IN THE COURT OF APPEAL

Appeal Court Ref No: A2/2018/1773

BETWEEN

Edwin Jesudason

Appellant/Claimant

-and-

Alder Hey Children's NHS Foundation Trust

Respondent

Appellant's re-Revised Skeleton Argument 13 November 2019

1. This re-revised skeleton argument is presented following the reconsideration on 5 November 2019 by Lord Justice Bean of that part of the Order of Lord Justice Bean sealed on 28 October 2019 which had initially refused the Appellant's application to present the same bundle to the Court of Appeal as used at the Employment Appeal Tribunal (EAT). The List of Issues and 3 pages from Mr Ahmed's ET1[1] are attached.

2. In addition to the Core Bundle, the parties are relying upon the same bundle which was before the EAT with sections labeled B, C, D, E and F. References to that bundle are in the format [***Bxx***]. Reference to the Core bundle are [***xx***]. References to paragraphs in the ET Reasons are [ET, para xx] with the corresponding page number in bold.

Background and History

3. The Appellant presented claims of whistleblowing detriment and dismissal and race discrimination in the Employment Tribunal (ET)

[1] This was in the Supplementary Bundle previously produced for the Court of Appeal

against the Respondent by ET1 claim forms dated 3 October 2014[2], 29 December 2014[3], 1 September 2015[4] and 16 October 2015[5] [***159-186***]. The first instance decision, which is the ultimate subject of the appeal, is that of the Liverpool ET (full panel, chaired by EJ Robinson). A List of Issues (attached) was prepared for the Tribunal; the Tribunal hearing took place in February 2016 and a reserved Judgment and Reasons were sent to the parties on 26 May 2016 [***87-120***]. The ET found against the Appellant.[6] A number of Grounds of Appeal were contained in a Notice of Appeal to the Employment Appeal Tribunal 'EAT' submitted on 6 July 2016 [***84-86***]. HHJ Eady in a judgment sealed on 2 March 2017, following a preliminary hearing, gave the Appellant permission to proceed on some of those Grounds[7]. The hearing before the EAT (full panel, chaired by Soole J) took place on 17 to 19 April 2018 and the reserved judgment was sealed on 6 July 2018 [***43***, ***44-83***].

4. The factual history of the matter is summarised along with the issues in the first instance ET hearing between paragraphs 4 and 10 of the EAT judgment dated 6 July 2018 [***46-49***]. An Outline Chronology prepared for the EAT is at [***40-42***].

The Nature of an Appeal to the CA from the EAT

5. The Court of Appeal granted permission to appeal on all six grounds on 20 December 2018. It decided they have "real prospects of success" [***83a***]. The restrictions on 'second appeals' to the Court of Appeal in rule 52.7 introduced by the Access to Justice Act 1999, s 55 do not apply to appeals from the EAT.

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[2] No 2403083/2014
[3] No 2404270/2014
[4] No 2407601/2015
[5] No 2408026/2015
[6] A victimisation claim was dismissed upon withdrawal
[7] summarized below at para 38 of this document

6. In appeals from the EAT, the Court of Appeal is a second-tier appellate court and is primarily concerned with whether the decision of the ET was right, and primarily not with whether the EAT was right (*Hennessy v Craigmyle & Co Ltd* [1986] ICR 461; *Campion v Hamworthy Engineering Ltd* [1987] ICR 966). However, the Court of Appeal expressed some reservations about the correctness of this approach in *Gover v Propertycare Ltd* [2006] EWCA Civ 286, [2006] and therefore this skeleton argument will address the content of the EAT Judgment as well as the ET Judgment and Reasons.

The Judgment and Reasoning of the ET

7. The ET recorded that the Respondent had accepted that the Appellant had made the pre-June 2013 disclosures in good faith [para 6, ***89***] and that the Appellant had accepted that Professor Lewis did not see or read a copy of the PAC letter of 5 December 2013 [***D178-190***] B until after Professor Lewis had sent the GMC referral letter [***E27-31***] regarding the Appellant on 15 or 16 October 2013 [ET para 7, ***89***]. It was not conceded that Professor Lewis was *unaware* of the letter (although the tribunal made a specific finding to that effect at [ET paras 136 to 138, ***105-106***]).

8. The tribunal referred to the Scott Schedule [***130-142***] and agreed list of issues (LoI) [attached] [ET para 8, ***59***]. The Scott Schedule listed the alleged detriments and race discrimination. The LoI listed:

   a. the alleged protected disclosures (at section 2 – 2.1 to 2.10);
   b. the alleged detriments (at section 5 – 5.1 to 5.11); and
   c. the alleged race discrimination (at section 7).

9. The tribunal was confused about the subjective elements of the tests which it had to apply:
   a. At paras 4.6 [***88***], and 18 [***90***] in setting out the questions which the tribunal must address, the tribunal has incorrectly cited the

law. The question of 'public interest' introduced on 23 June 2013 is not (as the tribunal appeared to think) "was the disclosure made in the public interest" but rather whether "in the reasonable belief of the worker making the disclosure" was it "made in the public interest" [Section 43B(1) ERA 1996]. This error appears clear from the rest of the tribunal's reasoning at ET paras 19 [***90***] (where reasonable belief is introduced separately from the reference to public interest in ET paras 18 [***90***] and 95 [***101***];

b. At ET para 93 [***101***] the tribunal concluded that "the disclosures 2.6 to 2.10 on the agreed list of issues are not protected disclosures and are not saved by section 43G because the failures to which the claimant referred had been put right and were unlikely to recur". The tribunal failed to address the initial subjective element of the test (i.e. whether the Appellant reasonably believed that the information disclosed, and any allegation contained in it, are substantially true);

10. The tribunal find that the Appellant "made some telling points which ultimately the RCS uphold as criticisms of the department" [ET para 53, ***94***] and "there were some pertinent points, however, which needed to be dealt with and made uncomfortable reading for the DPS as a whole" [ET para 61, ***96***]. The RCS report is referred to at ET paras 62 to 68 [***96-97***]: "The Trust was criticised for being too defensive and too quick to try to rebut the allegations rather than consider them dispassionately." . . . "there had been a breach of confidentiality" . . . "criticised the Trust's whistle-blowing policy overall" . . . "The main conclusions of the report did confirm that the methods of surgical consents were not outside the national parameters, and that the department did not fall below the general standard of acceptable practice, but that in five of the 20 cases that they reviewed care was sub-optimal and clinical governance weak." . . . "The overall conclusion of the report is that the practice of the hospital was safe. The report

was thorough and dealt with all the claimant's concerns, although Mr Jesudason did not think so."

11. The RCS report clearly did not find that the Appellant's allegations were "completely without foundation" which is what Sir David Henshaw falsely said in his letter of 22 October 2013 [**E10-11**] [ET paras 34 and 36, ***92***].

12. The tribunal also found that "The GMC concluded that Mr Jesudason's concerns were not baseless" [ET para 162, ***109***] and "that the claimant's concerns were not contrived later for some other purpose" [ET para 164, ***109***].

13. The Appellant having withdrawn the victimisation claim, the tribunal had to come to conclusions on claims of post employment detriments by reason of protected disclosure and direct race discrimination.

14. The tribunal concluded that disclosures prior to December 2012 established the Appellant as a whistle-blower [ET para 78, ***99***] but that the disclosures identified from 10 September 2013 [set out at ET para 80, ***99***] were not protected under section 43G ERA 1996 [ET paras 79-93, ***99-101***] save that the 5 September 2013 disclosure to the CQC was protected [ET para 79, ***99***] and [ET paras 94-95, ***101***].

15. The tribunal concluded that no detriment was suffered by the Appellant and that the treatment of the Appellant was not on the ground that he had made a protected disclosure [ET paras 223-229, ***116-117***]. At ET para 228 [***117***] the tribunal found that "the detriments set out in 5.3, 5.4, 5.5, 5.8, 5.9 and 5.10 of the list of issues were not connected to any whistle-blowing by the claimant 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".

16. The tribunal dealt with what it considered to be "the 16 specific claims of direct race discrimination" [ET para 171, ***109***] and concluded that "there is no race discrimination claim that can succeed" [ET para 222, ***116***]. The Appellant's race discrimination case was not addressed at all and there is no indication that the tribunal, having considered individual matters, took a step back and considered the race discrimination claim as a whole. Inferences may be drawn not only from the specific incidents and acts detailed in the Appellant's claim taken in isolation but also from the full factual background of the claim, including evidence about the conduct of the respondent before and after the act about which the complaint is made (*Rihal v London Borough of Ealing* [2004] IRLR 642, CA, para 31).

17. The date of 19 December 2012 is significant – because that is when the Appellant's employment terminated and he signed a compromise agreement. It did not however change the nature of his protected disclosures before that date (the status of which is not in dispute). The tribunal could not have found that the CQC Protected Disclosure of 5 September 2013 [***D178-190***] was the *only* disclosure that could be relied upon. The pre-December 2012 disclosures are still protected disclosures and any detrimental action towards the Appellant on grounds of those disclosures amounts to post employment detriment – including the 30 March 2009 [***D1-14***] and 4 January 2011 disclosures which are pleaded by C, for example in C's 2nd claim form [ET paras 52(i), (ii), ***212***]; and which are specifically referenced by the Tribunal as being 'protected' [ET paras 53 (end) ***94***, 54 ***95***, 77-78 ***98-99*** and 226 ***117***]. There is no reason for the use of the word 'but' at the start of the ET para 79 [***99***].

18. The CQC disclosure [***D178-190***] was the only *new* protected disclosure – a point that the ET seem to have overlooked when analysing whether the alleged detriments took place because of the protected disclosures [ET paras 226 and 229 ***117***].

19. Both the 30 March 2009 [***D1-14***] and the 4 January 2011 disclosures referred to the treatment of Mr Ahmed as did the CQC disclosure of 5 September 2013 [***D178-190***], by this point including the new allegation that there had been a cover up.

20. Mr Shiban Ahmed is very much at the heart of this dispute.

Mr Ahmed was not an academic consultant

21. There is a useful list of the consultants in the department of paediatric surgery (DPS) involved in the history of this matter in the RCS report at [***B159***]. It is not in dispute between the parties that Mr Ahmed was an NHS consultant – not an academic consultant – this was an important factual error made by the Tribunal which may have led to other errors [paras 49 & 51 ***94***, 59 ***95***, 176 ***110***].

False rumours about Mr Ahmed's mental health

22. A couple of days after Mr Ahmed raised concerns to the Respondent, on 29 January 2009, Mr Jones wrote to the Clinical Director for Surgery making a number of accusations against Mr Ahmed including about his state of mind [***B49-50***].

23. The Appellant's 30 March 2009 [***D1-14***] protected disclosure was triggered by the treatment of Mr Ahmed [see ET para 46 ***93***] and a significant disclosure within that protected disclosure was that Mr Ahmed, himself a whistleblower, had been suspended on unclear grounds and that Mr Baillie and Mr Jones had been spreading rumours that Mr Ahmed had mentioned suicide with no evidential basis at all. The Respondent appeared to do nothing in response to the March 2009 disclosure which the RCS report found 'difficult to understand' [***B173 at para C4.1***].

24. Mr Ahmed brought a claim against his employers which included the accusation of a false assertion that Mr Ahmed had mental health issues and that he would be subjected to psychiatric assessment [***B79***].

25. The Respondent did not disclose the Appellant's protected disclosure of 30 March 2009 [***D1-14***] in the Ahmed case. Mr Ahmed disclosed a redacted version and *then* the Respondent showed the full version to its witnesses – including the Appellant's colleagues. The ET [at ET para 63 ***96***] notes that the RCS criticised the Respondent for this. The RCS report states that "the content was treated primarily as allegations to be rebutted in legal proceedings" [***B173, para C4.2***].

26. Mr Baillie on 5 September 2010 [***B87***] in response to the Appellant's assertions in the 30 March 2009 [***D1-14***] protected disclosure accepted that he had told Mr Jones that Mr Ahmed had considered suicide.

27. Mr Jones in September 2010 [***B92***] in response to C's assertions in the 30 March 2009 Protect Disclosure [***D1-14***] stated "I am accused of having concerns that Shiban might be a suicide risk. This is true: I certainly did.". That is the <u>first</u> account by Mr Jones. His document includes a reference to "the many documents submitted to these proceedings" – which is a reference to the Ahmed Tribunal case.

28. Neither of those letters were disclosed by the Respondent in Mr Ahmed's case. That is surprising.

29. In their witness statements for the Ahmed case, neither Mr Baillie on 13 September 2010 nor Mr Jones on 14 September 2010 admitted that they had made those assertions about suicide. That is the <u>second</u> account by Mr Jones.

30. The 2011 RCS report [***B165***] did not itself address the Appellant's accusation about false assertions about Mr Ahmed and suicide or indeed the matters raised by Mr Ahmed in general.

31. As further information become known to the Appellant over time and given the lack of any investigation into this issue, the Appellant went on to make disclosures about false assertions about Mr Ahmed's mental health and an attempt to cover this up in the 4 January 2011 disclosure; the 5 November 2012 disclosure [***D169***], the 8 December 2012 disclosure [***D170-171***], the 5 September 2013 CQC disclosure [***D178-190***] and the s43G disclosures.

32. The Respondent did not investigate the accusation about false assertions about Mr Ahmed and suicide. The Respondent's witness, Louise Shepherd accepted this at the hearing of C's Tribunal claim. However on 23 July 2014 in a letter to the BMA [***E32-33***], Sir David Henshaw refuted any suggestion that C's colleagues were involved in covert suicide claims and states that "there were no authors of a suicide claim". He cannot have known this given that there was no investigation.

33. On 27 October 2014 [***B233 & 236***], Mr Jones attached another version of his 2010 letter to a signed w/s submitted to the GMC at 'MJ3'. He states in the w/s at para 17 [***E42***] that to the best of his recollection he started the letter in September 2010 and completed the letter after the conclusion of Mr Ahmed's ET (i.e. in October 2010). He states that MJ3 is a response to the Appellant's March 2009 submission (a protected disclosure). He states further that his letter contains nothing that related to the claims made by Mr Ahmed and at para 19 [***E43***] that Mr Ahmed's allegations did not include any allegation that he had been unfairly suspended because he had been deemed to be suicidal. The letter at MJ3 [***B233 & 236***] is different to the letter from September 2010 [***B89 & 92***] in that at para 1 the reference to "the

many documents submitted to these proceedings has been removed"[8] and at what is now para 10 (formerly 11) the words "I certainly did" are removed[9]. By now, the letter includes a new paragraph 12 listing examples where Mr Jones alleges the Claimant breached GMC guidelines [***B236-237***]. This is the third account by Mr Jones.

34. When challenged to explain these changes, Mr Jones responds on 25 March 2015 [***B231-232***] : "With regard to [the Claimant's] allegations: my letter of 2010 was written and re-written over the course of several days (if not weeks). This is the fourth account by Mr Jones. After being challenged over the metadata from an electronic version of the letter, Mr Jones accepted in his witness statement to the Appellant's tribunal dated 8 December 2015 at para 5 [***B261***] that the two letters were different. He now suggested that MJ3 had been modified by him in 2011 / 2012. This is the fifth account by Mr Jones.

35. In his oral evidence, Mr Jones said that there had been several drafts of the letter, that it was under constant revision because he was under continuous attack and that he wanted "redress"; that it might have been amended in 2013 and 2015; and that he was angry and included the new paragraph 12 (alleging breaches of GMC guidance) because he wanted to "up the ante" against the Claimant [***B385, 397-398***]. This was the sixth account by Mr Jones.

36. The Respondent has been asked to supply the meta-data to the letters from Mr Jones[10] (enabling the Appellant to ascertain the dates on which the documents were created and modified) but has refused to do so.

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[8] C suspects that this was done to enable the document to be presented as something that was brought into being unconnected with the Ahmed ET

[9] C suspects that this was done to tone down the enthusiasm which the first document suggests for such an assertion

[10] an electronic version exists as [***B231***] makes clear

37. This history certainly suggests that it was reasonable for the Appellant to be concerned and to raise concerns about the treatment of Mr Ahmed. Those concerns had not been investigated by any external body prior to the ET hearing.

The Grounds of Appeal permitted to proceed to a full hearing at the EAT

38. HHJ Eady permitted the following Grounds of Appeal to proceed:

a. *Ground 1* – whether the ET erred in finding that the Appellant was not subjected to a detriment in relation to the alleged detriments at 5.3 to 5.6 and 5.8 to 5.10 in the LoI;

b. *Ground 2* – whether the ET has erred in failing to find that detriments 5.3 to 5.6 were because of the disclosures;

c. *Ground 3* – whether the ET had failed to make findings in relation to issue 5.10 (the actions of Mr Jones);

d. *Ground 4* - whether the ET erred more generally in not finding that the detriments were because of the disclosures in that it failed to ask itself if the various communications were made in a detrimental manner because of the disclosures;

e. *Ground 5* – race discrimination – whether the tribunal looked at the list of 16 matters from which inferences could be drawn and treated it as a list of alleged discriminatory acts rather than addressing the 11 matters between 5.1 and 5.11 and asking whether those were discriminatory

f. *Ground 6* – perversity or failure to take two relevant matters in to account when determining that the Appellant could not rely on section 43G ERA 1996 (restricted to (i) the Ahmed cover up and (ii) the leak of the RCS report).

37. Sensibly, HHJ Eady took Ground 6 first – given that some of the other Grounds relied on the success of Ground 6. At the full hearing in the EAT, this approach was also followed.

39. The EAT dealt with Ground 2 together with Ground 4 on causation.

Cross Appeal

40. The Respondent Cross Appealed on two issues:

a. *Status* – whether the Tribunal had adequately dealt with the Respondent's argument that the Appellant, following his resignation, was making disclosures not as a former employee but as a 'campaigner';

b. *Time limits* – it is common ground that if the Appellant were to be successful, the tribunal would need to provide a fully reasoned consideration of whether some or all of the claim was out of time and if so whether time should be extended.

The Judgment of the EAT

40. The EAT rejected all of the arguments put on behalf of the Appellant. The Grounds which were permitted to proceed to the EAT full hearing are referred to below in the order that they were dealt with by the EAT.

The Grounds of Appeal

Ground 6

41. The tribunal's conclusion that the disclosures did not come within section 43G ERA 1996 is at ET para 93 [***101***]. As stated above, the tribunal failed to initially consider the subjective element of the relevant tests. More fundamentally the tribunal's conclusion was perverse in that it ran contrary to the clear evidence in front if it.

42. The relevant parts of section 43G state:

> *43G Disclosure in other cases*
> *(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, or
(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.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43. The ET concluded at para 90 [***100***] that "The seriousness of the relevant failure the claimant was claiming had diminished because they were old allegations on which the RCS had already reported." It is accepted that the test for perversity is a high hurdle but the tribunal's

decision was not a permissible decision open to it on the evidence before it which included:

a. That the elements of the disclosures relating to the allegation that the Respondent had concealed information and misrepresented the true position in Mr Ahmed's case were not part of the RCS report given that (1) the RCS report expressly said so [***B165***]; and (2) the letters relied on by the Appellant as evidence in this matter, emerged only after the RCS investigation 16-19 May 2011 and its report;
b. The Appellant's assertion that he had concerns that the Respondent had mishandled his complaints, including that the RCS report had been leaked [this was not addressed by the Tribunal];
c. The Tribunal's finding at ET paras 34 and 36 [***92***] that the response from Sir David Henshaw on 22 October 2013 overstated matters in suggesting that the Appellant's complaints were completely without foundation also referred to at ET para 112 [***103***] – and in relation to Ms Shepherd's repetition of the same untrue comment at ET para 121 [***102***] – and in relation to Mr Turnock's repetition of the same untrue comment at ET para 129 [***105***];
d. Louise Shepherd's admission in oral evidence that she has not investigated the Ahmed issue at (a) above [***B394***] - which was not addressed by the tribunal;
e. Mr Turnock and Mr Kenny's admission in oral evidence that a number of cases and issues like hypospadias and the Storz report were not dealt with by the RCS. These are matters where risk accrues over time to those patients and / or those with similar diagnoses - this was not addressed by the Tribunal;

f. More complaints and protected disclosures were made (by others) in later 2013 [***B217***] and the CQC rated the hospital high risk (failing it on 4 out of 5 standards) in 2014[11].

44. On a fundamental level, section 43G appears particularly likely to provide protection to an individual who has made disclosures to his former employer and to prescribed bodies and where not all of the matters alleged in those disclosures have been investigated or where there is concern about cover up. In such circumstances, for the tribunal to conclude that failures in relation to such 'uninvestigated' matters had been 'put right' is perverse.

(i) EAT on Ahmed Cover Up

44. Focusing on para 90 of the ET Reasons [***100-101***], the EAT at paras 33 to 62 [***55-60***] concluded at paras 37 to 47 that the 'Ahmed cover up' allegation was not put to the ET as part of the Appellant's case on s43G and that therefore he was (impermissibly) now seeking to argue on appeal a matter that had not been sufficiently argued before the ET. The key finding is in the EAT judgment at para 47 [***59-60***]. The EAT came to this conclusion despite the numerous references to the Ahmed cover up in relation to whistleblowing in the LoI [attached] and submissions on the basis that there was insufficient focus in the reasonableness section of the submissions and no reference to the point raised on appeal as to whether the RCS had considered all matters of concern.

45. In addition, at paras 48 to 62, the EAT concluded that there was no basis to believe that this point would have assisted the Appellant on the issue of section 43G reasonableness because the Ahmed ET1 referred to mental health issues and not suicide. In fact, the Ahmed

[11] http://www.bbc.co.uk/news/uk-england-merseyside-26841489 The CQC report was in the trial bundle

ET1 [***S8-10***] refers to suicide (a specific mental health issue) while his Scott Schedule [***B79***] broadens this complaint to mental health issues of any type.

46. The EAT's reading of the List of Issues ('LoI') and submissions is not the most natural reading. The centrality of the Ahmed matter to the entire case brought by the Appellant is self-evident from the numerous references in the LoI and Submissions. Sadly suicide or suicidal intent frequently arises in relation to those with other mental health issues. But suicide or suicidal intent is itself a mental health issue. Any division is artificial.

(ii) EAT on Leak of RCS report

47. At paras 63 to 66 [***65-66***] the EAT rejected the argument that this was raised at the ET on the issue of reasonableness (as opposed to detriment).

48. Clearly this matter could not have been dealt with *in* the RCS report. It was not therefore something that had been investigated. This was something that was raised by way of submissions and it was not dealt with by the ET, which was an error of law on its part.

Ground 1: Detriment

49. The ET's conclusion at paragraph 135 [***105***] that nothing in the Respondent's correspondence caused a detriment to Mr Jesudason is unsound.

50. 'Detriment' is not defined in the ERA 1996. Section 47B ERA 1996 provides protection from any detriment: there is no test of seriousness or severity and the provision could well be breached by detrimental action that seems very minor to an objective observer. In *Ministry of Defence v Jeremiah* [1980] ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage'

(26B-C), while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment' (31A-B).

51. The Appellant complained that the ways in which statements and rebuttals were made by the Respondent (going on the attack against the Appellant, overstating the situation with regard to the RCS report, denying the existence of letters mentioning suicide, altering evidence against him to the GMC) rather than a restriction to the facts, were detriments. The Respondent's rebuttals were clearly designed to portray the Appellant as irrational, vexatious, dishonest and incompetent. Despite the tribunal's own findings at ET paras 34 & 36 [***92***], 112 [***103***], 121 [***104***] and 129 [***105***] that the Respondent's reference to the Appellant's complaints having been investigated and found to be "completely without foundation" was 'overstatement' (i.e. untrue), the findings by the tribunal went no further than that the Respondent was seeking to protecting the Trust and its employees' reputations [ET para 91 ***101***] or to put the record straight [para 228] or to defend itself [ET paras 122 ***104***, 134 ***105***, 218 ***115***, 227 ***117***] – but the tribunal have not analysed the *manner* of those defences and whether that manner amounted to repeated detriment. Making false claims and assertions to external bodies is clearly detrimental.

52. The EAT at paras 67 to 75 [**66-68**], making reference to ET paras 224 [***116-117***], 113 [***103***] and 120 [***103-104***] of the ET's reasoning, concluded that this was a question of fact for the tribunal to determine and that the tribunal's finding that no reasonable employee would have considered these comments to be detrimental was one that was open to it.

53. Whilst the EAT is of course correct that questions of fact are for the ET to determine, there were weaknesses in the EAT's reasoning in this

regard and a failure to properly engage with the arguments made on behalf of the Appellant.

54. The ET found that the communications in detriments 5.8-5.11 (ET para 134 **105**) were merely the Respondent defending itself. The ET correctly identifies at ET para 112 [***103***] the parts of the communications which C considers detrimental and effectively finds that R's comment about each of the allegations having been investigated and found to be completely without foundation is untrue ('overstated'). Interestingly – as the tribunal identify at ET paras 119 [***103***] and 123 [***104***], the communication to the media [***E20***] doesn't use that phrase 'completely without foundation' – only those communications which C would not have immediate access to – to MPs [***E10-11***], the BMA [***E32-33***], the GMC [***E8-9*** *&* ***E27-31***]. That reinforces the undermining effect of such communication. At para 127 [***104***], the ET does not make a finding as to whether what Sir David Henshaw says to the BMA about the Ahmed case is true or not. We then need to go to ET para 223 [***116***] to find that ET concludes that there is no detriment and to ET para 224 [***116-117***] and the conclusion that "no reasonable worker would consider the comments . . . as detriments". No reasonable ET could have come to that conclusion without having made a finding (one way or the other) about the veracity of Sir David Henshaw's statement.

55. The ET's finding is perverse – on the ET's own findings of fact the Respondent was clearly defending itself by suggesting that the Appellant was vexatious on "a number of occasions", irrational "completely without foundation" and dishonest – when the Appellant asserts that things have not been investigated. It is that *manner* of the defence, (which includes assertions which are untrue) which is capable of amounting to a detriment to the Appellant.

56. The EAT have accurately set out the argument made on the Appellant's behalf at paras 72 to 74 [***67-68***] – in summary that the Respondent made untrue assertions to 3rd parties; that the test for detriment is light (*Ministry of Defence v Jeremiah* [1980] ICR 13 at 26B-C and 31A-B). However, the EAT then fails to properly engage with the perversity argument and goes so far as to say that this is an 'unimpeachable' question of fact at the end of para 75 [***68-69***]. The EAT have not addressed how it could not be perverse for the ET to have found that an untrue assertion to a 3rd party by the Respondent about matters having been investigated in response to a claim by the Appellant that those matters had not been investigated would not diminish the Appellant in the eyes of the 3rd party and therefore amount to a detriment. The Respondent was telling 3rd parties that the Appellant's portrayal of the narrative was wrong. That is self evidently detrimental.

Ground 3: Detriment 5.10

57. Paragraph 5.10 of the List of Issues states:

> *Whistleblowing: alleged detriments*
> 5. Was the C subjected to the following alleged detriments by the R on the ground that he had made one or more of the protected disclosures identified in 1 above by:
> . . .
> 5.10 27.10.14: MJ providing a false and misleading statement against C to the GMC;

58. The ET at para 132 [***105***] describes what the alleged act of Mr Jones was, but does not go on to make any finding as to whether Mr Jones had acted as alleged (i.e. whether the information provided was false and misleading) and if so why that false information had been supplied. It wasn't open to the tribunal to conclude (as it does at ET paras 134 and 135 [***105***]) that the trust was defending itself and that

the correspondence did not cause a detriment to the Appellant, without determining the fundamental part of the claim, which was that Mr Jones allegedly provided a false and misleading statement against the Appellant to the GMC. The tribunal's error of law is at least a failure to provide reasons, but more fundamentally appears to be a failure to address the issue placed before it for determination.

59. This matter is dealt with in paras 76 to 84 of the EAT's judgment [***69-71***]. At para 83, the EAT accepts (as did the Respondent) that the ET did not make an express finding on the contention that Mr Jones had made an alleged 'false and misleading witness statement'. However the EAT did not uphold this ground of appeal on the basis that the tribunal's unequivocal acceptance of Mr Jones' evidence in the context of the alleged suicide claim is consistent only with the conclusion that he was a reliable and honest witness.

60. This is an example of the EAT impermissibly 'filling in the gaps' in the ET's reasoning. The EAT can utilise a mechanism (known as the *Burns/Barke* procedure), whereby it can ask a Tribunal to clarify its reasoning in relation to any matter that is unclear but the EAT is not a fact finding tribunal and cannot extrapolate from a finding about the suicide claim, to assume a witness' reliability on other matters or that those matters would have been determined by the Tribunal in a particular manner.

Grounds 2 and 4: Causation

61. The tribunal should have gone beyond the question 'why did the Respondent make these rebuttals?' to ask 'why did the Respondent make these rebuttals in this way?'. That amounts to an error of law in failing to address the case placed before the tribunal. The tribunal's finding at paragraph 228 [***117***] appears to be that the statements relied on at paras 5.3 to 5.5 of the List of Issues were not related to the PAC/CQC letter [***D178-190***] (the CQC letter having been found to be a

protected disclosure) but to statements made by the Appellant to other bodies. This is perverse and the reasoning is not adequately explained. In particular the rebuttal at paragraph 5.3 of the list of issues was written directly in response to the protected act(s) (as was the rebuttal at paragraph 5.6 of the list of issues).

62. At paras 85 to 94 [***71-75***] the EAT summarises in part the arguments made on behalf of the Appellant but then concludes on Ground 2 at para 90 that this ground rests on a fallacy that the letter of 5 September 2013 [***D178-190***] is to be treated as if it were a protected disclosure by virtue of it being copied to the CQC; and on Ground 4 at para 93 that the Tribunal did consider the motivation and purpose behind the various rebuttal communications.

63. The Appellant's argument on Ground 2 did not rest on the letter of 5 September 2013 being treated as if it were a protected disclosure by virtue of it being copied to the CQC. The EAT failed to engage with the very arguments made on behalf of the Appellant which it summarised in part. It was clearly argued that the <u>tone</u> of the 'rebuttal' letters was influenced by all of the protected disclosures (which dated back to prior to December 2012 and included the CQC letter of 5 September 2013 [***D178-190***] and that the ET had not specifically dealt with that. Both the ET and the EAT have restricted themselves in looking at e.g. a rebuttal to the BBC solely in the context of any disclosure by the Appellant to the BBC; and both the ET and the EAT have restricted themselves by looking at the reason for the fact of a rebuttal – rather than the manner or tone of that rebuttal. The ET needed to address whether the previous disclosures (which the ET accepted were protected disclosures) and the Respondent's resulting view of the Appellant as a thorn in its side was responsible for the Respondent's false portrayal of the Appellant as irrational, vexatious and dishonest in its various communications with 3rd parties. The ET failed to do so.

64. On Ground 2, it was accepted by the Appellant that paragraphs 5.8 to 5.10 of the Tribunal List of Issues are dependent on the Ground 6 s43G argument succeeding but in relation to issues 5.3 to 5.5 and 5.6, these communications all appear to make reference to the letter of 5 September 2013 [***D178-190***] (which is a protected disclosure). The EAT did not engage with this instead attempting in its conclusions to (wrongly) re-characterise the arguments made.

65. On Ground 4, it was argued that the ET had failed to ask why these rebuttals were made in the form that they were and why they sought to portray C as irrational, dishonest and vexatious? The EAT concluded at para 93 [***74***] that the motivation and purpose behind these documents was at the heart of the proceedings and that the ET had accepted the Respondent's evidence as to motivation. Particular reference is made to ET para 224 [***116-117***]. However ET para 224 itself reveals a failure on the part of the ET to consider whether any *previous* protected disclosure was providing motivation to Professor's Lewis or whether the tone of the communications as opposed to the fact of them were on grounds of the disclosures made.

Ground 5: Race Discrimination

66. Section 7 of the agreed list of issues stated:

> *Race discrimination: less favourable treatment*
> 7. Was C subjected to any of the alleged detriments because of his race?
> 7.1 Would a hypothetical white comparator have been subjected to the detriments?
> 7.2 Is it appropriate to infer that the C's race was a significant influence in his treatment by reference to:
> 7.2.1 the existence of an "in/out club";
> 7.2.2 Mr Baillie's email mocking protected characteristics;
> 7.2.3 Trust witness statements condoning this;

7.2.4 the lack of prompt remedial action on (ii) and (iii);

7.2.5 the Alder Centre Report;

7.2.6 R's view, recorded by the CQC, that the findings of (v) above were "fairly standard stuff" for an organisation of 3000+ employees;

7.2.7 R's suppression of (v) at a cost in excess of £50,000;

7.2.8 the lack of prompt remedial action on (v) and (vi);

7.2.9 the concealment of (v) from the RCS and CQC;

7.2.10 the RCS report substantiating racist incidents;

7.2.11 the lack of prompt remedial action on (ii), including the failure to seek support from BME Networks or other similar expertise, despite requests;

7.2.12 C's colleagues' response to allegations of racism: their umbrage and denial, rather than support for investigation;

7.2.13 the continuing failure by the department to appoint and retain BME trainees in proportion to potential recruits;

7.2.14 the treatment of SA;

7.2.15 the failure to look into the allegation that a consultant used the phrase "brown faces";

7.2.16 the examples of professional jealousy against the C set out in March 2009 and the failure to address them?

7.3 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 unjustified claims by the C?

67. The tribunal expressly addressed the issues at 7.2.1 to 7.2.16 as if those were “16 specific claims of direct race discrimination” [para 171, **109**]. However the Scott Schedule and the list of issues make it clear that the Appellant’s case was that his race made it more likely that he would be victimised for whistleblowing. The tribunal made no findings on this allegation (save potentially in relation to Professor Lewis at paras 220 and 221 [***116***]).

68. In consequence, the tribunal failed to construct the correct hypothetical comparator – despite the Appellant's witness statement having set out in paragraphs 320-328 [***B378-381***] a number of evidential comparators where questions of probity had been raised but who had been treated differently. For each, detailed evidence was provided via page references. Had the Tribunal examined these documents, it could not reasonably have concluded at e.g. para 212 [***115***], that the Appellant never formally raised discrimination.

69. The tribunal also made odd findings and came to a very odd conclusion at ET paras 49 & 51 ***94***, 176 & 177 ***110*** and 182 ***111*** that the reason for any division in the DPS was because of a division between academic surgeons and NHS surgeons. The tribunal's finding is factually wrong (Mr Ahmed was not an academic surgeon) but more importantly for the purposes of the appeal, the three people identified by the tribunal – the Appellant, Mr Ahmed and Mr Losty are all not white British. That is a matter that required to be given more significance by the ET and could have formed the basis for the drawing of inferences.

70. At ET paras 219 [***115-116***] and 236 [***118***], the Tribunal conclude that anyone raising issues in the way the Appellant had, would have been dealt with in the same way. This fails to engage with the credit given to the Appellant by the CQC and GMC in raising his concerns [***B225, 240-255***]. It fails also to use the available evidence to construct a relevant comparator. For example:

a. On learning of the Appellant's disclosures, Mr Baillie wrote to HR acknowledging the breadth of the safety problems but then advocating they respond using the GMC as the Trust's "chief weapon" against the Appellant [***B88***]. Mr Baillie has not been treated in the same way as the Appellant, even though the Appellant's disclosures have never been written in such terms.

b. Forty-eight hours after Mr Ahmed complained about his clinical governance, Mr Jones wrote a scathing letter about Mr Ahmed's "state of mind", making multiple further allegations [***B49-50***]. He failed to disclose this letter to the Barnes investigation or the Ahmed Tribunal. Mr Jones has not been treated in the same way as the Appellant, even though the Appellant stood by his concerns.

71. At paras 95 to 119 of its judgment [***75-81***], the EAT accepted that the ET had erroneously treated the list of 16 factors from which an inference could be drawn as specific claims of race discrimination but rejected the appeal on the basis of para 219 of the ET Reasons [***115-116***] where a general comment is made about race discrimination. What the ET should have done was to identify what matters were said to be discriminatory, then look at them initially one by one, that exercise having been competed, take a step back and look at them en masse. This ET didn't do any of that and went off on a journey of its own. In addition the EAT fails to adequately engage with the Appellant's arguments about the credit given to the Appellant by the CQC and GMC in raising his concerns and on the construction of a relevant comparator [***B225, B240-255***].

Conclusion

72. If the Appellant is successful, given the fundamental nature of the errors of the ET, he wishes the matters successful on appeal to be remitted to be dealt with by a fresh tribunal. It appears that the original ET judge has since retired.

Andrew Allen
Outer Temple Chambers
13 November 2019