of findings of fact, so that the EAT can only interfere with the tribunal's decision on perversity-type grounds. That is reinforced by the insight of Underhill LJ in **Chesterton** to which I have referred. It is also well-established that the EAT should be particularly wary of challenges founded on selected strands of the evidence, given that, as Lewison LJ memorably put it in **Fage UK Limited v Chobani UK Limited** [2014] EWCA Civ 5; [2014] FSR 29 at [114] the trial court has the whole sea of evidence before it, whereas the appellate court is only island-hopping. A related, equally well-established, point, is that the tribunal is not obliged to refer to every facet of the evidence put before it, or that may have influenced its conclusion as to the overall picture. The starting point is that it should be taken, when reaching its conclusions, to have reflected on all the relevant evidence.

48. An example of these dangers in this case is the evidence regarding Mrs Lee's investigation report. Mr Avient submitted that its contents supported the contention that the claimant's view was not so eccentric that no reasonable person in his position could have taken it. However, it appears from the evidence relating to it put before the tribunal that, while Mrs Lee did find that the OBU should have notified the HCPC of the proposed changes in advance (and also considered that the respondent should have sought a reassurance that this had been done), she also concluded that the level of supernumerary hours was *not* critical to effective training, and that other students did not generally share the claimant's concern about the impact on patient safety or any wider implications.

49. For all of these reasons I agree with Mr Milsom that the fact that the tribunal did not refer specifically to the evidence of Mrs Lee's report does not show that it erred in reaching this particular conclusion. I also do not accept Mr Avient's contention that the fact that the claimant

was aware of the role of the HCPC showed that it was perverse to conclude that his view about his disclosure being in the public interest was not reasonable. The tribunal was not bound to conclude that his awareness of the *role* of the HCPC showed that his *substantive* stated concern must have been reasonably held.

50. The high point of Mr Avient's submissions is his contention that the tribunal wrongly relied upon the respondent's explanation as to why the change supported the public-service provision (at [117]), because that explanation was not given to the claimant in point of time prior to his making the disclosure. But this submission rests in particular on his contentions that the tribunal found (at [17]) that Ms Walters had given this explanation *to Professor Williams*, and only after the disclosure, and that, while the tribunal found at [19] that, while the claimant saw the 12 August 2015 email – which included the College of Paramedics' guidance dating from 2015 that 225 hours would be sufficient – it did not *specifically* find that he saw it before he made his disclosure. But none of this enables me to say that the tribunal did not have the evidence before it to support the conclusion that the claimant, who had worked as a student paramedic for some months, whether by having sight of that email, or otherwise, had been given to understand the respondent's rationale prior to his 31 August 2015 letter.

51. I therefore conclude that the high bar for a perversity challenge is not met, and I cannot say that the tribunal erred in its conclusion that the claimant's belief that the disclosure was made in the public interest was not, at the time he made it, reasonably held.

52. Ground 1 therefore fails.

Ground 2

53. This ground advances a perversity and/or inadequacy of reasons challenge in relation to the tribunal's findings that "no detriments were suffered by the Claimant as a consequence of Disclosure 2" specifically in respect (in the words of the ground) of the following:

"a. The Respondent's failure to commission a report;

b. The Respondent undertook a protracted process;

c. The Respondent's failure to notify the outcome of the report; and

d. The Respondent's failure to take the complaint dated 29 March seriously."

54. The strands at (a) to (c) relate, together, to the tribunal's conclusions in relation to the complaints discussed at [126] – [127], which drew on the earlier findings of fact at [17] – [18] and [24] – [26]. The last strand at (d) refers to the complaint in relation to which the tribunal set out its conclusions at [128], which drew upon its findings of fact at [28] – [32].

55. Mr Milsom submitted, and Mr Avient accepted, that if ground 1 fails, ground 2 falls away. Nevertheless, it might be said that I ought to consider ground 2 in case I am thought to be wrong in relation to ground 1. Mr Milsom, however, submitted that he had a further unanswerable knock-out point. This was that ground 2 only challenged the tribunal's conclusions that the conduct to which it referred did not amount to subjecting the claimant to a detriment. But these complaints had all in any event failed because the conduct was not "on the ground" of the claimed protected disclosures, and there was no ground of appeal in that regard. So, even if *both* ground 1 and ground 2 were to succeed, the tribunal's decision to dismiss these complaints would *still* have been sound.

56. Mr Avient, in discussion, fairly acknowledged that this point was well made in relation to the conduct at (d) above. I note that the tribunal indeed clearly did, at [128], find that, in addition to Ms Dymond's conduct not amounting to a detriment, "in any event" any detrimental treatment was not *because of* any protected disclosures. I therefore need give that strand of this ground no further consideration, as the decision to dismiss that particular complaint must in any event stand.

57. However, in relation to the conduct referred to at (a) – (c) Mr Avient's position was different. As to (a) he contended that, although the tribunal found at [126] that there was no causation, whether there was detrimental treatment, and if so, whether it was because of the

disclosure, were factually so bound up together, that if the tribunal had erred in relation to the former, that also rendered its decision unsafe in relation to the latter. As to (b) and (c) he contended that the tribunal had rested its decision on the conclusion that there was no detrimental treatment, and had not made a further or alternative finding of lack of causation. Strands (a) – (c) of this ground were therefore maintained.

58. As to (a), in more detail this ground refers to the respondent's whistleblowing policy requiring it to act quickly and to the fact that the claimant began the training course on 1 September 2015. As to (b) it refers to the duty under the policy to notify the claimant that steps were being taken to address the problem, and to the delay between his being told on 14 January 2016 that the investigation had concluded and being told the outcome on 31 May 2016, by which time he had been on the course for nine months. As to (c) the ground contends that the tribunal erred in relying upon Professor Williams having summarised the Lee report's findings and invited the claimant to a meeting, given (the ground asserts) that the summary he was given omitted key findings about allegations that had been upheld.

59. My conclusions on these remaining live parts of this ground follow.

60. As to (a) the complaint (as identified in a schedule before the tribunal) was that the respondent deliberately failed to act in commissioning an investigation into the claimant's concerns until 9 October 2015. That was when Mr Teague emailed the claimant informing him of Mrs Lee's appointment. But section 47B(1) only bites on conduct by way of a failure to act which is *deliberate*. In this case the tribunal made a clear finding that there was no *deliberate* delay and that the delay was not *because* the claimant had made a disclosure. Having regard to the chain of events from when Professor Williams received the 31 August 2015 email, leading up to the appointment of Mrs Lee, as found by the tribunal at [17] and [18], and given that the witnesses included Professor Williams, Ms Saunders and Mr Teague, those findings and conclusions were certainly not perverse.

61. Mr Avient submitted that it was an error at [126] to say that the respondent was not obliged to carry out an investigation. But I note that the respondent submitted that the matters raised by the claimant did not strictly fall within the scope of the whistleblowing policy; and in any event that the tribunal found at [17] that Professor Williams agreed that an independent investigator should be appointed in accordance with the policy. Given also the findings at [18], I also cannot say that it was perverse not to find that deciding to appoint an *outside* investigator was a deliberate delaying tactic.

62. Even if it might be said that, when considering the question of detriment, the tribunal failed to address whether, from the claimant's *subjective* point of view, he reasonably considered the time taken to be detrimental to him, the tribunal's conclusions that the respondent did not deliberately delay, nor delay because of his disclosure, were fatal to this complaint. Nor, given the findings of fact at [17] and [18], were these conclusions insufficiently explained. It is entirely clear that, in light of the evidence it had, the tribunal concluded that the claimant's suspicions were mistaken.

63. For the complaints to which strands (b) and (c) relate to have succeeded, the tribunal would have to have found that the respondent *deliberately* failed to keep the claimant better informed, and/or *deliberately* did not provide him with a copy of the report, *and* did so *on the ground of* his 31 August 2015 disclosure. I note that the respondent conceded in submissions to the tribunal that the delay in notifying the claimant of the outcome of the report was a detriment, as such, but disputed that there had been any deliberate conduct, as alleged, *on the ground of* any prior disclosure.

64. Mr Avient is right that, read literally, the tribunal at [127] only referred to "detriment", not, expressly, also, to the causation question. But reading the paragraph as a whole, it is clear that the tribunal concluded that there was no causation. That is having regard to the tribunal's findings that the respondent was not obliged to provide the claimant with a copy of the report, that there was no evidence that in a comparable situation an employee was or would have been updated in a way that the claimant was not, that the 31 May 2016 letter provided a summary of the findings, lessons

learned and steps being taken, that the claimant did not follow up on the offer of a meeting or request a copy of the report, and that there was no evidence that the handling of the matter was out of step with how the process was envisaged or had operated in other cases.

65. Mr Avient's submissions included that the 31 May 2016 letter did not fairly summarise material parts of the report nor address the claimant's patient-care concerns, that the tribunal failed to take into account the claimant's case as to why he did not take up the offer of a meeting, nor his reliance on the lack of positive evidence that there had been other cases under the whistleblowing procedure handled the same way. He said that the tribunal had failed to engage with the claimant's case that the respondent had hoped after the 14 January 2016 email that the claimant would not pursue the matter, and that the 31 May 2016 letter had deliberately downplayed the findings in the report.

66. However, I agree with Mr Milsom that this ground is, in effect, through the channel of perversity and *Meek* challenges, an attempt to reargue the claimant's case. But it was for the tribunal to evaluate the totality of the evidence on these matters, including having heard from Professor Williams and others involved. The tribunal was in a position to evaluate the reason for the delay in writing to the claimant, and whether the respondent deliberately went quiet. The tribunal was in a position to evaluate whether it agreed with the claimant that the 31 May 2016 letter was deliberately misleading, by omission or otherwise.

67. Further, whatever the claimant's reasons for not taking up the offer of a meeting, and not requesting a copy of the report, the tribunal was entitled to take into account that the claimant was *offered* a meeting and that he was not *refused* a copy of the report, in assessing whether the respondent had deliberately acted as alleged *because* the claimant had made his disclosure. It was also entitled to rely on the fact that the claimant could not point to a requirement to provide him with a copy of the report, nor to a comparable case that had been handled differently, in assessing whether there was something unusual about how these aspects were handled in this case. I

conclude that the high threshold for a perversity challenge is not met; and I consider that paragraph [127], set in the context of the tribunal's overall findings, sufficiently explains why these complaints did not succeed.

68. Ground 2 therefore fails.

Ground 3

69. This ground concerns the decision relating to certain complaints of detrimental treatment on the ground that the claimant had made disclosure 9. That was the particular disclosure among those said to have been made to Ms Jann at the meeting on 25 September 2018 that the tribunal found at [154] did amount to a protected disclosure. This ground contends that the tribunal made inadequately-reasoned or perverse findings in concluding that no detriment was suffered by the claimant:

> **"a. As a consequence of the meetings orchestrated by Mrs Gregory in November 2018;**
> **b. As to the failure of Ms Saunders (head of HR and director of the Respondent) to prevent ongoing victimisation;**
> **c. As regards the Respondent's asking Thames Valley police to locate the Claimant; and**
> **d. As regards the failure of the Respondent to follow the grievance policy and not preventing occupational health contacting the Claimant."**

70. Strands (a) and (b) relate to the events considered by the tribunal at [72] – [75] and [164] – [167]. As the tribunal described at [164] the complaints related, specifically, to Mrs Gregory having stood the claimant down from his frontline duties in order to attend a meeting with her, despite his having declined her invitation to such a meeting; and to Ms Saunders having failed to take action when, in point of time after the claimant had raised a grievance against Mrs Gregory, she reiterated her intention to stand down the claimant from his duties in order to meet her.

71. In relation to (a), the ground relies, in more detail, on the propositions that, on Mrs Gregory's own evidence, the source of her concern that the claimant was living in his camper van in the ambulance station car park was not an anonymous complaint, that no other employee had had

similar issues raised with them, and that no consideration had been given to the fact that the claimant was permitted to spend long hours at the ambulance station to study. As to (b) reliance is placed on the evidence that, following the grievance, Ms Saunders had indicated to the claimant that Mrs Gregory would not have line management responsibility for him pending its resolution.

72. Mr Avient also contended in his submissions that, while the tribunal identified the complaint about Ms Saunders at [164], it failed thereafter specifically to dispose of it. He also contended that Mrs Gregory would have known about disclosure 9 because it related to a matter that had been aired in the course of the disciplinary proceedings concerning colleague X, in which she had had a role; and that Ms Saunders would have known about it, because of the grievance concerning Mrs Gregory.

73. These two strands of this ground face the following difficulties. First, as to (a) the tribunal made a finding, in terms, at [167] that Mrs Gregory's intention was to be supportive. The respondent's case was that, in light of the claimant, in his reply to her initial email, expressing concerns about how colleagues had been treating him, she felt that a meeting, rather than more emails, was needed; and it was her usual practice to relieve such an employee of their duties in order to facilitate such a meeting. The tribunal heard Mrs Gregory give evidence, and it was entitled to accept the respondent's case as to her motivation. The high hurdle for a perversity challenge described by Mummery LJ in **Yeboah v Crofton** [2002] EWCA Civ 794; [2002] IRLR 634 is not surpassed.

74. In relation to Ms Saunders, as framed in the list of issues, the complaint was that she failed to prevent a recurrence of the conduct of which the claimant had complained in his grievance of 4 December 2018, when, by an email of 13 December, Mrs Gregory reiterated her intention to stand him down from his duties in order to meet her. However, it appears that the emails showed that Mrs Gregory had first proposed to meet in early December, but later put forward revised dates, and, specifically, proposed 13 December in an email of 10 December. The claimant then complained of

that to Ms Saunders. She then emailed him on 12 December informing him that Mrs Gregory would not be involved in line managing him until the grievance was resolved, and also asked him to provide suitable dates for a meeting with Ludlow Johnson (who was to investigate the grievance). It was the respondent's case that when, on 10 December, Mrs Gregory had emailed the claimant suggesting 13 December as a revised date for their meeting, she had not yet been told of the grievance.

75. In Mr Avient's closing submission to the tribunal, what Mrs Gregory was said to have done on 13 December was "demanded to know the purpose of a confidential meeting regarding the grievance." As to that, the tribunal found at [75] that, on 13 December, following the claimant having been contacted to attend a call-out, and replied that he was in a meeting with Mr Johnson, Mrs Gregory had wanted to know the nature of that meeting. There was no finding that she already knew that the meeting related to the grievance; nor was Mrs Gregory's conduct in making that enquiry identified as the subject of a complaint of detrimental treatment to the tribunal, as such.

76. Mr Milsom also drew attention to the fact that at [177] the tribunal rejected the generalised complaint of detrimental treatment by way of the respondent having (inter alia) failed to prevent or adequately prevent the condoning of detrimental treatment or meaningfully resolve the claimant's (internal) complaints, which (legal) complaint was, mainly at least, directed at Ms Saunders.

77. Finally, and importantly, the specific disclosure to which this ground of appeal relates, said to have influenced both the original actions of Mrs Gregory and the inaction of Ms Saunders, being disclosure 9, was specifically made to Ms Jann in the context of her investigation of mutual grievances involving two other individuals [53]; and the tribunal found in terms at [56] that her investigation was kept confidential, and was reported only to the named Investigation Committee, and she did not share her notes with anyone else. While Mr Avient postulated that it would be reasonable to infer that both Mrs Gregory and Ms Saunders, despite both of them denying it, knew about that specific disclosure in the meeting with Ms Jann, it is clear, reading these passages as a

whole, that the tribunal accepted that neither of them knew about it; and I cannot say that such a conclusion was perverse.

78. All of that being so, while I do consider that the tribunal should have spelled out expressly its conclusion in relation to the complaint, as originally framed, against Ms Saunders, as well as in relation to that against Mrs Gregory, I think it is clear from the decision as a whole that it concluded that neither Mrs Gregory, in originally wanting to meet with the claimant, and standing him down to facilitate that, nor Ms Saunders, in any of her conduct following the grievance against Mrs Gregory, was influenced by disclosure 9; and, indeed that neither of them was specifically made aware of it.

79. Strand (c) of this ground relates to the incident referred to at [84] to [86] of the tribunal's decision. The tribunal's rejection of the complaint relating to this incident at [175] is said to have been perverse or not *Meek*-compliant because: Mrs Gregory had been told by Ms Saunders not to line manage the claimant; his previous team leader's evidence was that on a previous occasion of concern she had visited his flat, and not called the police; the respondent could provide no evidence for its understanding that the claimant was living in his van; and this suggestion repeated racial slurs (by reference to the claimant's Irish descent) which formed part of his grievance.

80. In his submissions Mr Avient referred to Mrs Gregory's evidence that the claimant had discussed with her that he was living in a converted ambulance; but he submitted that this was not credible and/or contradictory of her evidence that she had become aware from one of her team leaders that he was parking his van at the ambulance station, and had a concern that he was living in it.

81. As to this, the tribunal found that the claimant was understood to be living in his van at the time, and that the reason for contacting the police was concern for his welfare after he had not reported for work, and unsuccessful attempts to contact him, and not in any sense related to his

claimed protected disclosures. The tribunal heard Mrs Gregory give evidence, and once again this challenge does not surmount the high perversity bar. The two paragraphs relied upon in her statement were not bound to be read as contradictory. The racial-slur charge against her gains no purchase given that the tribunal accepted that she acted on a genuine belief and concern. Nor are the reasons not *Meek*-compliant. They explain that this complaint failed because the tribunal found that Mrs Gregory was actuated by genuine concern for the claimant's welfare, after attempts to contact him had failed.

82. Ground 3 therefore fails.

Ground 4

83. This ground contends that the tribunal "failed to consider and/or failed to provide sufficient reasons as to the actions of the respondent subsequent to 14 February 2019 leading to the claimed constructive dismissal." This relates to the tribunal's findings and conclusions at [87] – [91] and [176] – [179]. In more detail the ground contends that the tribunal failed to give any, or any sufficient, reasons, in relation to the conduct complained of at [91] to [95] of the second particulars of claim. Mr Avient submitted that at [176] the tribunal only considered the period up to 27 May 2019, gave no reasons for its findings as to the reason for the claimant's absence, and failed to consider that he continued to be unfit for work from 12 June 2019. While the tribunal referred at [177] to "the reasons set out above", he submitted that there were no earlier findings touching on this aspect.

84. I need first to review how the matter was pleaded. The first claim form was issued on 27 May 2019. The narrative under the heading of "detriments" referred at [89] to the claimant having been not fit for work from 14 February 2019 until "beyond the date of issue". There was then a final paragraph [90] setting out generalised complaints of the respondent having failed to take any, or any adequate, steps, to identify those involved in detrimental treatment; to prevent the condoning of such treatment; or to meaningfully attempt to resolve the claimant's complaints of detrimental

treatment.

85. The claimant resigned on 31 July 2019. In the second claim form, issued subsequently, the paragraphs relating to claimed detrimental treatment in the first claim form were reproduced, but then followed by new paragraphs [91] to [95]. Paragraph [91] set out an extract from a letter that the claimant himself wrote on 9 July 2019 to Ms Saunders. In it he responded to a letter from Ms Saunders of 8 July 2019 which required him to attend a meeting on 12 July 2019 (the day after his then current fit note was due to expire). He set out why he would not be attending. Paragraph [92] then asserted that "[b]y letters dated 19 July 2019, the trust engaged in further repudiatory breaches." Paragraph [93] referred to the resignation letter, [94] asserted that the claimant had resigned in response to a repudiatory breach or breaches of express or implied terms, and hence been constructively dismissed, and [95] asserted that he had been unfairly and wrongfully dismissed.

86. The grounds of resistance in response to that claim indicated that on 19 July 2019 the respondent had referred the claimant back to its OH team for an assessment of his current health, and had indicated that there would be an investigation into his failure to adhere to reasonable management instructions and as to whether there had been a serious and irretrievable breakdown in trust.

87. As directed at a case management hearing in April 2020, the claimant produced a schedule of complaints of detrimental treatment because of protected disclosures, which reflected (only) those set out in the *first* claim form. However, Mr Avient noted that, at the case management hearing in December 2020 it was identified that the details of the claims and defence were adequately set out in the ET1 and ET3 forms *and* in that list of issues.

88. Standing back, it appears to me that the claimant *was* asserting, at least, that the respondent's letter to him of 19 July 2019 (coupled with a letter that day to OH making a further

referral) amounted to, or contributed to, a repudiatory breach, and, against the background of the earlier correspondence, was the final straw. The respondent understood that this was how he was advancing his case, and indeed in his closing submissions to the tribunal Mr Milsom advanced a rebuttal of it. I therefore turn to consider whether the tribunal sufficiently addressed this aspect of his case in its decision.

89. I start by noting that, in respect of the period *until* he went off sick, the conduct relied upon by the claimant as contributing to a cumulative breach of the implied duty was the same conduct said to have amounted to detrimental treatment on the ground of having made protected disclosures. It is entirely clear from all of the tribunal's findings and conclusions, that it did not consider that there was any such conduct in *that* period that amounted to a breach, or could or did contribute to a potential breach, of the implied term. That is reinforced by its statement at [176] that it did not consider that the claimant's absence was due to any misconduct by the respondent; and its statement at [179] that it has not found that there was any conduct that amounts to a breach of contract.

90. The tribunal's findings of fact at [87] – [91] show that it did also consider how events unfolded in the period from when the claimant went off sick on 14 February 2019 to when he resigned (although the reference at [88] to the grievance was, I think, clearly intended to be to the grievance which had been originally raised on 4 December 2018). The material communications between the parties during this period were in writing, and the tribunal had them (other than without-prejudice material) before it. Its findings of fact reflect its assessment of the material developments during this period.

91. At [175] the tribunal returned to the period following the start of the claimant's sickness absence. Mr Avient made the point that paragraphs [175] and [176] only referred to the period up to 27 May 2019. As to that, I note that, in the next paragraph, [177], the tribunal addressed the compendious complaints referred to there (which, as noted, were essentially directed at Ms

Sanders) and rejected them. Mr Avient, however, submits that this reasoning was inadequate as it did not expressly address the claimant's complaint that the letter to him of 19 July 2019 amounted to the final straw. As to that, he is right that the tribunal did not, in this passage, specifically refer to that letter. Given that this was argued to be the final straw, that omission has given me some pause. However, ultimately I have concluded that the reasons are sufficient. That is for the following reasons.

92. First, it is abundantly clear from the decision as a whole, that the tribunal did not consider that there was *any* detrimental treatment of the claimant because of his claimed protected disclosures. Further, conduct cannot, in law, contribute to a breach of the implied term, unless it is "without reasonable and proper cause". It was the respondent's case that, during this period, it was acting with reasonable and proper cause because it was endeavouring to progress the resolution of the grievance, and acting in accordance with its procedures for managing sickness absence, and, from a certain point, with its conduct procedure, in particular by seeking a meeting to discuss the sickness absence.

93. More specifically, the respondent's case was that the claimant failed to engage with it in respect of the grievance or absence-management processes. As to the letter of 19 July 2019, it was the respondent's case that, following the claimant having relocated to Ireland, having submitted a further fit note in June, and then written on 11 July maintaining his stance of non-engagement, it properly sought a further OH report as to his current state of health, and it properly indicated that it would investigate his conduct and whether there had been a complete breakdown of the relationship.

94. It is, of course, also abundantly clear that that case was contested by the claimant. But it appears to me that the tribunal essentially accepted the respondent's case that it acted with reasonable and proper cause in the way that it handled matters throughout this final period. In particular it found at [89] that the claimant "failed to engage" with the respondent's attempts to

progress mediation and resolve the grievance, and that the claimant at times "chose to ignore" that correspondence. It also found that the claimant was invited to meetings to discuss his sickness absence and support his return and had been assessed by OH as fit to do so, and that the claimant "ignored" that correspondence. It also referred at [90] to the claimant having eventually declined to attend a meeting at all and requested the respondent to refrain from contacting him. That was plainly a reference to his 11 July letter, which followed the letter from the respondent of 27 June and was followed by its letter of 19 July.

95. I conclude that, reading that passage together with the final paragraphs of the reasons, the parties cannot have been left in any doubt that the tribunal considered that the respondent acted throughout this final period with reasonable and proper cause, including in writing the 19 July letter to the claimant (and making a further OH referral at that point). This ground was not expressly advanced also as a perversity challenge, but in any event I consider that the tribunal was fully entitled to reach the conclusions about the respondent's handling of these matters that it did.

96. Ground 4 therefore fails.

Ground 5

97. The context of ground 5 is as follows. Following the close of evidence the tribunal received written and oral closing submissions from both counsel. At that time Mr Avient also made an application to strike out the response under rules 37(1)(b) and (e) **Employment Tribunals Rules of Procedure 2013** (unreasonable, scandalous or vexatious conduct and/or that it is no longer possible to have a fair hearing). At [3] – [5] of its decision (cited above) the tribunal rejected that application.

98. This ground challenges as perverse the tribunal's findings "as to the witness statements relied upon by the respondent". Reliance is placed, in particular, on certain paragraphs in different witness statements having been identical. It is also said that witnesses at points asserted matters of

which they had no recollection, made assertions about legal concepts of which they had no knowledge, or referred in statements to incorrect attachments. Mr Avient gave examples of these various mischiefs. He submitted that the tribunal could not determine where the words of the lawyers stopped and the evidence or personal voice of the witness commenced. In light of all that he submitted that the tribunal's conclusion at [4] was perverse; and that it should have concluded that the respondent's conduct of the proceedings gave gratuitous insult to the tribunal contrary to rule 37(1)(b) and that a fair trial was not possible as the veracity of the evidence could not be trusted (rule 37(1)(e)).

99. Further, this ground asserts that testing of the recollection of witnesses in cross-examination was hampered on occasion by a witness asking to be referred to their statement or being referred by the respondent's counsel to it despite objection from the claimant's counsel. Complaint is also made of the length of hearing having been truncated owing to limits on the availability of the judge.

100. I do not uphold this ground. My reasons follow.

101. The context for the principal challenge is the practice (see rule 43) that in employment tribunals in England & Wales, as in the civil courts, evidence in chief is usually given in the form of a written witness statement, prepared and exchanged in advance. The statement is read by the tribunal. The witness, once under oath or affirmation, is asked to confirm its truth, and supplementary questions may then be permitted before proceeding to cross-examination.

102. On occasion an opposing party may raise a challenge as to the extent to which the statement, or parts of it, truly reflect the witness's own evidence or recollection. On occasion the court or tribunal may, in its decision, accept that such misgivings are well founded. Mr Avient's submission and strike-out application to the present tribunal cited from the following passage in **Estera Trust (Jersey) Limited v Singh** [2018] EWHC 1715; [2019] 1 BCLC 171.

> **"90. The witness statements prepared for the main witnesses … were very long. They traversed and commented upon a range of events … . It is clear to me that**

> **they are the products of careful reconstruction of events and states of mind, based on a meticulous examination of all the documents in the case by the large teams of lawyers involved. The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements. As was demonstrated repeatedly in cross-examination, the statements mostly present considered argument and assertion in the guise of factual evidence and often with a slant that favours the case of the witness. In many instances, it emerged that this was without any real recollection on the part of the witness of the events or circumstances being described, but with a belief that the witness "would have" done or said something for superficially plausible reasons that are now advanced with the benefit of hindsight.**
>
> **91. That is not to be taken as suggesting that, as part of this process, the witnesses have been deliberately dishonest about parts of their evidence. Rather, it seems to me that the process of creating the written statements has infected or distorted the true evidence that the witness was capable of giving. The written statement then, in turn, affects the witness's memory of events when he or she comes to court to give oral evidence, having studied carefully his or her written statement in the days before doing so. It took skilful and painstaking work by counsel to remove the varnish that had been applied and identify what the witness could fairly recall and that of which he or she had no real memory at all.**
>
> **92. The result is that, in my judgment, these principal witness statements are not of much greater value as evidence of the matters in dispute than detailed statements of case … . While I take account of the contents of all the statements, and draw on particular passages where material, I am cautious about relying on factual assertions in the statements where these are not either supported by contemporaneous documents, or confirmed by the account that the witness gave of the matter when cross-examined or by the credible evidence of other witnesses."**

103. As the discussion in **Estera Trust** illustrates, what, in the given case, to make of such a critique, and what reliance to place on matters set out in a written statement, is a matter for the appraisal of the court or tribunal, having regard to *all* of the evidence, including the witness statements, documentary evidence, and, importantly, having heard the witnesses cross-examined. That, as paragraph [5] makes clear, is what this tribunal did in this case. This was a matter for the tribunal which presided over the trial, and received all of the evidence in its various forms. That includes the matter of what the tribunal made of how familiar or not witnesses appeared to be with their own statements. There is no basis for the EAT to intervene with its appraisal and conclusions.

104. The ground itself does not in terms challenge the decision on the strike-out application. In any event, for the reasons I have given it cannot be said that the tribunal erred by failing to accede to it on either of the two bases on which it was advanced. I should add that, specifically in so far as

the arguments advanced impugned the conduct of professional representatives, the tribunal was entitled to reject them. We are in territory here similar to that which sometimes arises upon wasted costs applications, where the tribunal must proceed with utmost caution and circumspection.

105. As to the unavailability of the tribunal for part of the originally-allocated hearing time, it appears that this was flagged up by the tribunal at the start, and the parties continued without a postponement or allocation of further hearing days being sought. Moreover the claimant was represented by counsel. This feature cannot be preyed in aid in support of this ground.

106. Ground 5 therefore also fails. Accordingly, the appeal as a whole fails.

The Cross-Appeal

107. The first order of business under this heading is the dispute between the claimant and respondent as to whether I can, or should, entertain the cross-appeal *at all*. Ms Criddle KC confirmed that her remit was limited to arguing the substantive point of law, so that I would have the benefit of Protect's submissions in the event that I decide to address it. She made no submission as to whether I could or should address it, and indicated that Protect would be content should I decide not to do so.

108. In view of how the respondent put its case, I need to set out the relevant litigation chronology. There was a case management preliminary hearing (PH) on 1 April 2020 before EJ Vowles. The claimant was in person, the respondent was represented by Mr Milsom. The minute recorded that "with the agreement of the parties" the case was listed for a two-day public PH in December 2020. Among the matters to be considered was: "Whether the tribunal has power to award compensation for non-pecuniary loss in respect of protected disclosure detriments." I will call that the detriment-remedy issue. The matter was also listed for a ten-day full merits hearing (FMH) in May 2021.

109. The claimant then tabled a schedule of loss in June 2020. This included claims for injury to

feelings (£35,000), aggravated damages (£5000) and damages for personal injury (£10,000).

110. At the PH on 14 December 2020 the claimant was represented by Mr Avient and the respondent by Mr Milsom. The hearing was by CVP, and in the event was ineffective because the judge, EJ Vowels again, was unable to access the electronic evidence. The minute reproduced the previously-set agenda and stated that "[t]hese matters will now be considered at the full merits hearing below." It gave the dates again. It then stated: "This allocation is for determination of liability and remedy but it is a matter for the hearing Tribunal whether to deal with these separately."

111. The FMH did not go ahead in May 2021 because of unavailability of a tribunal panel. It was relisted for November and December 2022. No further case management directions were given.

112. At the FMH Mr Milsom's closing submissions indicated that the tribunal was "respectfully invited to determine the [detriment-remedy issue] irrespective of the fact that on proper analysis the claims cannot succeed." He submitted that it was "in the interests of all parties (and many other parties to ET proceedings across the country) to obtain clarity on this matter of public importance." Both he, and Mr Avient, addressed the substantive issue in their closing submissions.

113. In the Answer to this appeal the respondent's cross-appeal opens as follows:

> **"Pursuant to earlier case management orders, the ET was directed to address a question of law, namely whether s49 ERA 1996 enables an ET to make injury to feelings awards. It heard full arguments from both parties. This was the sole head of loss relied upon for the pre-dismissal detriment claims.**
>
> **The EAT is respectfully asked to provide guidance on the question of law which shall prove necessary to revisit should the appeal succeed. The Respondent suggests it is in accordance with the overriding objective for the matter to be determined by the appellate tribunal in any event."**

114. The remaining paragraphs summarise the respondent's case as to why the employment tribunal, as a matter of law, has no power to make such awards. The Reply to the Cross-Appeal

summarises the claimant's case that it is settled law that the employment tribunal *does* have such a power. It also contends: "Further, in the absence of finding of facts, the cross-appeal is academic."

115. The judge who considered the cross-appeal on paper concluded that, in the absence of findings of fact, it was indeed academic. However, at a rule 6(16) hearing at which Mr Milsom appeared for the respondent, it was permitted to proceed. The judge's reasons were as follows.

> **"I consider that the point of substance in the cross-appeal, namely whether non-pecuniary loss can be awarded under section 49 Employment Rights Act 1996 is arguable: see Santos Gomes v Higher Level Care Ltd [2018] EWCA Civ 418, [2018] IRLR 440 – albeit there may be a question as to whether the EAT can depart from existing authority on the point.**
>
> **I also consider it is arguable that the cross-appeal can be entertained pursuant to section 21 of the Employment Tribunals Act 1996, despite the fact that the Employment Tribunal did not determine the point, in circumstances in which the appeal raises a pure point of law, there is authority that arguably would be binding upon the Employment Tribunal, it had been identified as an issue for the Employment Tribunal to determine and one of the disposals sought in the appeal is substitution of a finding in favour of the claimant that he was subject to detriment done on the ground that he had made protected disclosures; see Harrod v Ministry of Defence [1981] ICR 8 , 11B-12B; Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960, [88]-[100] and Revenue and Customs Comrs v Middlesbrough Football Co Ltd (EAT) [2020] I.C.R. 1404, [25]-[39]. The question of whether the cross-appeal can and/or should be entertained will be determined at the full hearing - it is possible that a different approach will be adopted depending on whether the appeal succeeds or otherwise."**

116. I start by noting that the EAT is a creature of statute, and derives its powers from statute. In particular section 21(1) **Employment Tribunals 1996** begins as follows:

> **"An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under or by virtue of-"**

The list of statutes that follows includes the **Employment Rights Act 1996**.

117. Mr Milsom's case at its highest is that the tribunal was *required*, in its decision arising from the FMH, to address and decide the detriment-remedy issue. At the April 2020 PH the tribunal had decided that that issue was to be determined at the December 2020 PH, as a preliminary issue. At the December 2020 PH that issue was rolled forward to the FMH. The FMH tribunal was then bound to follow the prior case-management decisions, there having been no material change of

circumstances. The parties had addressed the issue, and the decision should have dealt with it.

118. Alternatively, argued Mr Milsom, the EAT has the power pursuant to section 21 to determine the detriment-remedy issue in this case because it is a question of law arising from the proceedings in the employment tribunal. The EAT is also able to do so, notwithstanding that the tribunal made no findings of fact relating to remedy, because the issue raises a pure question of law. He argued that, particularly if the claimant's appeal succeeded to any extent, but even if it did not do so, the issue would not be wholly academic, because knowing the position on it would be liable to inform the approach of the parties to the options open to them following the EAT's decision.

119. Further, submitted Mr Milsom, the issue is one of some wider general significance, as was reflected in Protect having sought, and been granted, permission to intervene. This was a valuable opportunity for the EAT to give an up-to-date and definitive decision on this point of law, following the *obiter* remarks made in the course of the decision of the Court of Appeal in **Santos Gomes v Higher Level Care Limited** [2018] EWCA Civ 418; [2018] ICR 1571.

120. My conclusions on this aspect follow.

121. First, I do not agree that the FMH tribunal erred in law by not addressing this issue. While, in April 2020, the tribunal decided that the detriment-remedy issue should be determined at a PH ahead of the FMH, that was superseded by the proper decision in December 2020 that all issues would now fall to be considered at the FMH. That was not revisited after the originally-listed dates of the FMH were put back. The net effect was that the scenario in which the parties might know where they stood on this issue ahead of the FMH no longer arose.

122. The situation at the FMH was then, in principle, no different from that in any other case in which, potentially, a number of discrete issues are on the agenda at a given hearing, but where the decision on one or more of them may mean that one or more other issues may fall away and do not, as it turns out, have to be decided. In such cases, where such points have been argued, the tribunal

may go on to decide them in the alternative; but it is not bound to do so. In the present case the tribunal was entitled, having dismissed the complaints on their merits, and thereby entirely disposed of them, to stop there. It did not err in so doing.

123. That being so, the only route by which the EAT could, pursuant to section 21, entertain the cross-appeal would be on the footing that it may properly be treated as raising a question of law "arising in [the] proceedings" before the tribunal. As to that, Mr Milsom acknowledged that the scope of that phrase had been, as he put it, "the subject of some curtailment" in **Harrod v Ministry of Defence** [1981] ICR 8. I turn, therefore, first, to consider the decision in **Harrod**.

124. In that case the employee complained that an enforced move of work base to a new location amounted to a constructive dismissal, which was also unfair. The claim failed because the tribunal found that the employee was on "fully mobile" terms and could be moved unilaterally by the employer. At the appeal stage the employee conceded that his claim could not succeed because he had in any event affirmed the contract, but sought nevertheless to have the issue of whether he was a fully mobile or non-mobile employee adjudicated by the EAT. The predecessor of section 21 which applied at the time was worded in identical terms, and the employee's solicitor relied specifically on the reference to a question of law "arising in any proceedings" before the tribunal.

125. The EAT (May J presiding) considered this at 11E – 12D. The passage begins:

> **"Upon a first reading of the words of section 136 (1), we can see that there might well be some force in the argument and that appeals under that subsection could lie to this appeal tribunal on points of law decided by an industrial tribunal in the course of proceedings before them, even though the appellant was not seeking to challenge the ultimate result."**

126. The EAT recognised that such an appellant might have a concern that if they did not challenge a ruling on a point of ongoing significance to the employment relationship, they could, in future litigation where the point was at issue, be met by an argument of issue estoppel. But they continued:

> **"Having considered the matter carefully, however, we have come to the conclusion that it is inherent in any appeal that the appellant must be seeking to set aside the decision, judgment or order, whatever it may have been of the tribunal . below, and that it would need very clear words to entitle a party to any proceedings to appeal to an appellate tribunal on the basis that although the decision below was right, nevertheless the reasons for it were wrong. We have come to the conclusion that, notwithstanding that the wording of section 136 (1) is arguably open to a wider construction, the proper view is that it comprehends only appeals which attempt to disturb the order of the industrial tribunal."**

127. The EAT went on to say that, if the appeal were indeed to be dismissed for want of jurisdiction, it did not propose to express any view on whether that could give rise to an issue estoppel on the point. But it went on to conclude that the EAT was not "as it were, a consultative tribunal to which parties can come to have points which were raised in proceedings before the industrial tribunal dealt with by us, when the party appealing to us does not seek to disturb" the tribunal's order.

128. Mr Milsom said that he did not seek to go behind **Harrod**. I also note that it was cited with implicit approval in **Riniker v UCL** [2001] EWCA Civ 597 (CA). However, he sought to distinguish **Harrod**, arguing that different considerations arise where the point raised is of wider interest and is capable of disposing of the claim or part of it. He relied upon the decisions of the EAT in **Wolfe v North Middlesex NHS Trust** [2015] ICR 960 and **HMRC v Middlesbrough Football and Athletic Co (1986) Ltd** [2020] ICR 1404. I turn then to consider those authorities.

129. In **Wolfe** the EAT declined to entertain a cross-appeal seeking to challenge what was said to be a finding in the tribunal's reasons that stress alone could amount to a disability. Reliance is placed before me on the EAT having described that cross-appeal as being against "an immaterial finding of no general significance". But the EAT also identified that the tribunal's remarks were *obiter*, and that the proposed cross-appeal was not against a "decision" as defined in the rules of procedure. Given that, and that jurisdiction was *declined*, I do not think **Wolfe** can be relied upon as authority for the proposition that the EAT *does* have jurisdiction to entertain an appeal in respect of a finding if it is of general significance, let alone where there has been no finding on the issue

concerned at all.

130. In **Middlesbrough Football** a cross-appeal *was* entertained by the EAT. But that was in light of a number of particular features. The first was that the issue of law was of wider interest [36]. But, further, the issues raised were capable of finally disposing of the claim [36]. Further, if the proposed grounds were not considered on their merits there was (for reasons the EAT explained) a real risk of injustice to one party [37]. I note also that the main issue there was whether the arguments in question were properly raised *as a cross-appeal*. The EAT concluded that they were; but that in any event they could have been advanced as an alternative basis for defending the outcome challenged by the appeal [38]. While the EAT noted at [34] the opening wording of section 21, its decision did not rely upon the words "or arising in any proceedings before"; and indeed **Harrod** was not cited or considered.

131. I conclude that **Middlesbrough Football** cannot be relied upon as support for the proposition that those words give the EAT the power to consider an issue arising in the proceedings which is of wider interest, and that this is not precluded by **Harrod**. In any event, unlike in **Middlesbrough Football**, the present cross-appeal does not seek to challenge a part of the tribunal's decision which, if correct, provides an alternative basis for upholding that decision. It does not challenge any part of the tribunal's decision at all. Nor, if I do not determine the detriment-remedy issue, is there a potential risk of injustice arising to a party, of the kind that arose in **Middlesbrough Football**. The present claimant's appeal has not succeeded; and even if it had, and that had then led to one or more detrimental treatment complaints succeeding on remission, the detriment-remedy issue could then have been adjudicated by the tribunal at that point (with a right of appeal should it err in law).

132. Returning to **Harrod**, having regard to the EAT's statement that the wording of what is now section 21 comprehends "only" appeals which attempt to disturb the tribunal's judgment or order, I am not convinced that I have the power to entertain this cross-appeal. But, recognising that it may

yet be said that the phrase "or arising in any proceedings" must have *some* meaning, I have considered whether, if I do have the power, I should exercise it in this case. I was referred for guidance to two particular authorities in the civil jurisdiction, both of which also reviewed key earlier authorities.

133. Mr Milsom relied upon **Rolls Royce plc v Unite the Union** [2009] EWCA Civ 387; [2010] 1 WLR 318 (CA). What happened in that case takes a little unpacking. It began as a High Court claim by the company, seeking a determination as to whether the inclusion of length of service within a redundancy selection matrix found in existing collective agreements would contravene the subsequently-enacted **Employment Equality (Age) Regulations 2006**. Bean J gave directions that this be determined at a trial under CPR Part 8. At trial the company contended that the effect of the **2006 Regulations** was that to use the length of service criterion would now be unlawful. The union disputed that. The judge, Sir Thomas Morison, declared ([2009] IRLR 50) that the length of service criterion in the relevant agreements was *not* rendered unlawful as a result of the **2006 Regulations**.

134. Thus it was that Wall LJ observed at [5] that the judge had "found for the union and dismissed the claim" and it was the company that then appealed. Wall LJ went on to record that the union's position had initially been that the court should not entertain the claim, as the employment tribunal was the more appropriate forum. But in the event it had participated in the High Court hearing. Further, as he noted at [11], before the Court of Appeal there was agreement between the parties that it should determine the appeal on its merits, the company having agreed to pay the union's costs.

135. The Court of Appeal was nevertheless concerned as to whether it should entertain the appeal. Wall LJ considered that the court must decide that by going back to first principles [34].

136. After reviewing the authorities Wall LJ concluded that, contrary to his initial reaction, the Court of Appeal should hear the appeal. His reasons were as follows:

> **"54. … firstly, that we are being asked to construe a Statutory Instrument deriving**

> **from the European Directive on Age Discrimination. In my judgment, the construction and interpretation of material emanating from Parliament is both a matter of public importance, and one of this court's proper functions.**
>
> **55. Secondly, although these are private as opposed to public law proceedings, and although there is no immediate *lis* between the parties, the point is not academic, and if not resolved by this court will lead to a dispute between the company and the union, who do not agree on it. In this respect, the case seems to me to be analogous with *Kay* .**
>
> **56. Thirdly, the point is one of some importance, and is likely to affect a large number of people both employed by the company and beyond. Fourthly, the propriety of proceeding has been considered by two judges of the High Court, Bean J and Sir Thomas Morison. The former deemed the Part 8 procedure appropriate: the latter determined the issues before him. There has been no appeal against or challenge to Bean J's decision.**
>
> **57. Finally, and I accept that this is a pragmatic point, we are being asked (by both parties) to hear the appeal, and it has been fully argued both before the judge and before us. Both we and counsel have invested a substantial amount of time in it."**

137. Aiken LJ approached the issue as one of whether the court should exercise its power to grant declaratory relief. His conclusions at [120] included that the court will be prepared to do so "in respect of a 'friendly action' or where there is an 'academic question' if all parties so wish, even on 'private law' issues. This may be particularly so if it is a 'test case' or if it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned." Had he been confronted with the question at first instance, Aiken LJ would have declined jurisdiction. But, as the High Court had initially decided to entertain the complaint *and* gone on to decide the issue and make a declaration, he was ultimately prepared to exercise the jurisdiction ([127] – [128].

138. Arden LJ agreed with Wall LJ, adding that she considered that there was a real dispute between the parties, and that it was practically highly desirable for there to be some guidance in advance of the company formulating and carrying out its redundancy scheme. There had also been no change of circumstances since the matter had come before the trial judge and it would be wrong to deny a party the opportunity to argue that the judge's order was wrong [151] – [152].

139. Mr Avient referred to **Hutcheson v Popdog Limited** [2011] EWCA Civ 1580; [2012] 1 WLR 782. There, after reviewing the authorities, including **Rolls Royce**, the Master of the Rolls

(for the court) said at [15]:

> **"Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."**

140. In that case the substantive appeal had become academic; and the prospect of a decision on the point at issue affecting the costs position was uncertain, so that would be a disproportionate reason for entertaining the appeal. Permission to appeal was accordingly refused.

141. Turning to the case before me, the detriment-remedy issue is obviously of wider general significance. I can also allow that, following the decision in **Santos Gomes**, which specifically concerned working-time rights, but canvassed some of the wider arguments in *obiter*, while expressly leaving the issue for another day, it might be thought propitious for the EAT to take this opportunity to seize the day. I have also had the benefit of hearing high-quality argument on all sides. Significant resource, including of the EAT's own hearing time, has also already been devoted to it.

142. However, the following features point the other way.

143. First, not only has the tribunal found no relevant facts, it has made no decision of its own on the law, nor expressed any view. Of course, had it done so, neither other employment tribunals, nor the EAT would have been bound by its view; but this feature still points up the novelty of what the EAT is being asked to do: to determine a point of law that has not been decided by the tribunal at all.

144. Importantly, this is not a "friendly application" case where the parties both agree that they would like the EAT to determine the point. Though, at an initial PH at which the claimant was unrepresented, the tribunal recorded agreement that it be decided as a preliminary issue, before the

EAT, where he is represented by counsel, the claimant's position is that I cannot decide it, and, in any event, as he contends that the law is settled, that there is no need for me to do so.

145. Further, as I have noted, this is not a case where, if I do not decide the point, one or other party may later find themselves stuck with a determination by the tribunal which they have missed the opportunity to challenge as wrong. Subject of course to the right to seek permission to appeal, I have also upheld the tribunal's decision on liability, which disposed of this claim. Even if the litigation hereafter continues, and reaches a point at which the detriment-remedy issue needs to be confronted, it can be. This is also certainly not a case, like **Rolls Royce**, where there is a clear and imminent future practical scenario arising between the parties, to which the point will be germane.

146. Accordingly, even had I been persuaded that I had the power to entertain the cross-appeal I would have declined to do so. It is therefore neither necessary nor appropriate for me to say anything about the substantive issue itself.

Outcome

147. For the foregoing reasons, the appeal and the cross-appeal are both dismissed.