Neutral Citation Number: [2024] EAT 95

Case No: EA-2023-000273-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 May 2024

Before:

HIS HONOUR JUDGE TARIQ SADIQ

(SITTING ALONE)

- -

Between:

MR IAN RITSON

Appellant

- and –

MILAN BABIC ARCHITECTS LIMITED

Respondent

- -
- -

MR JASON BRIAN FRATER (Consultant, of **360 Law Services Ltd**) for the **Appellant**
MR TIM DRACASS (Counsel, instructed by **Starford Ltd**) for the **Respondent**

Hearing date: 2 May 2024

- -

Transcript of Proceedings

JUDGMENT

SUMMARY:

VICTIMISATION DISCRIMINATION – Protected disclosure

VICTIMISATION DISCRIMINATION – Dismissal

Automatic unfair dismissal – protected disclosures

The Claimant, an architect, was dismissed for alleged redundancy following the introduction of the Coronavirus Jon Retention Scheme ("CJRS"). He had less than two years service at the time of his dismissal. The Claimant brought ET claims claiming that his dismissal was automatically unfair by reason of his protected disclosures. He also claimed that he had suffered detriments on the grounds of his protected disclosures. The ET dismissed the Claimant's claims. It found that the matters relied upon by the Claimant did not amount to qualifying disclosures and none of the five proven detriments were done on the grounds of any protected disclosures. In any event, the ET was satisfied that the Claimant's dismissal was for redundancy.

Held: dismissing the appeal.

The Claimant challenged the ET's findings that the disclosures did not amount to qualifying disclosures. The ET rejected the Claimant's case on the facts and made permissible findings that the disclosures did not amount to qualifying disclosures. The ET's approach did not involve an error of law and it had given adequate reasons for its decision. The ET permissibly found that the disclosures had not been made in the public interest. There was no challenge to the ET's finding regarding causation in respect of the Claimant's dismissal and/or selection for redundancy and/or causation regarding detriments. Given the ET's finding of fact, that was a permissible conclusion. The ET permissibly found that the matters relied upon by the Respondent were genuinely separable from any protected disclosures made by the Claimant in any event.

HIS HONOUR JUDGE TARIQ SADIQ:

1. This is an appeal against the Judgment of Employment Judge Abbott sitting with members at London South Employment Tribunal ("the ET"). The hearing took place between 18 and 20 January 2023 and the Judgment, which is dated 14 February 2023, was sent to the parties on 16 February 2023. The parties will be referred to as the Claimant and the Respondent as they were before the ET. The ET dismissed the claims for:

(i) Automatic unfair dismissal on the grounds of protected disclosure under section 103A of the Employment Rights Act 1996;

(ii) Automatic unfair dismissal under the alternative claim pursuant to section 105 of the 1996 Act, namely unfair selection for redundancy on the grounds of protected disclosure; and

(iii) Detriments on the grounds of protected disclosure under section 47B of the 1996 Act.

2. The legal representation at the ET was the same as before me in the Employment Appeal Tribunal; for the Claimant, Mr Frater, Consultant with 360 Law Services Limited and Mr Dracass, of Counsel for the Respondent. I am grateful for their assistance.

The Background

3. The facts are set out by the ET at paragraphs 22 to 59 of the Judgment. A summary of the salient facts for the purposes of this appeal are as follows. The Claimant was employed by the Respondent as an architect from 23 April 2018 and was dismissed for alleged redundancy on 10 April 2020. He had less than two years service at the time of termination of employment. He worked part-time, four days per week.

4. In late February/early March 2020 there were escalating concerns regarding the spread of Covid-19 in the UK. On 20 March 2020, the Government announced the creation of the Coronavirus Job Retention Scheme ("CJRS"). The principle of the scheme was to avoid employers having to make employees redundant, but the details of the scheme were not available at that stage. On 23 March 2020, the Prime Minister announced a national lockdown with effect from 27 March 2020.

5. On 30 March 2020 Mr Babic, who was described by the ET as the "controlling mind" of the Respondent, emailed all staff that he had been informed of a substantial shortfall in income from at least one client which was likely to be an industry-wide problem. He explained that on his accountant's recommendation it would be in everyone's interest for all employees to be furloughed. At this stage he envisaged all staff would be paid until the end of April 2020. He asked staff to accept the furloughed position and stated, "Moving forwards the furloughed position is that you are no longer working". By email the same afternoon, the Claimant accepted being furloughed and stated he would not undertake any further work from tomorrow, namely 31 March 2020, until he was told to return.

6. On 3 April 2020 there were various text messages exchanged between the Claimant and Mr Donaldson, a work colleague, Mr Babic and the Claimant, and conversations with Mr Babic and Mr Donaldson regarding the ongoing work on a project at the Prince Regent Lane ("the PRL project") which is described at paragraph 34 of the Judgment, including at (d) a text message from Mr Babic to the Claimant at 9:24am:

> "Ian
> David has just told me that your not working?
> We need PRL checked and kept up
> to date so that we don't have a
> reoccurrence of jan/feb problem?
> HHS?
> I welcome ur reply."

7. The Claimant's replied by text at 10:18am, which is the first protected disclosure relied upon by the Claimant, which is recorded at paragraph 34(i), stating:

> "Hi Mian from your email about putting us on the job retention scheme and from my own reading too my understanding is that I'm not allowed to work in this period. This is different from self employed people who get the money even if they do work but I don't want to cause any problems for you or I by working while you're claiming the grant. I believe David is still working on PRL? Kind regards Ian."

8. At paragraph 34(j), Mr Babic replied by text to the Claimant at 11:11am:

> "Noted and understand your position. Once c19 is sorted out there will b a time lag of 3-6 months which I will have to fund even though clients will not have money to pay me. Therefore I'll look after the staff who r looking after my business first? Enjoy your holiday."

9. At paragraph 34(k), which is the second protected disclosure relied upon, the claimant sent a text message at 1:59pm to Mr Babic:

> "Milan, I am thinking about your business. There is no option to continue working under the job retention scheme and if we break the rules and HMRC find out you risk having to pay back all of the grant money that they will give you for wages. Surely it's not worth taking that risk when you have self employed people that are still able to work during this time without it causing any problems."

10. At paragraph 34(l), at 2.10pm, Mr Babic replied by text:

> "It's your choice today but it will be mine later."

11. The ET made a finding at paragraph 39 of the Judgment that around early April 2020 Mr Babic was taking advice from his accountants regarding when he could reasonably expect to receive furlough money. The ET found that the advice he was given was that it was not likely that money would be received in April 2020 and it was reasonable for Mr Babic to act on that advice in the circumstances. Then at paragraph 40, the ET made a finding that in discussion with his advisers, Mr Babic determined that due to foreseen cash flow issues he had no option but to make redundancies. To release the most cash, he decided the best

solution was to make redundant the highest paid employees other than himself, being the Claimant and a Mr Poplett. The ET made a finding that that was a reasonable position for him to adopt in the developing circumstances.

12. On 7 April 2020 Mr Babic wrote an "at risk of redundancy" letter to both the Claimant and Mr Poplett. In the letter he highlighted the following matters, inter alia:

> "…Unfortunately, I am being told that the Government Coronavirus Job Retention grants are not going to be available for businesses to access in April as was anticipated. This means that if we keep all of the staff on furlough as employees, we would need to pay 80% of salaries not only for this month but probably for May and June as well. This is not a situation that the company can sustain as we simply do not have the cash flow to enable us to do this.
>
> It is therefore with regret that I am having to take very difficult decisions with regards to making certain staff redundant. Whilst I have not yet made a final decision I am placing you at risk of redundancy and need to speak to you urgently tomorrow (Thursday 9th April 2020) to discuss the possibility of making you redundant and whether there are any suggestions that you might have that would avoid this."

13. At paragraph 41, the ET recorded that an email was sent to all staff to consider whether they were prepared to take unpaid leave for two to three months, which was unsuccessful. At paragraph 42, there was a telephone conversation between Mr Babic, the Claimant and his wife, and the ET made findings about what was discussed, including at point (c) that Mr Babic explained that only the highest paid employees were in scope for redundancy as he did not consider it made sense to make those on lower salaries redundant, and that he had sufficient flexibility with the self-employed staff.

14. On 9 April 2020, Mr Babic emailed the Claimant attaching the letter of termination which was effective from 10 April 2020. On 14 April 2020, the Claimant emailed Mr Babic again raising concerns about redundancy and indicating a desire to appeal but there was no mention of his concerns about being dismissed for whistleblowing or making protected disclosures. On 14 September 2020 the ET claim was lodged by the Claimant.

The ET's Decision

15. Regarding the structure of the ET's decision, the ET identified the agreed issues at paragraph 8, the relevant law regarding the issues at paragraphs 10 to 21, made findings of fact at paragraphs 22 to 59, and the ET addressed the issues based on its findings of fact and reached its conclusions on paragraphs 60 to 84.

16. In summary, the ET concluded that the two protected disclosures relied upon by the Claimant were not qualifying disclosures and therefore all the claims failed on that basis alone (see paragraph 64). The ET went on to consider the issue of detriments and causation regarding dismissal. Regarding the section 47B detriments claim, the ET found five detriments proven but that none of the detriments based on its findings were on the grounds of the protected disclosures (paragraphs 74 to 75). Regarding the section 103A automatic unfair dismissal claim, the ET found that the principal reason for the Claimant's dismissal was redundancy (paragraph 79). Regarding the alternative section 105 automatic unfair dismissal claim, the ET found that the principal reason for the Claimant's selection for redundancy was because he was one of two of the highest earning employees and Mr Poplett was also made redundant (paragraph 83).

The Grounds of Appeal

17. There were four grounds of appeal, although there are a couple of sub-limbs of appeal under ground one. The first ground of appeal is that the ET incorrectly determined the issue of "likely" breach of legal obligation under section 43B(1)(b). Sub-limb (a) of ground one is that the ET made a finding about a subjective matter without having heard evidence about the Claimant's subjective belief. Sub-limb (b) is that the ET failed to consider whether it was probable that a legal obligation would be breached as per the guidance given in the guideline case of **Kraus v Penna Plc**. Sub-limb (c) is that the ET erred in law in considering only the

Claimant can breach a legal obligation when considering the obligation can be broken or is likely to be broken.

18. Ground 2 is that the ET failed to consider the guidance given in paragraph 37 of the Court of Appeal case of **Chesterton Global Ltd t/a Chestertons v Nurmohamed** regarding the public interest question. Ground 3 is that the ET made findings of fact contrary to the evidence, and ground 4 is that the ET failed to give adequate reasons.

19. As was conceded by Mr Frater, Consultant for the Claimant, there was no express challenge to the ET's findings regarding causation in respect of the Claimant's dismissal and/or selection for redundancy and/or causation regarding detriments. Significantly, in paragraph 9 of his skeleton argument, Mr Frater stated that the issue on appeal was whether the ET correctly determined whether the Claimant had blown the whistle, namely whether the disclosures amounted to qualifying disclosures.

20. At the sift stage Mr Andrew Burns KC sitting as a Deputy High Court Judge decided that grounds 1(b) and (c) and ground 2 were arguable. Regarding grounds 1(a), 3 and 4 he had serious reservations that they met the threshold regarding being reasonably arguable and/or whether they were simply makeweight arguments, but because they were intertwined with the grounds that he had permitted, he let the whole notice of appeal through.

The Law

21. The following statutory provisions are relevant. Section 43A of the Employment Rights Act 1996 ("ERA"), defines the meaning of a protected disclosure as follows:

> **"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."**

22. Section 43B defines qualifying disclosure so far as is relevant as follows:

> **"(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."**

23. As stated by His Honour Judge Auerbach at paragraph 9 of **Williams v Michelle Brown AM** UKEAT/0044/19, section 43B of the ERA has a number of elements to it:

a. There must be disclosure of information;

b. The worker must believe that disclosure is made in the public interest;

c. If the worker does hold such a belief, it must be reasonably held;

d. The worker must believe the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f);

e. If the worker does hold such a belief, it must be reasonably held.

24. In a case under section 47B(1)(b), it must be shown that the failure to comply was likely namely more probable than not, not just that it was a mere possibility - see paragraph 24 of **Kraus v Penna** [2004] IRLR 260 EAT.

25. As for the words "in the public interest", in **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731, the Court of Appeal in the well known judgment of Lord Justice Underhill at paragraphs 26 to 34 made four points about the approach that has to be taken in general:

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

> **textured. The parties in their oral submissions referred both to the 'range of reasonable responses' approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to 'the *Wednesbury* approach' employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative.**
>
> **29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.**
>
> **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, as pointed out at paragraph 17 above, the new ss.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."**

26. In **Chesterton**, Counsel for the claimant proposed a fourfold classification of the relevant factors whether the disclosure was made in the public interest, which the Court of Appeal held was a useful tool - see paragraphs 34 and 37. They were as follows:

a. The numbers in the group whose interests the disclosure served;

b. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

c. The nature of the wrongdoing disclosed; and

d. The identity of the alleged wrongdoer.

27. However, a failure to follow the guidance in **Chesterton** does not *per se* amount to an error of law - see the case of **Dobbie v Felton t/a Felton Solicitors** [2021] IRLR 679, His Honour Judge Tayler presiding, in particular paragraphs 28 and 43.

28. Turning to the question whether a dismissal was because of a protected disclosure and thus automatically unfair, section 103A of the Employment Rights Act provides that:

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

29. Section 105(1) of the Employment Rights Act provides:

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

30. The "separability principle" was discussed by Lady Justice Simler (as she then was) in the case of **Kong v Gulf International Bank (UK) Ltd** [2022] ICR 1513. A distinction is made between the protected disclosure of information and the conduct associated with it, or consequent on the making of the disclosure. Lady Justice Simler comprehensively reviewed the authorities, including the well-known case of **Fecitt** and endorsed the passages cited in them as the correct statements of law (see paragraph 56). At paragraph 57 she said:

> **"Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn."**

31. At paragraph 59 Lady Justice Simler said:

> **"The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way."**

Discussion and conclusions

32. Ground 1 limb (a) as originally drafted was that there was no evidence regarding the Claimant's subjective belief. This ground was abandoned by Mr Frater, the Claimant's

representative, in his oral submissions. He conceded that there was evidence before the ET regarding the Claimant's subjective belief. Mr Frater sought permission to amend the grounds of appeal and re-cast ground 1 limb (a) as follows, namely that the ET failed to consider the Claimant's subjective belief properly or at all. That application was opposed by the Respondent.

33. I refused permission to amend the grounds of appeal for the following reasons. It was a very late amendment arising during exchanges with me in response to Mr Frater's oral submissions this morning. There was no written application in support. There was no good reason for the delay. The fact that it was overlooked by Mr Frater was not a good reason. Clearly, there was evidence regarding the Claimant's subjective belief before the ET and significantly this point had been raised by the Respondent in its Reply to the appeal. Further, the re-casted ground was, with respect, hopeless. This was now a perversity ground. The Claimant's case on perversity fell far short of the overwhelming case required to establish perversity. It was clear that the ET made a finding of fact at paragraph 35 that the Claimant had no subjective belief that the disclosures were made in the public interest, which they repeated at paragraph 65(d) of the Judgment, and that the only interests that the Claimant had in mind were those of himself and the Respondent. In my view, those were entirely permissible findings.

34. Dealing with ground 1 limb (b) which is "the **Kraus v Penna** point", this ground also fails for the following reasons. It is common ground that the **Kraus v Penna** point and whether it was probable that the legal obligation would be breached did not feature in the Claimant's submissions before the ET. Further, it is trite law that a failure to set out a relevant legal principle does not necessarily mean that there has been a substantive error in the ET's decision and its reasoning, unless it can be shown to have resulted in a substantive

error of law - see **Simpson v Cantor Fitzgerald Europe** [2021] ICR 695 at paragraphs 30 to 32. Here, there is nothing to suggest in the ET's determination whether the Claimant had a reasonable belief turned on the question whether a future breach of a legal obligation was a mere possibility, rather than a probability. In fact, in the Claimant's witness statement before the ET at paragraph 26, he referred to being concerned that if he did not draw Mr Babic's attention to his understanding of the furlough rules and the consequences of breaching them, that Mr Babic might ask other staff to break the law too. This suggests a mere possibility or risk of a future breach rather than a probability, which falls short of the standard required. Therefore, even on the Claimant's own case, the case of **Kraus v Penna** does not assist him.

35. The third limb of ground 1 also fails. It was accepted by the Respondent that in an appropriate case, a qualifying disclosure can be established by reference to a reasonable belief that a legal obligation can be breached by someone other than the Claimant. However, in my view, that situation did not arise on the facts before the ET. The high point of the Claimant's case before the ET was that Mr Babic might ask other staff to breach the furlough rules as well, not that he was disclosing information that he believed tended to show that it was likely other employees would break or be asked to break the furlough rules. In any event, at paragraph 35 of the Judgment the ET rejected the Claimant's evidence that he was actually concerned that Mr Babic might ask other staff to break the law if the issue was not highlighted to him, which was a permissible finding for the ET to make.

36. Finally, I deal with paragraph 25 of the Claimant's skeleton argument and the submission that Mr Babic was in breach of the furlough rules. This point was not referred to expressly in the Claimant's grounds of appeal and the issue was not explored with Mr Babic in evidence before the ET in any event. For all these reasons, ground 1 of the appeal is dismissed.

37. Ground 2 is the "**Chesterton** point". Given the Claimant was unsuccessful regarding ground 1 in relation to the qualifying disclosure issue, ground 2 namely the public interest issue is academic. I deal with ground 2 in any event. Ground 2 also fails for the following reasons. It is clear from paragraph 17 of the Judgment that the ET referred to **Chesterton** and stated that the question whether a worker reasonably believed that the disclosure was in the public interest involves two stages: the Claimant's subjective belief and whether that belief was objectively reasonable. The ET also set out the factors referred to by Lord Justice Underhill in paragraphs 27 to 29 of **Chesterton**. Accordingly, it is clear that the ET had in mind the correct legal principles regarding the public interest question.

38. Moreover, in **DPP Law Ltd v Greenberg** [2021] IRLR 1016, at paragraph 58 the Court of Appeal held that where an ET has correctly stated the legal principles to be applied, an appellate tribunal or court should be slow to conclude that it has not applied those principles, and generally should only do so where it is clear from the language used that a different principle has been applied to the facts found. Here, it is not suggested that different legal principles were applied by the ET regarding the public interest question.

39. In addition, the ET found at paragraph 64(d) that the Claimant had no subjective belief that his disclosures were made in the public interest and the only interests the Claimant had in mind were those of himself and the Respondent. At paragraph 35, the ET rejected the Claimant's evidence that he had in mind at the time the wider public interest in avoiding taxpayer money being taken fraudulently if he, and others, worked on furlough. Accordingly, the ET found that the Claimant fell at the first hurdle, namely that he had not established a subjective belief. Therefore, there was no need for the ET to consider the objective element regarding whether the Claimant's belief in the public interest was a reasonably held one, and accordingly the section 47 factors in **Chesterton** were largely academic. For all these

reasons, ground 2 of the appeal is dismissed.

40. Ground 3 amounts to a perversity challenge regarding three specific findings of fact made by the ET. This, in my view, is an attempt to re-open the clear and permissible findings of fact made by the ET. It essentially is a re-run of the matters before the ET. The Claimant's case on perversity falls far short of the overwhelming case required to be established for perversity to be made out. I deal with each of the findings of fact challenged in turn.

41. The first is that the ET found that Mr Babic was not aware it was not possible to work on furlough. This, with respect, as was accepted by Mr Frater, the Claimant's representative, is a mischaracterisation of the ET's finding of fact in the second part of paragraph 34(c) of its Judgment. The ET found that Mr Babic genuinely believed at the time that the Claimant was dealing with a task at hand which would not be a problem under the furlough rules given the limited nature of the task required. This was not a finding of fact that Mr Babic was unaware that it was not possible to work on furlough. The task in hand as stated in paragraph 34(c), was the need to immediately deal with the PRL project issue to avoid a repeat of the delay to the project. This, as is clear from the first part of paragraph 34(c), is what Mr Babic meant by the words *"I can't believe it, he's refusing to work"*. Therefore, for these reasons the ET's finding at paragraph 34(c) was permissible and not perverse.

42. The second finding of fact challenged is the finding that the Claimant did not consider the public interest. As I have said, the ET found at paragraph 64(d) that the only interests that the Claimant had in mind were those of himself and of the Respondent. The reference to *"if we break the rules"* in the second protected disclosure relied upon, namely the text message at 1.59pm on 3 April 2020 was, in my view, equally consistent with the Claimant's interests and Mr Babic's. Significantly, it is also consistent with the ET's finding at the end of paragraph 35 that the messages were only concerned with the position of the Claimant and

the Respondent. Moreover, at the bottom of paragraph 35 of the Judgment the ET expressly rejected the Claimant's evidence that he was actually concerned that Mr Babic might ask other staff to break the law if the issue was not highlighted to him, and that the messages were, on their face, only concerned with the position of the Claimant and the Respondent. Accordingly, the ET's finding at paragraph 64(d) of the Judgment was clearly permissible and not perverse.

43. The third finding challenged under ground 3 was withdrawn by Mr Frater, the Claimant's representative, in his oral submissions before me and so I do not need to say anything further about it.

44. Ground 4 is the reasons challenge. Ground 4 fails for the following reasons. Looking at the judgment overall, the ET's Judgment was clearly **Meek** compliant. It is not difficult to understand why the Claimant lost. He lost because the ET found that none of the texts relied upon by the Claimant amounted to qualifying disclosures because of the Claimant's lack of reasonable belief that a legal obligation had been, was being, or was likely to be breached. He lost because the principal reason for dismissal was redundancy, not the protected disclosures. He lost because the principal reason for selection for redundancy was that he was one of the two highest earning employees and he lost because none of the five proven detriments were done on the grounds of the alleged protected disclosures.

45. Dealing with the specific criticisms raised in the grounds of appeal, the first criticism under inadequate reasons is Mr Donaldson's contemporaneous message, the text message at page 8 of the supplementary bundle, to the Claimant that read as follows, *"But you're going to get sacked whilst being at Loughborough"* (which was an acronym for furlough) *"if you're not willing to work"*. In fact, the ET addressed this matter at paragraph 37 of its Judgment. The ET said:

> "On Sunday 5 April 2020, Mr Donaldson raised concerns to the Claimant that he felt the Claimant's job was at risk. Specifically, Mr Donaldson expressed this was because the claimant was 'not willing to work' while on furlough."

46. That was Mr Donaldson's impression as found by the ET, who also found that he was the Claimant's friend - see the end of paragraph 37 of the Judgment. Significantly, the ET stopped short of making a positive finding regarding the discussion between Mr Babic and Mr Donaldson. At the end of paragraph 34(c)), the ET stated:

> "Whatever exactly was said between the two, Mr Donaldson formed the impression that Mr Babic was sufficiently angry that he might dismiss the Claimant for refusing to assist with the PRL issue."

47. However, it cannot be said that this finding had any significant impact on the decision to dismiss the Claimant and/or to select him for redundancy. The issue that the ET had to grapple with was what was in Mr Babic's mind regarding the decision to dismiss. In that regard the ET made a clear finding of fact that the reason for dismissal was not because of the protected disclosures but because of redundancy (paragraph 79) and that the principal reason for selection for redundancy was that the Claimant was one of the two highest earning employees (paragraph 83). These findings have not been expressly challenged by the Claimant in the grounds of appeal, and were permissible in any event. Accordingly, the ET gave adequate reasons regarding this issue.

48. The second matter under inadequate reasons and ground 4, is Mr Babic's comment (a) in the list of issues, *"It's your choice today but it will be mine later"*. The ET considered with care at paragraph 79 the reasons for the Claimant's dismissal and decided that the principal reason was redundancy. The ET also considered the Claimant's alternative case and found at paragraph 83 that the principal reason for the Claimant's selection for redundancy was that he was one of the two highest earning employees. These findings have not been challenged by the Claimant and were permissible in any event.

49. Further, the ET also recognised the need to give careful scrutiny regarding the change in the Respondent's position from the length of service being the criteria in the ET3 and Mr Babic's witness statement to the Claimant being the highest earner, but found that this did not undermine its conclusion regarding causation – see paragraph 84. The fact that the Claimant was the highest earning employee and the Respondent's financial position were the factors that the ET found were the principle reasons for the Claimant's selection for redundancy (see paragraph 83).

50. Although the ET accepted at paragraph 67 that Mr Babic's comment in the text message dated 3 April 2020 constituted a detriment, it also found at paragraph 75 that this was because of Mr Babic's anger and frustration regarding his perception of the Claimant's inflexibility in relation to assisting in resolving a discrete work issue regarding the PRL project. There was no challenge to the ET's finding at paragraph 75. In my view, it was clear on a fair and proper reading of the ET's decision that it was drawing a distinction between the Claimant's prior messages and his conduct, namely his perceived lack of flexibility in relation to dealing with the PRL project, which was separable from any alleged protected disclosures (which were not found in any event). Significantly, at paragraph 12 of the Judgment the ET expressly referred to the decision in **Kong** regarding the separability of the reasons.

51. In conclusion, for all these reasons, all the grounds of appeal fail. I can find no proper basis to intervene with the ET's decision and therefore the appeal is dismissed.