Neutral Citation Number: [2019] EWCA Civ 2007

Case No: A2/2019/0302

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HER HONOUR JUDGE STACEY
UKEAT/0105/18/BA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before :

LORD JUSTICE BEAN
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

- -

Between :

SAMIR IBRAHIM	**Appellant**
- and -	
HCA INTERNATIONAL LIMITED	**Respondent**

- -
- -

Jeremy Lewis and **Georgina Churchhouse** (instructed under the auspices of **Advocate** formerly the **Bar Pro Bono Unit)** for the **Appellant (Claimant)**
Keith Bryant QC (instructed by **HCA Healthcare**) for the **Respondent**

Hearing date: 7 November 2019

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Approved Judgment

Lord Justice Bean :

1. The Appellant is a fluent Arabic speaker who worked for the Respondent as an interpreter from about 2008 (the date is not agreed) until 6 October 2016. On 24 January 2017 he issued claims in the employment tribunal ("ET") of unfair dismissal, wrongful dismissal, arrears of wages, sex discrimination and detriment on the grounds of public interest disclosures made in March 2016 ("whistleblowing").

2. Following a case management hearing on 4 May 2017 a two-day preliminary hearing took place before Employment Judge ("EJ") Ayre on 14 and 15 June 2017. Since this was a preliminary hearing rather than a full merits hearing (it did not, for example, consider questions of causation or remedy) there was no requirement for a three-member ET; so the judge heard the case sitting alone. Mr Ibrahim appeared in person save that he ws assisted pro bono by counsel (Mr Paul Livingston) through the Employment Litigant in Person Scheme, ELIPS, during one afternoon of the hearing. Mr Keith Bryant appeared for the Respondent, as he was to do before the Employment Appeal Tribunal ("the EAT") and in this court. All Mr Ibrahim's claims were rejected by the ET.

3. Since we are concerned on this appeal only with the whistleblowing claim it is sufficient for present purposes to note briefly the decision on the other claims. In her reserved judgment of 28 September 2017 EJ Ayre held that Mr Ibrahim had not been an employee of the Respondent company (thus disposing of the unfair dismissal and wrongful dismissal claims); that the contractual claims for arrears of wages should be struck out as having no reasonable prospect of success; and that it was not just and equitable to extend time to enable the claim for sex discrimination, which concerned an alleged incident on 8 June 2014, to be presented outside the primary limitation period.

Whistleblowing: section 43B of the 1996 Act

4. The Employment Rights Act 1996 s 43B, as amended, provides:-

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or

> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

5. The whistleblowing issues which the ET defined at the case management hearing of 4 May 2017 were as follows, as set out in paragraphs 9.3-9.4 of the ET decision:-

> "9.3 In his grievances of 15 and 22 March 2016, was information disclosed which in the Claimant's reasonable belief tended to show one of the following?
>
> 9.3.1 An unidentified person had failed to comply with a legal obligation to keep patient information confidential;
>
> 9.3.2 A miscarriage of justice had occurred in that the claimant had been falsely accused.
>
> 9.4 If so, did the Claimant reasonably believe that the disclosure was made in the public interest?"

The events of March 2016

6. I gratefully adopt EJ Ayre's narrative in paragraphs 43 to 48 of her judgment:

> "43. On 15th March 2016 the claimant met with Lesley Pope, the Director of Rehabilitation. The claimant asked her to investigate two issues that he was concerned about. The first was his belief that there were rumours that he (the claimant) had been involved in a breach or breaches of patient confidentiality, and the second was that that Ilham Mohammed had behaved in an unprofessional manner towards him.
>
> 44. On 16th March the claimant sent an email to Lesley Pope to follow up on their meeting the previous day. In that email he wrote:-
>
> > "…I would like you to launch a formal investigation into the following two matters, which might be linked to each other or totally different matters, only an investigation will tell!
> >
> > First, to investigate into the rumours among the International patients and their families about my confidentiality and performance (I informed you before that I was blamed by some families for disclosing patients confidential information, but unfortunately they refused to make a complaint against me, although I tried with them to do so. I explained to you that I cannot accept this as a settlement and I need to clear my name otherwise I will not be able to do my work properly.
> >
> > Second, I told you that I had a feeling that I was 'kicked out of my office' and as the time passes my feeling gets stronger

> and stronger. I accused Ilham of a major misconduct i.e. She took an action against me without giving me the chance to defend myself, and that she has been slandering me to my colleagues"

> 45. Lesley Pope referred the matter to the respondent's HR team. On 22nd March Sheila Johnson, Chief Human Resources Officer, met with the claimant and Nezha Elbassri. The claimant told Ms Johnson that he felt degraded, humiliated, shocked and confused, and that he believed there were rumours among patients and their families that he had been leaking patients' confidential information. He told her he wanted to clear his name and restore his reputation. Ms Johnson asked the claimant to prepare a document setting out the concerns that had been raised, and told him that she would then start an investigation.

> 46. The claimant wrote to Ms Johnson on 28th March summarising his main concerns as being– "the rumours around the hospital accusing me of breaching the patient confidentiality policy" and "my relationship with my line manager – Ilham". He went on to describe Ilham's behaviour and actions as "totally unacceptable", and to allege that "she showed me very clearly that I am no longer welcome in the International Relations Office" and "I was treated as if I were a disgrace to my department".

> 47. The claimant ended his email to Lesley Pope by saying that he wanted to raise a formal grievance.

> 48. David McIntosh, Consultant Liaison Manager, was appointed to investigate the claimant's complaint. The complaint was not upheld."

The findings of the ET

7. The findings of the ET were as follows:-

> "124. The matters complained of by the claimant were that:-

> > 124.1. He was the subject of false rumours that he had breached patient confidentiality; and that

> > 124.2. Ilham Mohamed had behaved badly towards him.

> 125. In relation to the first allegation, the Tribunal accepts the respondent's submissions that complaining that false rumours have been made does not amount to a disclosure of information tending to show that someone has breached a legal obligation or that there has been a miscarriage of justice. The claimant has not identified any legal obligation that may have been breached when the false rumours were made, if indeed they were made.

> 126. The Tribunal does not consider that false rumours are capable of amounting to a miscarriage of justice in the circumstances of this case.
>
> 127. In relation to the second allegation, a suggestion that a manager has behaved badly could potentially amount to a disclosure of information tending to show that the manager has breached a legal obligation, but in this case it does not. As the claimant was not employed by the respondent there was no implied duty of trust and confidence and the claimant's contract could have been terminated at any time without notice.
>
> 128. In any event, the disclosures that were made by the claimant were not made in the public interest, but rather they were made with a view to the claimant clearing his name and re-establishing his reputation."

After referring to the decision of this court in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979, which had been handed down since the oral hearing in the ET, EJ Ayre concluded :-

> "130. Whilst the Tribunal accepts that disclosure of information tending to show that patient confidentiality has been breached would be a matter of public interest, the claimant did not disclose information tending to show that patient confidentiality had been breached. Rather, he complained that others had falsely accused him of breaching patient confidentiality.
>
> 131. The disclosures were not made in the public interest, but rather with a view to clearing the claimant's name."

The appeal to the Employment Appeal Tribunal

8. Mr Ibrahim appealed to the EAT. The appeal was initially rejected on the paper sift under Rule 3(7) by Judge Eady QC (as she then was). However, at a Rule 3(10) hearing before Judge Richardson the Claimant was assisted by counsel (Mr Patrick Halliday) under the ELAAS scheme. He replaced the previous discursive grounds of appeal drafted by the Claimant in person with amended grounds alleging errors of law in two respects. Firstly it was argued that the ET should have held that a disclosure of information tending to show that an employer or fellow employee has defamed the Claimant is one which tends to show that a person has "failed to comply with a legal obligation". Secondly it was said that the ET's finding in paragraphs 128 and 131 of its judgment that the disclosures were not made in the public interest, but rather with a view to the Claimant clearing his name, "elides the two stages of the public interest test which are, first, whether the worker genuinely believed that the disclosure was in the public interest and secondly, whether that belief was reasonable". It was also submitted that the ET was wrong to rule that the public interest test was failed because the Claimant's motive was to clear his own name.

9. Judge Richardson allowed the matter to proceed to a full hearing, observing that "there does not appear to be a finding whether the Claimant believed the disclosure to be in

the public interest or whether it was reasonable to hold this belief. The fact that his motive was to clear his name does not answer these questions. The bare finding that the disclosure was not in the public interest does not on the face of it address the correct questions." The appeal proceeded to a full hearing before Judge Stacey.

10. Judge Stacey upheld the first ground of appeal and accepted the submission of Ms Elizabeth Grace for the Appellant that s 43B(1)(b) of the Employment Rights Act 1996 is broad enough to include an allegation that the Claimant was being defamed. This ruling is not challenged by the Respondent, and I need say no more about it except to observe that it remains open to challenge in this court in a future case. It seems counter-intuitive to describe as a disclosure in the public interest a complaint by a worker to management that someone is spreading false rumours about him; on the other hand, intuition is not a safe means of interpreting the quite intricate and technical provisions of what is now Part IVA of the Employment Rights Act 1996.

11. Mr Ibrahim's success on the first ground of appeal was not, however, enough to achieve success before the EAT, since Judge Stacey upheld the finding of EJ Ayre that the Claimant (in Judge Stacey's words) "did not have a subjective belief in the public interest element of his disclosure". She held that the ET was entitled to find that the Claimant's concern was only that false rumours had been made about him and about the effect of those rumours on him. She accepted the submission of Mr Bryant that the ET's narrative of the facts at paragraphs 43-45 of EJ Ayre's judgment (cited above) showed that it was a personal concern of the Claimant that he was being defamed. Judge Stacey concluded:

> "I agree that the Tribunal's conclusions could have been more clearly expressed and it would have been helpful if they had firstly addressed the Claimant's subjective belief by reference to the guidance in paragraphs 26-31 of *Chesterton* and separately considered if the subjective belief was reasonable, as suggested by Ms Grace. But it is clear from the body of their judgment that they found against the Claimant in relation to his subjective belief in the public interest of his disclosure. That was a decision open to them on the evidence in this case."

The appeal to this court

12. The Claimant sought permission to appeal to this court on a variety of grounds. By order of 17 April 2019 Longmore LJ, having considered the case on the papers, granted permission on one ground only. He wrote that:

> "It is arguable that the ET did not address satisfactorily the question whether the applicant believed that his disclosure (that he was being accused or suspected of leaking confidential information about patients) was in the public interest or that such belief was reasonable or that the EAT did not remedy that deficiency."

13. At a fairly late stage counsel for the Claimant sought an order for production of the EJ's notes of Mr Ibrahim's evidence. By order of 7 October 2019 Underhill LJ declined to order the Judge to produce her notes but directed that, without prejudice to any

argument as to admissibility, the Respondent's solicitor and counsel were to provide to the Appellant and the Court within 14 days a copy of any notes of the Appellant's evidence taken by its solicitor or counsel which remain available; such notes to be limited to the oral evidence given by the Claimant on the morning of 15 July 2017 relating to the issue as to whether the Claimant made protected disclosures, including as to

> "(a) evidence given on the issue of concerns as to confidentiality and relating to whether disclosure was believed to be in the public interest and/or what he had in mind when making the disclosures;
>
> (b) evidence as to the context, and concerns raised with the Appellant including by patients and their families as to breach of confidentiality and as to whether the matter was being addressed by the hospital.
>
> (c) evidence as to what was said during the meetings on 15 and 22 March 2016 and on the hearing of the Appellant's grievance in relation to the disclosures on 13 April 2016.
>
> (d) evidence given in relation to the emails of 16 March 2016 (referred to at ET Reasons para. 44) and 22 March 2016 (referred to at ET Reasons para. 46)."

14. The Respondent's notes were duly provided. They do not purport to be a verbatim record. The Claimant's wife had accompanied him at the hearing and made notes of her own. Mr Lewis provided a colour coded chart with his client's comments on the accuracy or otherwise of the Respondents' notes, but I did not find these of any assistance. All one can say about the notes is that they show that the topic of whether Mr Ibrahim believed his disclosures to be in the public interest came up in his cross-examination. Mr Bryant understandably put it to the witness that his contemporaneous emails and his witness statement to the ET made no mention of it. More than that is hard to decipher from the document we have.

The Chesterton case

15. In *Chesterton* Underhill LJ, giving the leading judgment, held:

> "27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B….. 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.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise….the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated

impression. Although Mr Reade in his skeleton argument referred to authority on the *Reynolds* defence in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras. 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the Tribunal at para. 147 of its Reasons.

……..

36. ……The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter

> disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

16. Beatson LJ agreed on the approach of Underhill LJ, adding some observations of his own. Black LJ also agreed with Underhill LJ.

17. The two stage approach set out by Underhill LJ in paragraph 27 of his judgment is significant. Previous analysis tended simply to follow the wording of s 43B in its reference to "reasonable belief" and thus roll the two stages into one: see for example paragraph 35 of the judgment of Supperstone J in *Chesterton* itself in the EAT ([2015] ICR 920), where he said that the ET "properly asked itself the question whether the claimant made the disclosures in the reasonable belief that they were in the public interest". Another important point to emerge from *Chesterton,* made by Underhill LJ at paragraph 30 of his judgment, is that a claimant's predominant motive in making the disclosures is not the same thing as his subjective belief.

The parties' submissions in this court

18. For the Claimant Mr Lewis and Ms Churchhouse make three principal points in relation to the *Chesterton* guidance. First, a tribunal should not focus on motive when assessing subjective belief: Underhill LJ held in *Chesterton* that a worker can believe that a disclosure is in the public interest while not being motivated by that belief.

19. Second, a tribunal should be "flexible" when assessing a worker's subjective belief. A worker does not need to formulate his belief in terms of the "public interest" for that belief to be "made in the public interest". A belief that the disclosure would serve a "wider interest" suffices. In *Chesterton* the claimant's belief that the disclosure would be in the interests of senior managers was treated as a belief that the disclosure was made in the "public interest". The same flexible approach was adopted by Judge Eady QC in *Okwu v Rise Communication Action* UKEAT/0082/19, 24 June 2019 at paragraph 47. In *Okwu* the EAT held that, because the disclosure was about data protection concerns, the claimant reasonably believed her disclosure was made in the public interest, even though her belief was not consciously formed in those terms.

20. Third, a tribunal should look at the circumstances in which the disclosure was made to assess a worker's subjective belief. A tribunal should focus on the worker's belief as to the interests served by making the disclosure, not just on the content of the disclosure. If a disclosure is accompanied by a request for an investigation, a tribunal should consider what interests would be served by that investigation when determining the worker's subjective belief. A tribunal can use evidence produced after a worker's disclosure to justify the reasonableness of the worker's belief at the time of the disclosure.

21. Mr Bryant QC for the Respondent accepts that motive is not the same as belief. But he submits that the ET's conclusion rests on factual findings which it was entitled to make:

    (a) The disclosures were that the Claimant was being defamed by false rumours about a breach of patient confidentiality. They did not concern any actual breach of patient confidentiality, nor did the Claimant express a belief that such a breach occurred.

(b) The ET was entitled to find that the Claimant's only subjective belief, at the time he made the disclosures, was that he wanted to clear his name and restore his reputation. When the ET held that the Claimant made the disclosures "with a view" to clearing his name, it was not confining itself to an assessment of the Claimant's motive, but instead referring to the extent of the Claimant's subjective belief.

22. Mr Bryant realistically accepted that, at some points in its judgment, the ET elided the two limbs of the *Chesterton* test. However, he submitted that this should not be treated as an error of law because (a) the ET frequently set out the correct test; (b) this court used the elided formulation in *Chesterton* at paragraph 37; (c) the ET's reasons should be taken as a whole and interpreted generously.

Discussion

23. The judgment of this court in *Chesterton* was handed down on 10 July 2017, after the conclusion of the oral hearing in the ET in the present case and, we are told, the lodging of written submissions for which the ET had given permission. At that point EJ Ayre had a problem with which any judge who has faced it (as most of us have) would sympathise. The problem occurs when, after a court or tribunal has reserved judgment, a decision of an appellate court is published which shows that the law is different, or at least arguably different, from what it was thought to be during the hearing. This may require further submissions and may also show that the evidence was not directed to exactly the right issues.

24. In the present case the Claimant appeared in person in the ET (save for pro bono assistance during one afternoon of the hearing). This placed the ET under an obligation to ensure that he had a proper opportunity to explain his case. The common law operates on the basis that (at least in most cases) the judgment of this court or of the Supreme Court does not change the law but reveals or clarifies what had previously been undiscovered or unclear.

25. In the light of the judgment of this court in *Chesterton*, and with the benefit of hindsight, it is clear to me that the Claimant should have been asked directly by the ET whether at the time he made the disclosures on 15 and 22 March 2016 he believed he was acting in the public interest. If he had answered "yes" he could have been asked for an explanation, and it would no doubt have been put to him in cross-examination that the suggestion was no more than an afterthought. The ET would then have had to evaluate his evidence on the point and make findings about it. But I am not satisfied, on the material available to us in this court, that this is what happened at the ET hearing.

26. Notwithstanding Mr Bryant's elegant attempts to persuade us that the reasoning of the ET is sufficient to support its conclusion, I consider that the gap identified in the last paragraph has not been filled. The conclusion given at paragraph 128 and repeated at paragraph 131 of the ET's judgment that the disclosures "were not made in the public interest, but rather with a view to the claimant clearing his name and re-establishing his reputation" deals with what the judge found was the Claimant's motive, but not with his subjective belief at the time. The narrative at paragraphs 43 to 45 of the ET judgment shows clearly that nothing was *said* by the Claimant at the time about the public interest, nor even about the reputation of the hospital at which he had been working. But, while

that is a point to be made against the Claimant's case on subjective belief, it does not dispose of it altogether.

27. Mr Bryant suggested in his skeleton argument that if we considered that there was any gap in the reasoning of the ET we should follow the procedure devised by the EAT in *Burns v Royal Mail Group plc* [2004] ICR 1103 and approved by this court in *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373 of making an order seeking amplification of the ET's reasons. Although it is open to this court to follow the *Burns/Barke* procedure where appropriate, I would not regard it as satisfactory in the present case, because it is not clear that the critical issue was adequately covered in the course of the Claimant's evidence. There is thus no alternative to a remission of the claim to the ET.

28. As is common in cases of this kind, Mr Lewis for the Appellant submitted that if the case is to be remitted it should be to a different ET, while Mr Bryant for the Respondent argued that if, notwithstanding his primary submissions, we did decide on a remission, it should be to EJ Ayre. Both counsel relied on the well-known decision of the EAT (Burton J presiding) in *Sinclair Roche & Temperley v Heard and Fellows* [2004] IRLR 763, in particular at paragraph 46.

29. This is not in my judgment a case of a fatally flawed decision, nor one in which there is the appearance of partiality or pre-judgment. I consider that the professionalism of the employment judge can be relied on and that this factor outweighs any risk of confirmation bias. Considerations of proportionality and efficiency also point in the direction of remission to the same tribunal.

30. Accordingly I would allow the appeal and remit the preliminary hearing in the whistleblowing claim to the ET for further hearing, before EJ Ayre if possible, on the issue of whether the Claimant had a subjective belief that the disclosures were in the public interest and, if so, whether such belief was reasonable. The findings of fact in paragraphs 43-45 of the existing judgment should be treated as binding. The Claimant should be at liberty to give further evidence. It does not seem to me that evidence on this limited issue will be required from any other witness, but if so an application can be made to the ET for appropriate directions.

Lord Justice Baker:

31. I agree.

Lord Justice Dingemans:

32. I also agree.