Neutral Citation Number: [2020] EWCA Civ 73

Case No: A2/2018/1773

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
SOOLE J, MRS C. BAELZ AND MR B BEYNON
UKEAT/0248/16/LA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2020

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE BAKER
and
SIR PATRICK ELIAS

- -

Between :

MR EDWIN JESUDASON	**Appellant**
- and -	
ALDER HEY CHILDREN'S NHS FOUNDATION TRUST	**Respondent**

- -
- -

Mr Andrew Allen (instructed on a Direct Access basis) for the **Appellant**
Mr Simon Gorton QC (instructed by **Weightmans LLP**) for the **Respondent**

Hearing dates: 19 and 20 November 2019

- -

Approved Judgment

Sir Patrick Elias:

Introduction.

1. Ever since the introduction of the Public Interest Disclosure Act 1996, the law has sought to provide protection for workers (colloquially known as "whistle-blowers") who raise concerns or make allegations about alleged malpractices in the workplace. Too often the response of the employer has been to penalise the whistle-blower by acts of victimisation rather than to investigate the concerns identified. The 1996 Act inserted a new Part IVA into the Employment Rights Act 1996 designed to prevent this. The long title to the Act describes its purpose as follows:

> "An Act to protect individuals who make certain disclosures of information in the public interest: to allow such individuals to bring action in respect of victimisation; and for connected purposes."

The law which gives effect to the simple principle enunciated in the long title is far from straightforward. The basic principle, set out in section 47B of the Employment Rights Act, is that a worker has the right not to be subject to a detriment by any act of his employer on the grounds that he has made what is termed a "protected disclosure". The main focus of this appeal is the appellant's claim that he was unlawfully victimised for whistle-blowing and that the courts below were wrong to find otherwise. He also makes a separate claim for race discrimination, also rejected in the courts below, which I consider at the end of this judgment.

The facts

2. The appellant, a Tamil of Sri Lankan origin, is an extremely distinguished paediatric surgeon specialising in surgery for birth defects and children's tumours. He was an Honorary Consultant working in the Department of Paediatric Surgery ("DPS") at the Alder Hey Children's NHS Foundation Trust ("the Trust") from 2006 until his resignation in 2012. He was simultaneously employed as an academic surgeon at the University of Liverpool. He has been highly critical both of the Trust management and of his consultant colleagues in the DPS. Between 2009 and 2014 he made a series of allegations to the Trust, various regulatory bodies and certain third parties, including organs of the media, in which he identified what he claimed were fundamental failings in the operation of the DPS. He was damning in his assessment of its work. The matters raised include very serious allegations of professional incompetence; the use of improper medical practices; deliberate attempts to mislead the legal process; and attempts to cover up wrongdoing and to gag the appellant himself from pursuing his complaints. In some cases specific individuals have been strongly criticised. The Trust has sought to deal with some of these allegations, as have a number of professional bodies, but not to the appellant's satisfaction. He says that it is because of the Trust's unwillingness to remedy these alleged failings that he has found it necessary to take his case to a wider audience.

3. In October 2014 the appellant lodged a series of claims with the Employment Tribunal ("ET") alleging that he has suffered a number of detriments as a result of his legitimate

whistleblowing activities. For reasons I will shortly explain, the claims relate only to alleged detriments suffered between 2013 and 2014 which was after he had resigned from the Trust. The ET heard extensive evidence over some seventeen days and considered the evidence in chambers for a further three days. It held that the appellant was an unreliable witness and had failed to make good any of his claims. The appellant appealed to the Employment Appeal Tribunal ("EAT") (Mr Justice Soole) which dismissed the appeal on all grounds, concluding that there were no material mis-directions or other errors of law by the ET and that it had reached conclusions which were properly supported by the evidence. Permission to appeal to this court was given by Lewison LJ.

4. Although the alleged wrongdoing relates only to detriments allegedly suffered after the appellant's resignation in 2012, the appeal cannot properly be understood without setting the events in the context of the earlier period when he was employed.

5. There were tensions between the appellant and some of his consultant colleagues in the DPS almost from when he took up his post in 2006. These subsequently became so serious that they prompted a group mediation process in 2008 (the "Braun Process"). This was an informal attempt to resolve the differences conducted by an independent external psychologist. An important feature of this process was that it was conducted under Chatham House Rules which meant that the confidentiality of all disclosures made in the course of the mediation should be respected.

6. The Braun Process failed and subsequently, in March 2009, the appellant made the first of a number of protected disclosures which was triggered in part by the alleged improper treatment of a consultant colleague, Mr Ahmed. This was a letter sent to the HR manager at Liverpool University and which, with the appellant's permission, was also forwarded to the management at the Trust. It was not at that time seen by the other consultants in the DPS. The ET dealt with this letter in considerable detail (paras 43-54). The letter predominantly made allegations about incompetence, bullying, poor relationships, and the alleged jealousy shown to the appellant by other surgeons. It also raised issues relating to diversity (or lack of it) and training. The ET noted that the criticisms were often no more than expressions of opinion, unsupported by any evidence. The letter alleged that the poisonous atmosphere was having an adverse impact upon patient care. The appellant cited three cases which he described as "egregious disasters". Despite being pressed to identify these cases, he did not do so.

7. In March 2010 the claimant went on a three year secondment to a children's hospital in Los Angeles. On one of his visits back to the UK he made a second protected disclosure in early January 2011. In this letter he identified a number of clinical matters, alleging that there had been clinical mis-judgments. Both this and the first protected disclosure made use of confidential information gleaned from the Braun Process. The Claimant also went to the press in late 2010 and early 2011 and this resulted in an article critical of the Trust in the Independent on Sunday.

8. In 2009 Mr Ahmed, also a Consultant under an Honorary Contract at the Trust, issued Employment Tribunal proceedings against the Trust which included claims of whistle-blowing and race discrimination. In the course of this litigation he had disclosed a redacted version of the March 2009 letter from the appellant and at that point an unredacted version was disclosed to some of the DPS consultants because they were witnesses in that action. This was the first they had seen of this letter. They took

umbrage at the criticisms directed at them and were highly indignant that some of the allegations involved a breach of confidentiality. They considered that there was now an irrevocable loss of trust and were unwilling to continue to work with the appellant. In early 2012 Mr Richard Jones, at that time the Interim Director of Human Resources, set up an independent review with the aim of reconciling the parties but it was unsuccessful. The NHS surgeons – or many of them at least - remained unwilling to work with the appellant. Accordingly the Trust took steps to bring the appellant's honorary contract to an end.

9. In July 2012 the appellant obtained an interim injunction from the High Court to prevent the Trust from convening a panel to consider termination of his contract on the grounds of an irretrievable breakdown in relations between him and most of his consultant colleagues in the DPS. Thereafter he made further protected disclosures to the General Medical Council ("GMC") and the Care Quality Commission ("CQC") in October and November 2012 respectively.

10. At the High Court trial in December 2012, it transpired that the appellant had improperly provided to Private Eye documents obtained as a result of disclosure in the legal proceedings. The appellant admitted to having done this in the course of cross-examination, having previously categorically denied that he was the source of the leak. Following this admission, and as a result of this serious breach of duty, he entered into a Compromise Agreement under the terms of which he discontinued the High Court action, paid a substantial sum towards the costs of the Respondent, and resigned from his post with the Trust. He had by then also initiated whistleblowing claims in the ET; it was a term of the Compromise Agreement that he would discontinue these claims also.

11. As a result of the Compromise Agreement, the appellant cannot seek to rely upon any detriments allegedly suffered before the Agreement was reached. However, it is common ground that the Agreement does not stop him from alleging that he has suffered post-Agreement detriments on the grounds of having made pre-Agreement protected disclosures.

12. Meanwhile, in response to the 2009 and 2011 letters, together with a whistle-blowing complaint from Mr Ahmed, the Trust had asked the Royal College of Surgeons ("RCS") to review the appellant's criticisms of the DPS. The RCS appointed four reviewers who carried out their review on four days in May 2011. The terms of reference had been agreed with the Trust; broadly they were required to look at specific cases where concerns about clinical practices had been raised, and more generally to assess the operation of the DPS with reference to such areas as communication, team working, governance, and training in order to identify any systemic or individual failings or short-comings. They produced a detailed report (the "RCS report") in August 2011. The conclusion was that overall the care provided did not fall below the general standard of acceptable practice although the report did note that in 5 of 20 cases reviewed, care was sub-optimal and clinical governance was weak, and that there had been a fall from the department's previous world class status. It also found failings in the way the Trust had managed the appellant's whistle-blowing; it considered that the Trust was too defensive and too quick to rebut criticisms rather than to consider them dispassionately. However, it specifically rejected the appellant's claim that there had been a "club culture" operating within the department and also his contention that there was discrimination against BME candidates in recruitment.

13. The report made twenty four recommendations designed to improve processes and governance, and these were accepted by the Trust.

14. The report also made criticisms of the appellant. It found that he would not be able to carry his colleagues were he to be the group leader, not least because he had scant regard for them; and that he was unwilling to acknowledge the legitimacy of other perspectives and concerns. The ET expressly found that "the report was thorough and dealt with all of the Claimant's concerns" (para.68) whilst noting that the appellant did not agree with that observation.

15. Even after his resignation, and after the RCS report had been published, the appellant continued to make various allegations of malpractice and other failings in further disclosures to third parties, including the press. He lodged fresh whistleblowing complaints in the ET in October 2014 in which he alleged that he had suffered further detriments both because of these disclosures and his earlier ones. It is these complaints which constitute the primary focus of this appeal. Before analysing them, I will set out the relevant legal principles.

The Law

16. Section 47B of the Employment Rights Act 1996 sets out the basic principle which affords protection to a whistle-blower:

> "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."

In this case the claimant was not actually employed by the respondent when the disclosures were made. He had already resigned. However, section 43K has an extended definition of worker which includes former workers. In *Woodward v Abbey National plc* [2006] EWCA Civ 822; [2006] IRLR 677, the Court of Appeal held that this does not only allow a worker to take proceedings after having ceased employment with respect to acts taken whilst he was still employed; it also enables former workers to have the right not to be victimised by detriments suffered after their employment has ended. In *Oyango v Berkeley Solicitors* [2013] 1 WLUK 497; [2013] I.R.L.R. 338, the EAT held that a whistle-blowing claim could also be lodged for alleged victimisation for post-employment disclosures. The ET held that the *Oyango* principle was applicable here (para.96). In so doing it rejected an argument that the appellant had been acting as a campaigner rather than in his capacity as a worker and was therefore disentitled to claim protection. There is a cross appeal against that finding, essentially on the basis that the ET's decision on this point was unreasoned. For the purposes of this appeal, I will assume that the ET ruling on the point was correct.

Protected disclosure

17. The concept of "protected disclosure" is an important issue in this appeal. It is defined by section 43A of the 1996 Act:

> "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

18. A qualifying disclosure is in turn defined by section 43B:

> "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."

19. The requirement that the worker should reasonably believe that the disclosure is made in the public interest was introduced by an amendment effected by section 17 of the Enterprise and Regulatory Reform Act 2013 which came into force with effect from 25 June 2013. The purpose of this was to reverse the effect of the EAT decision in *Parkins v Sodexo Ltd.* [2002] IRLR 109, and to prevent complaints which relate purely to the claimant's own treatment, such as a breach of a claimant's contract with no wider public implications, from falling within the terms of the section. At the same time, a requirement that the disclosure should be in good faith was removed from the definition by section 18 of the 2013 Act (although if a disclosure is not in good faith, this may reduce any compensation payable to a successful complainant by up to 25%: section 49(6A)). Neither of these requirements affects the question whether the disclosures in this case are protected disclosures. It is accepted that the disclosures made after the amendment would, if they otherwise satisfied the statutory requirements, be in the public interest, or at least that the appellant could reasonably believe that they were; and it is also conceded that the pre-amendment disclosures – indeed, all the relevant disclosures - were made in good faith

20. The disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section. As Sales LJ observed in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436; [2019] ICR 1850, para. 35, the question is whether the statement or disclosure in question has "a

sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para.36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

21. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979; [2017] IRLR 837, para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

22. In order to qualify for protection, the disclosure must be to an appropriate person. There are essentially three types of disclosure relevant to this appeal: disclosure to the employer under section 43C; disclosure to a prescribed person (typically a regulator) pursuant to section 43F; and disclosure to "other persons" under section 43G, which may in an appropriate case include organs of the media. The threshold justifying a disclosure becomes more rigorous where the worker is raising his concerns or allegations beyond the employer. For a section 43C disclosure to the employer, the only constraint on the worker is that his disclosure satisfies the test of a qualifying disclosure in section 43B. No doubt he must at least genuinely suspect that the information is or may be true, otherwise he could not reasonably believe that it tends to show any of the matters identified in section 43B(1). By contrast, the second type of disclosure to a prescribed person (which means prescribed by an order of the Secretary of State) specifically requires that the worker must "reasonably believe that the information disclosed, and any allegation contained within it, are substantially true": section 43F(1)(b)(ii). The third type of disclosure to other parties under section 43G, which will often be print and broadcasting media, also includes this requirement that there must be a reasonable belief that the information is substantially true, together with other conditions which must be met before any disclosure satisfies the terms of that section.

23. A significant issue in this case is whether the post-Agreement disclosures fall within the scope of this section and therefore I will set it out in full:

> "(1) A qualifying disclosure is made in accordance with this section if—
>
> (a) ...
>
> (b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer,

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer."

24. There are in essence four hurdles to satisfy in order for a worker to bring the disclosure within this section:

(1) the worker must have a reasonable belief that the disclosure, and any allegations implicit in it, are substantially true;

(2) the disclosure must not be made for personal gain;

(3) there must be a justifiable reason falling within subsection (2) for not raising the matter with the employer or a prescribed body rather than some other body; and

(4) in all the circumstances of the case, it must be reasonable to make the disclosure.

25. The structure of the legislation, therefore, is that disclosure to "other bodies" should be a last resort and only justified where disclosures to the employer or a regulated body would, in the circumstances, not be adequate or appropriate. The justifiable reasons for not raising the concerns with the employer or a prescribed body (where there is an appropriate one) are that the worker reasonably believes that the employer will victimise him if he takes that step; or that there is no prescribed body and he believes that evidence of the alleged wrongdoing will be destroyed. He is also relieved from the need to disclose the information to his employer if he has already disclosed it either to the employer or a regulated body. The section does not say in terms that he can only legitimately disclose to another body if the employer or the prescribed body has failed properly to deal with the original disclosure, but if the employer has dealt with it, or can reasonably be expected to do so, that will be highly relevant to the question whether the disclosure is reasonable. It is one of the factors which subsection (3) expressly requires a tribunal to take into account when considering the reasonableness question. It will often be unreasonable to make the disclosure to a third party in those circumstances.

26. The test whether the disclosure is reasonable is an important control mechanism in relation to disclosures falling within section 43G. In answering that question, a tribunal must have regard to all the circumstances; the specific considerations identified in subsection (3) are not exhaustive. As Auld LJ pointed out in *Street v Derbyshire Unemployment Workers Centre* [2004] EWCA Civ 964; [2005] ICR 97 para. 52, the question of reasonableness is essentially an issue of fact for the ET:

> "….in my view, section 43G provides a collection of partially overlapping requirements, any one of which, if not fulfilled, will defeat a worker's right to maintain that his disclosure is "protected" within the meaning of the Act. Whether, in the circumstances of any particular case, the claim is defeated on that account is essentially a matter for the employment tribunal to assess on a broad and common-sense basis as a matter of fact, in the light of each of the requirements in paragraphs (a) to (e) of subsection (1). Whether it approaches the question through one or more than one of those requirements and whether or not they overlap is essentially a matter for its evaluation on the evidence before it."

Detriment

27. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept

is well established in discrimination law and it has the same meaning in whistle-blowing cases. In *Derbyshire v St. Helens MBC* [2007] UKHL 16; [2007] ICR 841, paras. 67-68 Lord Neuberger described the position thus:

> "67…. In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah* [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
>
> 68. That observation was cited with apparent approval by Lord Hoffmann in *Khan* [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

29. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in *Manchester NHS Trust v Fecitt* [2011] EWCA 1190; [2012] ICR 372 where the meaning of this phrase was considered by Elias LJ (with whose judgment Mummery and Davis LJJ agreed). There was a debate whether the test for detriments short of a dismissal should be the same as the test where the alleged victimisation took the form of a dismissal, when the question is whether the protected disclosure is the reason or the principal reason why the action was taken; or whether the test should reflect the much looser link adopted in the discrimination law field. Elias LJ preferred the latter approach and summarised it as follows (para.45):

> "In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

30. As Lord Nicholls pointed out in *Chief Constable of West Yorkshire v Kahn* [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

> "Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

31. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

Analysing the claims.

32. The appellant has alleged that he has been subjected to unlawful detriments as a result of making a series of protected disclosures. The case before the ET raised issues in the three areas: whether the disclosures relied upon were protected disclosures; if so, whether the appellant had suffered any detriment as a consequence; and if so, whether a reason, being more than trivial, in the mind of those acting for the Trust, for taking the action causing the detriment was the fact that the appellant had made a protected disclosure or disclosures.

The alleged disclosures relied upon.

33. The appellant relied upon a number of communications which he alleged were protected disclosures. These included the pre-2012 qualifying disclosures including the letters of March 2009 and January 2011 to the Trust and communications made after the Compromise Agreement had been made. It was conceded that the pre-Agreement disclosures made to the Trust and the CQC (but not those to the GMC or the media)

were all qualifying disclosures. The later, post-Compromise Agreement disclosures which the appellant relied upon were the following:

1. 5 September 2013; disclosures in the form of a letter sent to the Right Hon. Margaret Hodge MP, chair of the Public Accounts Committee of the House of Commons with copies sent to various recipients including the Health Secretary and the chair of the CQC.

2. 10 September 2013; disclosures to Channel 4.

3. 21 October 2013; further disclosures to Channel 4.

4. 29 April 2014; disclosures to the BBC.

5. 23 June 2014; disclosures in a speech to the British Medical Association.

6. 16-19 October 2014; disclosures in an academic presentation to the European Association of Paediatric Societies ("EAPS").

34. Mr Gorton QC, counsel for the Trust, accepted that the communication made with the CQC fell within the scope of section 43F since the CQC is a prescribed body and it was accepted for this disclosure, as indeed for all these disclosures, that the subject matter fell within one or other of the matters listed in section 47B(1).

35. The other disclosures relied upon were neither disclosures to the Trust nor to any prescribed body and therefore could only amount to qualifying disclosures if they fell within the scope of section 43G. (Communications to an MP are now covered by section 43F because MPs are now prescribed persons, but they were not when these communications were sent.) The ET held that none of these disclosures complied with the conditions imposed by section 43G (paras.82-93). Although the detail of the matters raised varied with respect to each of these disclosures, in essence they covered much the same ground although in varying degrees of detail. I will outline the matters covered in the letter to the chair of the Public Accounts Committee of the House of Commons with copies sent to the CQC and other signatories. This is the most detailed of the disclosures.

36. This document is an extremely detailed thirteen page letter. It made various criticisms of the DPS and the Trust more generally under a number of distinct headings. The appellant alleged that the Trust had used money and the support of the BMA to leave in place an "unaccountable, unsafe culture" with a small club of surgeons denying that there was a problem; that there was poor leadership and an over-defensive reaction to criticisms; that there had been improper use of a surgery technique known as FVP and in particular a claim that Mr Jones had decided to "experiment with vagotomy and pyloraplasty in neuro-disabled children undergoing fundoplication, without consulting either ethical or research committees". There was also a detailed complaint about the behaviour of certain consultants and the Trust itself with respect to Mr Ahmed in which the appellant made serious allegations against individuals and asserted that there had been a cover-up by the Trust. There was a fundamentally false account of the circumstances of the appellant's resignation in which he asserted that his concerns had not been investigated, that he had been forced to resign because the BMA had withdrawn their funding in order to protect Trust employees and to collapse the trial,

and that attempts had been made to gag him by offering him a six figure sum. There was no mention of the unlawful disclosure of confidential materials which brought about his resignation and led to him paying costs, nor of the fact that he had misled his own BMA lawyers by denying to them that he had done this.

37. The ET concluded that in substance the letters repeated the same criticisms as the pre-2012 disclosures with little, if anything, that was new (para.82). It noted in addition that the appellant reiterated complaints which the RCS review had expressly rejected, such as there being a "club culture" operating in the Department and the allegation that Mr Jones had adopted improper practices which were experimental when in fact the RCS report said they were acceptable, and indeed had been used on one occasion by the appellant. In addition, the ET found that the appellant had knowingly lied about the circumstances in which he had resigned from the Trust and had made the untruthful claim that he had been offered a six figure sum to keep silent.

38. The ET analysed these disclosures by reference to the four requirements of section 43G (see para.22 above). It accepted that the claimant reasonably thought that he might be subject to a detriment for raising the issues in the way he did (although without giving reasons why it reached that far from self-evident conclusion). It was never suggested that the disclosure had been made for personal gain. The ET did not in fact make a specific determination on the third issue, namely whether the appellant reasonably believed that the information disclosed was substantially true (although there was the finding that he knew that parts of it were manifestly false). Although Mr Allen, counsel for the appellant before us (but not before the ET), criticised the ET for failing to reach a conclusion about that, it was unnecessary for it to do so because the ET was satisfied that the fourth requirement was not satisfied: it was not reasonable for these disclosures to be made within the meaning of section 43G(1)(e). The ET focused on the potentially relevant matters identified in section 43G(3), as it was required to do. It had regard to the fact that the Trust had taken action in response to many of the complaints by setting up the RCS investigation and implementing its recommendations. This also meant, in the ET's view, that the allegations now made were unlikely to recur.

39. The appellant appealed this ruling to the EAT. He alleged that the evidence did not sustain the ET's conclusion that the RCS report had dealt with all his concerns. There were a number of outstanding matters which the Trust had not put right and these justified him in ventilating his complaints more broadly. The failure by the ET to appreciate this fact vitiated its decision on reasonableness; it had failed to make any reference to these potentially critical matters.

40. At a preliminary hearing before the EAT, HH Judge Eady permitted this ground to be argued but with respect to two matters only. The first was the alleged dishonesty of staff in spreading false rumours about Mr Ahmed and the subsequent cover up of the wrongdoing by the Trust. The second was an allegation that the RCS report had been improperly leaked to staff. Neither had been referred to by the ET in the context of determining whether the section 43G disclosures were reasonable; the former had only been considered by the ET in the context of the race discrimination claim, when in fact it found the claim to be unfounded.

41. As to the first issue, the appellant alleged that two consultant surgeons in the DPS, Mr Matthew Jones and Mr Baillie, had brought about the suspension of Mr Ahmed by falsely alleging that he was suicidal, and when it became apparent to the Trust that they

had done this, the Trust took no steps to discipline or reprimand either officer. Indeed, the appellant submitted that far from investigating the facts, the Trust tried to cover up the wrongdoing and to conceal relevant incriminating material from the Ahmed tribunal. Issues relating to the Ahmed case had in fact been raised before the RCS review team, but they said in terms in the report that they did not think it appropriate to investigate them because Mr Ahmed was by then back at work following an aborted hearing at the ET (when he had withdrawn his claims and paid the costs).

42. The second complaint not remedied by the RCS report was the allegation that the report had been leaked to staff prematurely on the Trust's K drive, which is the public access server open to all staff. This complaint could not have been considered in the RCS report itself because the alleged failing post-dated it.

43. The EAT did not accept that these criticisms of the ET were warranted. It was able to deal with the second ground relatively briefly (paras. 63-65). It noted that there was a dispute about whether or not the report had been prematurely published on the K drive; Mr Simon Kenny, who gave evidence on this matter on behalf of the Trust, denied in cross-examination that it had been. In any event, the EAT was satisfied that the issue was never raised before the ET in the context of the reasonableness of the disclosure. It was only referred to in counsel's closing submissions in the context of detriment, and then "in very limited and passing terms"(para.65). Furthermore, it was not identified in a list of grievances which the appellant had drawn up in May 2012. In the circumstances the EAT concluded that there could be no legitimate criticism of the ET for failing specifically to consider this issue when analysing whether it was reasonable to make the disclosures. The EAT added that there was no basis for concluding that it might have reached a different conclusion even had the matter been expressly considered, no doubt having in mind the relative insignificance of this particular issue.

44. As to the first ground, the EAT found that whilst the Ahmed issues did figure in the whistle-blowing submissions, the failure to investigate these matters had similarly never been advanced before the ET in order to support the reasonableness of making disclosures to third parties. Accordingly, the appellant was unjustifiably seeking to introduce a new point on appeal. In reaching that conclusion the EAT considered at some length the list of issues and closing submissions before the ET (paras.37-47). The EAT considered that given the weight of material before the ET, the ET could reasonably expect "all relevant points to be made explicitly at the relevant stages of the argument." In the absence of the point being clearly relied upon, it was not fair to criticise the ET for failing to give it weight in the reasonableness assessment.

45. The EAT gave a further reason for rejecting this submission. The Ahmed matters had been expressly relied upon in the context of the race discrimination claim and the ET had specifically found – admittedly without any very detailed examination of the facts - that the allegation was false and that neither Mr Jones nor Mr. Baillie had acted inappropriately (paras.206-209). The ET had heard and accepted evidence from both Mr Jones, and it explicitly rejected the evidence of the appellant on these matters.

46. The EAT considered afresh the relevant submissions of counsel on this point. It went through the material in some detail (paras. 48-62) and concluded that the allegations were unfounded. There never had been any allegations made about Mr Ahmed relating to suicide, only to mental health issues. The EAT also concluded that both Mr Jones and Mr Baillie had acted appropriately. In view of this conclusion, the EAT reasoned

that even if the ET had considered the Ahmed issue in the context of asking whether the section 43G disclosures were reasonable, there was no basis to conclude that the ET would have altered its finding on reasonableness.

47. The grounds of appeal before us impermissibly sought to broaden the attack beyond the two grounds which HH Judge Eady had said were arguable, and we refused to consider these other matters. As to those two matters, I see no reason to interfere with the EAT's conclusion that neither of them was relied upon, or at least not sufficiently clearly, in support of the contention that the disclosures in issue were reasonable because of the failure to remedy these faults, and that accordingly there was no error of law by the ET in failing to deal with them in that context. That is sufficient to reject this aspect of the appeal. However, since the EAT spent some time on the alternative ground to the effect that there was no merit in the Ahmed point in any event, and it was a point relied upon by the Trust in argument, I should deal with it.

48. In my judgment this was not a proper basis for rejecting this particular submission. I do not think that it was appropriate for the EAT to consider, in the context of reasonableness, whether a particular complaint was made out or not. A disclosure of alleged wrong-doing may be reasonable even though it is ultimately found to be unsubstantiated provided, in the case of a section 43G disclosure, that the worker reasonably believes that it is substantially true. Neither the ET nor the EAT made any finding about that, whether expressly or by inference. The question of reasonableness must be assessed as at the time the complaint or concern is raised, not with hindsight after the complaint has been examined. If the appellant did reasonably believe that the facts on which he relied were substantially true, this might in principle have justified the disclosure, particularly given that the RCS report had chosen not to deal with the Ahmed issues.

49. Mr Gorton raised a further point. He submitted that even if the appellant had specifically raised the Ahmed issue in the context of the reasonableness inquiry, the ET's decision would have been the same. I have no doubt that he is right. The question of reasonableness has to be assessed having regard to "all the circumstances of the case". The circumstances here are that on any view many of the complaints raised in the communications relied upon were considered in the RCS report, some were found to be unsubstantiated, and with respect to those that were, recommendations were made and appropriate action was taken by the Trust. Some of the complaints related to manifestly false accounts by the appellant of the circumstances of his resignation and the alleged offers of a six figure sum to keep him quiet. I do not accept Mr Gorton's submission that the Ahmed issue was a minor matter of no real significance in the range of issues raised by the appellant; that is certainly true of the K-drive issue which barely surfaced in the complaints, but a fair reading of the appellant's letter to the PAC, for example, shows that the Ahmed matters were considered by the appellant to be of real importance, and he set out his complaints with respect to them in some detail. Even so, in the light of the ET's findings in the round about the complaints for the most part being old and/or false, it is in my judgment fanciful to believe that the ET might have found any of the communications relied upon to be reasonable. A worker cannot expect to have protection for a host of complaints unjustifiably brought to the attention of the media or other influential third parties on the basis that amongst them there is one issue which it might have been reasonable to disclose. A whistle-blower must take some responsibility for the way in which complaints or concerns are framed, and the

requirement of reasonableness in section 43G enables an ET to refuse to give protection to irresponsible disclosures. Had the disclosure related only to the Ahmed issue, then perhaps it would in the circumstances have satisfied the reasonableness test. But that was not how the appellant chose to put this issue into the public domain.

50. I would therefore reject this ground of appeal both on the narrow basis relied upon by the EAT, and for the further reason that the findings of the ET are such that even had the ET taken the Ahmed matter into account in the reasonableness assessment, its decision would inevitably have been the same. It follows that the only protected disclosures which can be relied upon by the appellant are the pre-2012 disclosures to the Trust and the CQC, and one later disclosure, namely the copy of the PAC letter dated 5 September 2013 which was sent to the CQC.

Were there any detriments?

51. The ET's conclusion, legitimately reached, that there was only one relevant qualifying disclosure post the appellant's resignation in 2012, bears directly upon the question of detriment. In the list of issues placed before the ET, which influenced the road map which the ET followed in its judgment, the heading of "alleged detriments" in fact covered two quite distinct questions: first, whether there was a detriment; and second, whether the action giving rise to it was on the ground that the appellant had made the protected disclosures.

52. The ET had to determine whether there was any detriment resulting from the established qualifying disclosures, namely the letter copied to the CQC and the pre-2012 disclosures. The claimant had identified in a Scott schedule eleven detriments he allegedly suffered. (These were summarised as items 5.1-5.11 of the List of Issues.) The first related to an allegation that between June and August 2012 certain doctors briefed against the appellant in relation to circumstances relating to the death of a young baby. It is not clear to me how that could be relied upon since the alleged detriments occurred before the Compromise Agreement but the ET did deal with it and concluded that no briefing of the kind relied upon had occurred. There is no outstanding appeal with respect to that conclusion. The last was a catch-all which added nothing to the other specific matters. There were two further alleged detriments (items 5.2 and 5.7) relating to letters sent to the GMC by Professor Lewis about the appellant's probity and raising the question whether, because of some of the appellant's actions, he was fit to practice. The ET found that these letters gave rise to no detriments, and HH Judge Eady did not believe that there was an arguable case for appealing those findings and refused the appellant permission to do so. Although the appellant was unhappy with this ruling, it was not appealed and we cannot, and do not, go behind it. Accordingly there are seven outstanding detriments which the EAT had to consider and which can be analysed under three heads.

    (1) There were letters from Sir David Henshaw, the Chairman of Alder Hey, to four parties. Item 5.3 was a letter dated 22 October 2013 which Sir David wrote to the Right Honourable Margaret Hodge MP, chair of the Public Accounts Committee which was in terms said to be a response to the letter which the appellant had sent to the PAC. It included an Annex, Annex A, which set out the Trust's position more fully. Item 5.5 was a letter dated 24 October sent to the chair of the CQC which was a response to an interview which the appellant had given on Channel 4 News in which he had said he

was due to have a meeting with the CQC. Sir David said that the letter was designed to help the CQC "to understand the background to Mr Jesudason's issues with the Trust". The PAC letter was included to provide fuller briefing. The third letter, item 5.6, was sent to David Davis MP on 29 November 2013 and again included the PAC letter. This was in response to comments which Mr Davis had made in Parliament relating to the appellant's allegations and which the Trust believed to be false. Item 5.8 was a fourth letter sent to the Chair of the BMA in response to what Sir David felt were inaccurate and untruthful allegations about the Trust made by the appellant in his speech to the BMA Annual Representative Meeting. This letter also included the Annex A of the PAC letter.

(2) Item 5.4 was an internal email dated 23 October sent by Louise Shepherd, the Chief Executive of the Trust, to all the consultants at Alder Hey. This was intended to inform them of the media involvement in these matters and to reassure them that the Trust would support the department and protect the reputation of the Trust.

(3) Item 5.9 was a letter to representatives of EAPS from Rick Turnock, then Medical Director, responding to an e-poster in which the appellant had misrepresented certain matters and in particular had repeated his false account of having been dismissed by the Trust for his whistle-blowing activities, and having been promised payments to keep quiet. Mr Turnock sought to present the Trust's position and requested the immediate removal of the poster.

(4) Item 5.10 was an exhibit to a statement from Matthew Jones to the GMC provided in part at its request as part of the GMC's investigation into the appellant following receipt of the letters from Professor Lewis. This was a very detailed document which, inter alia, contained an account of how it became obvious that the claimant had wrongly and unlawfully disclosed confidential documents to Private Eye. It also gave a very detailed and considered rebuttal of the serious and, as Professor Jones understandably described them, distressing and wounding criticisms of both his colleagues and him personally.

53. The ET dealt with these allegations in two batches; first, it considered together items 5.3 to 5.6 (paras. 110-124) and then items 5.8 to 5.11 (paras.125 -135). The ET set out in some detail the content of the letters. Essentially they sought to show that the appellant's concerns had been dealt with by the independent RCS investigation into his complaints, and it noted that the appellant had made further complaints to the GMC about the conduct of three surgeons and to the CQC about the general standard of care. None of them were sustained. The letters also set out the circumstances explaining how the appellant's employment came to an end, countering the false account given by the appellant himself.

54. However, in the course of each of these communications, save for item 5.10, the exhibit to the statement from Matthew Jones to the GMC, the following statement (or something very similar) was made:

> "'Each of Mr Jesudason's allegations have been thoroughly and independently investigated by different professional bodies on a number of occasions and found to be completely without foundation". "

In all but items 5.5 and 5.9 the letters go on to say that the appellant's persistent campaign was "weakening genuine whistle-blowing", adding that "we have reported his conduct to the GMC".

55. The ET recognised (para.112) that these comments were at the heart of the appellant's complaints. It had earlier in its decision observed that some of the comments in the letters, particularly those from Sir David Henshaw, had clearly overstated the case with respect to the RCS report (paras. 34-46). Contrary to his account, the appellant's complaints had not been "completely without foundation": the RCS report had identified areas of concern and made various suggestions for improvement which in fact the Trust had adopted. This "overstatement" was also found in the same terms in the email from the Chief Executive to all consultants and in Mr Turnock's letter to the EAPS (items 5.4 and 5.9)

56. The appellant contended that these false observations were more than a mere "overstatement" because by inference they represented the appellant as someone who had made vexatious, irresponsible and wholly unsubstantiated allegations. This was a wholly unfair and inaccurate portrayal of the appellant, constituting a detriment in law. The comments were damaging to his standing and reputation.

57. The ET did not specifically identify the alleged detriments in terms of the appellant being perceived to be vexatious and irresponsible, although it did so indirectly. When summarising its conclusion at para.228, it said that the letters "did not undermine the claimant's concerns or his standing with his peers". But it will have been obvious that the core of his complaint was that he was implicitly being traduced by the way the letters were phrased. The ET rejected the appellant's submissions on the point. It held that nothing in the correspondence amounted to a detriment to the appellant giving its reasons as follows (para.124):

> "The Trust was anxious to do a number of things by issuing the media statements and the letters to the various MPs etc, which was to protect its own staff, to confirm to its patients within the catchment area that the Trust is a safe place for them to bring their children and to try to quell the media interest that was in danger of overwhelming the Trust."

58. The ET came essentially to the same conclusion with respect to the other communications in items 5.8 to 5.10, saying that the Trust was defending itself against the continued allegations made in the media by the appellant. It stated in terms that (para.135):

> "Nothing in the correspondence caused a detriment to Mr Jesudason. The letters sought to give the opposing view to Mr Jesudason's allegations."

59. It returned to the point in its summary of conclusions. In para.224 it said this:

> "However, we find that no reasonable worker/employee would consider the comments referred to in paragraph 5 of the list of issues as detriments. Those comments were made either without the knowledge of the author (Professor Lewis) of the whistle-blowing, or in an attempt to protect the Trust against potential criticism from the press or other bodies, or wanting to put the record straight."

60. The EAT held that this was a conclusion open to the ET; it was an "unimpeachable finding of fact" (para. 75) The ET had applied the correct legal principles and directed itself in accordance with the established authorities. This was not a perverse conclusion. Mr Gorton relies upon that analysis: he submits that the ET plainly took on board that the letters had wrongly claimed that there was no substance in the complaints but still concluded, as it was entitled to do, that no reasonable employee would have treated these comments as a detriment given the purpose why the letters were sent.

61. I reject that submission. In my judgment the analysis of the ET, and its acceptance by the EAT, reveals some confusion amounting to an error of law. The concluding sentence of para.224 suggests that the appellant's standing cannot be affected if the only purpose of the Trust was to put the record straight. In my view that is manifestly wrong; a detrimental observation about a whistle-blower, claiming for example that he is a liar or a troublemaker, may be made in a letter whose purpose is to put the employer's side of the story. It does not cease to be a detriment because of the employer's purpose or motive. That purpose – why the letter was written in that way - will be relevant at the later causation (in the sense of the "reason why") stage when the question is whether the detriment was by reason of the protected disclosures, but it is irrelevant to the question whether a detriment was suffered at all.

62. I therefore accept Mr Allen's submission that both the ET and the EAT erred in law in bringing issues of causation into the factual question whether the appellant had been subjected to a detriment or not. In my view there was clearly a detriment to the appellant in the way in which these letters were framed and it was not open to the ET to conclude otherwise. If the letters had said in terms that the appellant had in his original disclosures acted in a vexatious or irresponsible and irrational way, or in bad faith, it would be impossible to say that this was not capable of constituting a detriment. There can be no difference where this is the natural inference to be drawn from the words used. Mr Gorton points out that an unjustified sense of grievance is not enough to constitute a detriment. Perhaps if the letters had accurately stated how the appellant's complaints had been assessed in the RCS report, that would be a convincing argument. The appellant could have no legitimate grievance at the Trust responding, even in a robust way, to his damaging and, in part, false communications. But the Trust's communications did not fairly or accurately reveal the fact that some of his complaints were justified, and in my view the only sensible inference from the offending passages is that the appellant had made specious, unjustified and unsubstantiated complaints, with perhaps some suggestion of bad faith resulting from the use of the phrase "weakening genuine whistle-blowing". Any worker could reasonably treat these

comments as damaging to his reputation and integrity and could reasonably believe that they might bring him into disrepute with his peers. These detriments were caused by the acts of persons acting on behalf of the Trust when they chose to send the various letters with the offending observations. The only question, therefore, is why the Trust, through these individuals, made the observations which gave rise to the detriment.

63. The misleading observations to the effect that the RCS report had given an entirely clean bill of health to the Trust did not apply to item 5.10, the exhibit to the statement by Mr Jones with the GMC. His statement was intended to support the GMC investigation against the appellant. Here the allegation before the ET was a different one; it was that the statement was in certain respect false and that this was to the appellant's detriment. Presumably this was because the statement was hostile to the appellant and it would increase the chance of his being found unfit to practice if the allegedly unfair criticisms of him were believed. The ET did not expressly decide whether the statement was false or not. The appellant submits that without doing so, it could not answer the detriment question. The EAT accepted that there was no express finding that the statement was true, but concluded that this finding was implicit in the ET's decision when read as a whole. The ET had accepted that Mr Jones had been telling the truth with respect to the Ahmed issues in the context of the race relations claim, and it was a reasonable inference that it was treating him as an honest witness who had neither doctored the letter nor made a false or misleading statement. In fact, as I have already noted, the ET had also accepted that where the testimony of the Trust's witnesses was at odds with the evidence of the appellant, they were to be believed. I accept that this would justify the inference that Mr Jones genuinely believed the statement to be true, but this is not necessarily the same as a finding that it was in fact true (at least, not unless all the disputed points were put to the witness and he confirmed their veracity). But in my view it was not critical for the ET to resolve this question because even if the statement was false in some respect, but not to the knowledge of Mr Jones, then for reasons I develop below, I do not think any detriment resulting from this statement could be shown to be on the grounds of any protected disclosures.

Causation: the" reason why" question.

64. This is the critical issue in this appeal. Why did the Trust take the action which caused the detriment? As Lord Nicholls pointed out in *Khan*, this is essentially a matter of fact for the ET. The "reason why" question must be asked with respect to the particular act which causes the detriment. Mr Allen strongly emphasises this point. He submits, in my view correctly, that the issue is not the reason why the letters rebutting the appellant's allegations were written but why the offending passages which caused the detriment were included in those letters. He submits that the ET wrongly conflated these two issues. Mr Allen says that the ET never did separately address why the offending passages were included, and the case should be remitted to enable it to do so.

65. This is an unusual case in that the alleged detriments arise out of communications which are a response to the appellant's disclosures to third parties. Even if the disclosures are protected disclosures, an employer is obviously entitled to respond to them in order to rebut what has been alleged and to put his side of the case, even robustly. If, as in this case, the rebuttal also contains misleading statements which constitute a detriment to the worker, it does not follow that the reason for making those statements is the fact that the worker has made the protected disclosure. Conversely, if the response is to a communication which is not a protected disclosure, it does not

follow that offending comments in the letter which give rise to a detriment are necessarily unconnected to a protected disclosure. The reason for making the false or misleading statement may still be earlier protected disclosures made by the claimant, as is alleged here. Having said that, the employer is likely in practice to have a much harder task in showing that the making of the protected disclosure played no, or at most a trivial, part in the decision to include a false statement where the letter in which it is contained is itself a direct response to a protected disclosure.

66. In this case the ET found that none of the letters or emails in which the false statements were made was in response to a protected disclosure. They were all connected "to the non-prescribed information sent to the likes of the BBC, Channel 4 and the Right Honourable David Davies" (para.228). The appellant's primary argument was that all the letters to the media and other third parties were protected disclosures by virtue of section 43G. For reasons already given, I reject that argument as did the courts below. But in the alternative Mr Allen submits that with respect to items 5.3 and 5.5 in particular, namely the letters from Sir David to the chairs of the PAC and of the CQC respectively, the letters were in response to a disclosure which the ET accepted was a protected disclosure, namely the PAC letter, a copy of which the appellant sent to the CQC. The assumption seems to be that since the content of the letter was a protected disclosure with respect to the CQC, it must be protected with respect to the other recipients also.

67. The EAT summarily rejected this argument, noting (para.90) that it "rests on the fallacy that the letter [to the PAC] is, by virtue of being copied to the CQC, to be treated as if it were a protected disclosure to all the other recipients." I agree with the EAT that the argument is fallacious. It would wholly undermine the carefully structured safeguards in the legislative scheme if copies of a letter are to be treated as protected disclosures with respect to all recipients merely because there is a protected disclosure with respect to one of them. Moreover, Sir David's letter to the chair of the CQC stated in terms that it was a response to a BBC interview which the appellant had given. It was not a response to the PAC letter that had been copied to the CQC. In my judgment the conclusion of the ET on this point is wholly consistent with the evidence and there is no error in its analysis.

68. But that is not the end of the argument. As I have said, there is no reason in principle why the Trust might not in its responses have chosen to take the opportunity to retaliate against the appellant at least in part because of earlier protected disclosures he has made. Mr Allen says that the ET did not engage with this possibility and simply assumed that the reason for sending the letters also explained why the offending passages were included. The EAT held that the ET had in terms concluded that the purpose of the letters was not to disparage or discredit the appellant, and that this was inconsistent with the appellant's submissions on this point (para.94).

69. Whilst I accept that the ET's reasoning could have been sharper in this regard, in my view a fair reading of the ET decision as a whole shows that it did make an appropriate finding about why the false statements were included in the Trust's various responses. I say this for the following three reasons in particular. First, given the centrality of this issue, it is fair to assume that this matter would have been explored in detail with the Trust's witnesses at the hearing and the ET found in terms that "where the claimant's evidence conflicted with that of the respondent's evidence [sic] we preferred the evidence of the respondent's witnesses" (para.26). It was always the Trust's case that

even if it had over-egged the pudding, its focus was to rebut what the Trust perceived to be grossly unfair misrepresentations by the appellant made to the media and others, and to tell its side of the story.

70. Second, in para.112 the ET identified the areas where the letters were alleged to have caused detriment to the appellant, and in the subsequent paragraphs it dealt with the content of the letters. It summarised the reason for sending them as follows (para.124):

> "The Trust was anxious to do a number of things by issuing the media statements to the letters to the various MPs etc., which was to protect its own staff, to confirm to its patients within the catchment area that the Trust is a safe place for them to bring their children and to try to quell the media interest that was in danger of overwhelming the Trust."

71. That paragraph read on its own would lend some support to Mr Allen's contention that the Trust was focusing on the reason for sending the letters rather than the reason for including within them the false statements about which he complained. But I think it is reasonable to infer that the ET will have had the false statements very much in mind since this was the basis of the alleged detriments. In my judgment the ET has in substance found that the motivation for sending the letters was the same as the motivation for claiming – albeit falsely - that the criticisms by the appellant had no substance; it was to minimise the damage resulting from the third party disclosures which were themselves false in material ways. I think this is confirmed in the summary of conclusions at the end of the judgment in para.228. The first sentence of that paragraph says in terms that even if, contrary to the ET's findings, the items in para. 5 of the list of issues did constitute detriments, they "were not connected to any whistle-blowing by the appellant but were all connected to the non-prescribed information sent to the likes of the BBC, Channel 4 and the Right Honourable David Davies MP". Since the detriments resulted from the false statements, that is in my view an unambiguous finding that the offending statements were not linked to the making of any protected disclosures.

72. The third factor is that it is intrinsically unlikely that the authors of these letters would have been reacting to the protected disclosures. All but the copy letter to the CQC were made years earlier; those complaints had been dealt with and the appellant was no longer employed in the Trust. Similarly, it is unrealistic to think that the false or exaggerated statements would have been linked in any way to the fact that the letter which the appellant had sent to the PAC had been copied to the CQC. Sending a copy to the CQC did not place these issues in the public domain and that, as the ET found, was the reason for the Trust's concerns.

73. In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.

74. The ET was manifestly entitled to reach that conclusion. So whilst I accept that, contrary to the finding of the ET and the EAT, sending letters in the way they were drafted did constitute a detriment to the appellant, it was not a detriment on the grounds that the appellant had made a protected disclosure or disclosures.

75. The statement which Matthew Jones made to the GMC fell into a different category because it did not contain any of the misleading exaggerations found in the other letters. The allegation here is that the statement was false. I have already set out above why the statement could have been misleading and potentially detrimental to the appellant. The finding that Mr Jones genuinely thought that it was truthful would not preclude such a conclusion. But even if it was misleading, it could not have been on the grounds of any of the protected disclosures. The ET made an unambiguous finding that the statement was made to defend the reputation of Mr Jones and his colleagues. Since Mr Jones had believed it to be true in all respects, there can be no basis, as there was with the other letters, for differentiating between the reason for sending the statement and the reason for including false information. Therefore even if the statement did constitute a detriment, in the light of the ET's findings it could not have been on the grounds of whistle-blowing.

Race Discrimination.

76. The appellant also submitted that he had been subjected to the alleged detriments because of his race. The ET rejected this argument and the EAT dismissed the appellant's appeal. The ground of appeal on this point, as it was before the EAT, is that the ET failed properly to address the issue and as a consequence did not make relevant findings. Mr Allen submits that the case should be remitted on this point for further consideration.

77. The relevant legal principles, in so far as they bear on this aspect of the appeal, are as follows. The definition of direct discrimination is found in section 13(1) of the Equality Act 2010:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

It requires a comparison between the claimant and either an actual or a hypothetical comparator.

78. Section 136 deals with the burden of proof in such cases. So far as is material it provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

79. Prior to the enactment of this section, there were separate provisions on the burden of proof found in different discrimination statutes as a result of amendments to those statutes to give effect to provisions of EU law. They were cast in very similar terms to each other but were framed differently from section 136. The way in which these earlier provisions had to be applied was considered in a number of cases, and especially two Court of Appeal decisions, *Igen v Wong* [2005] ICR 931 and *Madarassy v Nomura International plc* [2007] ICR 867.

80. In *Ayodele v Citylink Ltd*. [2018] ICR 748, the Court of Appeal considered and rejected a submission that these authorities could no longer be relied upon in the light of the change of wording. Elias LJ explained the effect of these authorities in *Royal Mail Group v Efobi* [2019] EWCA Civ 18 para.10:

> "The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

81. In the list of issues presented to the ET, the relevant issues relating to the race claim were described as follows:

> (1) Was C subjected to any of the alleged detriments because of his race?
>
> (2) Is it appropriate to infer that C's race was a significant influence in the treatment by reference to:

[Then sixteen matters were identified which allegedly justified such an inference.]

> (3) Was the reason the R treated the C the way it did in relation to the alleged detriments that it wanted to defend its reputation against the unjustified claims by the C?

82. The reference to a "significant influence" in para.(2) reflects the principle in discrimination law, as in whistle-blowing cases, that there will be discrimination on grounds of the relevant characteristic if race is a significant, in the sense of being a more than trivial, reason for taking the action which constitutes the less favourable treatment: It seems that paragraphs (2) and (3) are seeking to reflect the two stages in the burden of proof test; the sixteen matters are relied upon as evidence to shift the burden to the employer, and paragraph (3) asks whether the burden has been discharged. However, in my view para. (2) is not happily expressed. It can never be

legitimate to infer that a claimant's race was a significant influence in the treatment meted out to him solely because of other incidents, unrelated to the claimant, where race was a significant influence; but the evidence may be probative, and the existence of such cases will in an appropriate case shift the burden of proof to the employer to show that race played no part in the treatment of the claimant.

83. In the grounds of appeal it is alleged that the ET should have asked whether the appellant's race made it more likely that he would be subjected to detriments on the grounds of having made protected disclosures. Mr Allen repeated the point in his skeleton and complained that the ET had made no finding on this question. But the issue must be whether the appellant was in fact discriminated against on the grounds of race, not whether it was more likely that he would be. Were the offending passages included in the relevant letters because of the appellant's race?

84. If the point is that the ET ought to have considered whether the appellant had, by reference to the sixteen matters, shifted the burden to the Trust in this case, then for reasons I explain below, the ET did in my view consider that question. It considered each of the sixteen matters in some detail. It is true that the ET treated them as distinct claims of race discrimination directed against the appellant and it gave reasons for rejecting each one of them. Mr Allen submits that this was not the purpose for raising these matters; rather it was to show that it was "more likely that [the appellant] would be subjected to a detriment on grounds of having made a protected disclosure". I take this to mean that the ET should have decided whether these matters, or any of them, shifted the burden of proof to the employer to rebut the charge of race discrimination.

85. I accept, as did the EAT, that the ET did misunderstand the reason why these matters were being relied upon. It observed, for example, that some of the claims were out of time, or were too generalised, or did not relate to the appellant. However, in the course of its consideration of the sixteen matters, it did in fact deal with the question whether the evidence showed that race played a part in the decisions and actions in issue. It was not satisfied that it did in any of these cases. Moreover, the ET in terms stated that in so far as these matters were not intended to be specific allegations "but to be used to infer racial discrimination in a more general sense (an all pervading antagonism towards the claimant because of his protected characteristic) we could not see that from the evidence" (para.219). This comes close to, if it does not actually encapsulate, the reason why this material had been adduced. I read the ET's conclusion as being that the appellant had not shifted the onus so that the employer had to show a non-racial reason for incorporating the offending passages in the letters.

86. Mr Allen takes issue with some of the conclusions reached by the ET with respect to these sixteen matters and he questions whether the analysis was sustainable. For the most part these were findings of fact based on evidence before the ET and there is no proper basis to interfere with them. I will not deal with them in any detail. Of particular relevance were findings by the ET that there was no "club culture" which divided consultants on grounds of race, although there were tensions within the group; and the ET pointed out that the RCS report had referred to a generally "collegiate culture" (paras 176-182).; that there was no evidence of aversive racism within the consultant body, i.e. denial of personal prejudice but in fact unconscious hostility (paras 183 - 191); that there was no evidence supporting an alleged failure properly to support BME staff (para.202-203); and that the hostility to the appellant personally as a result of the first two communications sent in 2009 and 2010 was because colleagues were upset by

the allegations which they felt were unjustified and was not an adverse reaction because of the appellant's race (para.204); and that the statistics did not bear out any discrimination in the appointment or retention of staff (para.205). The appellant also relied upon the treatment of Mr Ahmed in this context, but as discussed above, the ET found there was no adverse or unfair treatment of him, and it pointed out that Mr Ahmed had a costs order made against him for unreasonably bringing and conducting his case before the ET.

87. The appellant also criticises the ET for not constructing a relevant comparator. As to the latter point, as the EAT pointed out (para. 110) both the list of issues and the closing submissions were on the basis of a hypothetical comparator and there can be no legitimate criticism if the ET did not identify actual comparators (although in fact it did in one case).

88. The main criticism of the appellant with respect to this ground is that the ET did not ask itself whether the detriments themselves were suffered as a result of discriminatory treatment. In my view that simply fails to do justice to the ET decision. The central question with respect both to the whistle-blowing and race claims was why the appellant was treated in the way he was. In particular, focusing on the detriments, why did the authors of the letters include exaggerated and potentially damaging observations in them? The ET gave a very clear answer to this; the reason was nothing to do with either whistle-blowing or race. With regard to the latter it summarised its findings in this way (para.236):

> "With regard to those claims post December 2012 any employee or ex-employee of the Trust, whatever their race, who made the sort of accusations that Mr Jesudason made against his colleagues which had either been dealt with and/or were allegations to which a response was needed (either to the press or some external body) would have been dealt with in the same way by the Trust whatever their race."

89. In my judgment this is an unequivocal answer to the third point identified in the list of issues. It shows that in the ET's view even if, contrary to its earlier findings, there had been some evidential basis arising out of the sixteen matters which justified shifting the burden of proof, the Trust had discharged the burden of providing an explanation, other than race, for its treatment of the appellant.

90. There are two further points which in my view make this conclusion unchallengeable. First, witnesses from the Trust gave evidence, which no doubt will have included the reason for acting as they did, and they were found to be credible. The court is in no position to interfere with that finding.

91. Second, and in my view very importantly, the ET noted (para. 222) that it was not put to any of the Trust witnesses (apart from Professor Lewis, who no longer figures in this appeal) that their actions were motivated by considerations of race. That is bound to make it extremely difficult for any court to find discrimination because almost in all likelihood the evidence will be lacking.

92. Mr Gorton went further and submitted that in view of the failure to cross-examine the Trust witnesses on this point, the appeal was bound to fail because it would be unfair to make a discrimination finding in such circumstances. He relied upon the decision of the Privy Council in *Chen v Ng (British Virgin Islands)* [2017] UKPC 27 although the facts were far removed from this case. The Judicial Committee was faced with an appeal in which a judge had found a party to be untruthful on two grounds, neither of which had been put to him in cross-examination. The Judicial Committee in a joint judgment given by Lords Neuberger and Clarke held that this will often, but not inevitably, be unfair and was in fact unfair in that case (paras.52-54):

> "52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.
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> 53. Mr Parker relies on a general rule, namely that "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted", as Lord Herschell LC put it in *Browne v Dunn* (1893) 6 R 67, 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in *Markem Corpn v Zipher Ltd* [2005] RPC 31.
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> 54. The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as

> to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him."

93. Here, as in the *Chen* case, there was not an infringement of what the Judicial Committee described as the "general rule"; the allegation of race discrimination was clearly in the frame from the beginning. But a finding of discrimination of this nature is a serious matter and in my view it would generally be unfair for an ET to make such a finding without the relevant party being given the opportunity to rebut the basis of that charge. Whether a witness has had that opportunity should not be judged in a formalistic or technical way, focusing on the particular way in which questions were framed in cross-examination, but by looking at the substance of what was put. Did the witness have a fair chance to deal with the basis on which discrimination was alleged? If not, there would have to be very cogent evidence indeed before a court could conclude that a finding of discrimination was overall fair. It would be even harder in such a case for an appeal court to substitute a finding of race discrimination where the ET had found none. (In *Chen* it was of course the other way around). Indeed, it is difficult to envisage how that could ever be fair, even allowing for the more informal procedure adopted in employment tribunals.

94. Accordingly, were Mr Allen seeking to have a finding of discrimination substituted for the ET decision, I would agree with Mr Gorton that the appeal could not succeed on grounds of fairness alone. However, Mr Allen does not ask for this remedy; rather he seeks to have the case remitted because of what he alleges was the fundamental failure by the ET properly to address the discrimination issue. He says that it approached the question in a fundamentally misguided way. Had he made good that claim then in my view the case would have had to be remitted even though the consequence would be that the appellant would have a second bite of the cherry and would have the opportunity to put right at the second hearing what he failed to do at the first, namely to put his case to the witnesses. However, in my view whilst the ET did to some extent misunderstand the way the case was being put, it nonetheless made appropriate and relevant findings based on the evidence before it and these justified the conclusion that there was no race discrimination. I would therefore dismiss this ground of appeal.

95. There were two grounds raised in a cross appeal. One I have already mentioned, namely the complaint that the ET had given inadequate reasons for rejecting the Trust's submission that the appellant was acting in his capacity as a campaigner rather than a former worker. The other was that the claims were out of time which the ET did not

address because it was not necessary to do so. In view of my conclusions it is not necessary to explore these issues. Had there been a remission following a successful appeal, then like the EAT I would have remitted these points to the ET and I did not understand Mr Allen to argue against that course.

Disposal.

96. I would therefore dismiss all grounds of the appeal.

Lord Justice Baker.

97. I agree.

Lord Justice Henderson.

98. I also agree.