Appeal No. UKEAT/0867/04

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 28 June 2005
Judgment delivered on 26 September 2005

Before

THE HONOURABLE MR JUSTICE SILBER

MR P JACQUES CBE

MR S YEOBAH

MR PATRICK MILNE — APPELLANT

THE LINK ASSET AND SECURITY COMPANY LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Nicholas Randall Instructed by Lovells, Atlantic House, Holborn Viaduct, London EC1A 2 FG
For the Respondent	Mr Christopher Quinn Instructed by Aldridge Parker, 27, Austin Friars, London EC2N 2QP

SUMMARY

1. Claims for unfair dismissal based on (a) constructive dismissal and (b) the whistle blowing provisions in sections 43B and 103A of the Employment Rights Act 1996.

2. In the appeal on claim (a), the main issue is whether the appellant was constructively dismissed. The Employment Tribunal found that there was no breach of a fundamental term of the appellant's contract of employment as a result of the suspension of the employee and the way in which disciplinary proceedings were conducted. The main Ground of appeal was perversity but in the light of **Yeboah v Crofton** [2002] IRLR 634, the appeal fails as there is no "overwhelming case" that no reasonable Employment Tribunal could have reached the decision of the Employment Tribunal in the present case although many other Employment Tribunals might well have found that there had been breach of a fundamental term of the appellant's contract of employment.

3. In the appeal on claim (b), the employee relied on various errors by the Employment Tribunal in categorising the purpose of the whistle blowing but the appeal has to be dismissed because of the unchallenged findings of the Employment Tribunal on the absence of good faith and of reasonable belief on the part of the employee as well as the lack of causal link between the whistle blowing and the resignation of the employee.

4. Appeal against costs order against employee in relation to the whistle blowing claim dismissed as the Employment Tribunal was entitled to make the order in the light of its findings.

THE HONOURABLE MR JUSTICE SILBER:

I. Introduction

1. Patrick Milne ("the Appellant") was employed from 30 September 1999 until 22 December 2003 as a Broker and Manager for the UK Equity FTSE options desk by The Link Asset Security Company Limited ("the respondents"), which carried on business as among other things a brokerage firm negotiating trades on derivative products.

2. The appellant made an application to the Employment Tribunal complaining that he had been constructively dismissed and that his dismissal was unfair whilst also claiming that his dismissal was automatically unfair under the whistle blowing provisions of sections 43 B (1)(b) and 103A of the Employment Rights Act 1996 ("ERA ").

3. By a decision which together with the extended reasons ("the Reasons") was sent to the parties on 17 September 2004, the Employment Tribunal found that: -

(a) the appellant had not been constructively dismissed by the respondents and so the unfair dismissal claim failed ("the unfair dismissal issue");

(b) the appellant had no whistle blowing claim under Part IV A of the ERA ("the whistle blowing issue") and

(c) the appellant should pay £5,000 towards the respondents costs ("the costs issue").

4. The appellant appeals against each of these conclusions and he now seeks an order that this matter be remitted to an Employment Tribunal for a hearing on each of these issues. We have had the benefit of helpful oral and written submissions from Mr Nicholas Randall, counsel for the appellant and from Mr Christopher Quinn, counsel for the respondents.

5. Before considering the submissions of the parties, it would be prudent to summarise the findings of the Employment Tribunal, which together with counsel, we have found difficult to analyse. In considering the submissions of counsel, we will bear in mind the statement of Waite LJ in **Jones v Mid-Glamorgan County Council** [1997] IRLR 685 in paragraph 30 of his judgment at page 690 with which the other members of the Court of Appeal agreed when he said that:-

> **"The guiding principle, when it comes to construing the reasons of the [Employment] Tribunal at an appellate level must be that if the [Employment] Tribunal has directed itself correctly in law and reached a conclusion which is open to it on the evidence, the use in other passages of its reasons of its reasons of language inappropriate to the direction it has properly given itself should not be allowed to vitiate the conclusion unless the relevant words admit of no explanation save error of law"**

II. The Facts found by the Employment Tribunal

6. The respondents operated for some of their employees a trust benefit tax scheme (" EBT"), which was a matter of some concern for the appellant and this now forms the basis of his whistle blowing claim.

7. The appellant signed up to the EBT after first he had received information from BDO Stoy Hayward, a firm of accountants who were responsible for giving advice on the appropriateness or otherwise of this EBT, and second he had discussed it with his wife who had experience in Human Resources matters. The Employment Tribunal found that the appellant

was not required to join the EBT and that he was not put under an unacceptable pressure to participate in the EBT.

8. The appellant was suspended from his job by the respondents on 12 December 2003 pending the holding of a disciplinary meeting on 17 December 2003. As we will explain, the Employment Tribunal were very critical about first the decision of the respondents to suspend the appellant prior to that meeting, second the absence of any investigation before the disciplinary meeting and third the failure of the respondents to afford the appellant a full opportunity to state his case or to answer specific allegations because he did not know about them till the hearing itself.

9. The Employment Tribunal found that at the disciplinary meeting held on 17 December 2003 various historic issues some of which related to performance and some of which related to conduct were mentioned without any focus.

10. According to the Employment Tribunal, the appellant did not go to the second proposed meeting on 19 December 2003 but instead he chose to resign. It noted that the appellant wanted to avoid the embarrassment of dismissal given the high profile of his job. The Employment Tribunal rejected the contention of the appellant that the respondents had fabricated evidence against him because of his opposition to the EBT. The Employment Tribunal said in paragraph 13 of their Reasons that they felt that the respondents "were trying to resolve the position amicably if that was possible..” The Employment Tribunal observed in relation to the appellant-who was then the applicant-in paragraph 12 of their Reasons that:

> **“..the applicant had not been dismissed at the time he resigned and we do believe that the respondents were genuine as to their concerns as the applicant's conduct and performance. This is a case where the respondents were disorganised in the way in which they dealt with client complaints, employee complaints and the proposed restructuring which they referred to**

> **as "sectorisation". Whilst it may have been the case that the applicant was going to be dismissed (for instance, on 17 December, the minutes referred to the fact that the applicant's blatant denial made his position unfixable) and it is understandable that he choose to leave this was ultimately his decision. We have to ask ourselves, before we can consider any issue as to the fairness or unfairness of the dismissal, whether or not there has been through the applicant's procedure and conduct, been a fundamental breach of the applicant's contract of employment. We do not think there has been".**

So the decision of the Employment Tribunal was that there was no dismissal or breach of the public interest disclosure provisions with the result that the appellant's claims failed.

III. The Unfair Dismissal Claim

(i) The appellant's submissions

11. Mr Randall submits that the Employment Tribunal erred-

(a) when deciding whether or not the appellant had resigned or had been constructively dismissed that they had to consider and to take into account the appellant's whistle blowing claim:

(b) by finding that the respondent had not committed a fundamental breach of the appellant's contract of employment and that in so doing the Employment Tribunal took into account irrelevant features:

(c) when considering why the appellant had resigned and in particular if it was in response to a fundamental breach of contract committed by the respondent.

12. Each of these submissions is disputed by Mr Quinn, who submits that the Employment Tribunal were entitled to find that the appellant was not constructively dismissed essentially for the reasons considered by the Employment Tribunal and that in any event this Appeal Tribunal

cannot hold that the Employment Tribunal's decision was perverse. We now turn to consider each of the appellant's submissions in turn.

(ii) Submission (i) (The Employment Tribunal erred when deciding whether or not the appellant had resigned or had been constructively dismissed that they had to consider and to take into account the appellant's whistle blowing claim)

13. Mr Randall submits that when considering the issues as to whether or not the appellant had resigned or had been constructively dismissed, the Employment Tribunal apparently considered that they had to consider the appellant's whistle blowing claim and that this was an error on their part. It is, he says, to be found in the Employment Tribunal's assertion in paragraph 2 of its Reasons that:

> "*The first issue before us was therefore whether the [appellant] resigned or was constructively dismissed, although this inevitably involved consideration of the reasons for the [appellant's] departure and consideration of his whistle blowing claim"*

14. This approach in our view fails to take account of the fact that the appellant made it clear both in his application to the Employment Tribunal and in the accompanying "Particulars of Claim" that he was claiming separate remedies first for "unfair dismissal" and second for "automatically unfair dismissal under s 103A [of the ERA]", which is dismissal because of whistle blowing. These were two separate claims requiring proof of separate matters and each of these two claims had to be considered separately by the Employment Tribunal. We are not satisfied that there is any merit in this complaint of the appellant because first it is clear from the Employment Tribunal's approach to the constructive dismissal claim in paragraphs 12 and 13 of its Reasons to which we will refer in greater detail in paragraphs 18 to 30 below that it considered the constructive dismissal claim as a discrete claim. The second reason for that conclusion is that the appellant had contended in his witness statement, which he adopted in evidence as his examination-in chief that the reasons for the Respondents' behaviour to him,

which formed the basis of the constructive dismissal claim was "the fact that I had raised concerns about the tax scheme" and that this was "the trigger for the Respondent's behaviour", which forms the basis of the claim for constructive dismissal.

15. Even if we are wrong and there is force in Mr. Randall's submission set out in submission (i) then for the reasons explained in **Jones'** case to which we referred in paragraph 5 above, this error of the Employment Tribunal does not automatically mean that it erred in finding there was not a constructive dismissal as there might well have been other findings of the Employment Tribunal, which would have enabled it to conclude there had been a constructive dismissal of the appellant by the respondents. That exercise requires consideration first of what has to be shown before an Employment Tribunal can find that there has been a constructive dismissal and second whether the Employment Tribunal reached findings on these points, which have been contaminated by the error of considering the claims in the way which we have described in paragraphs 13 and 14 above or by any other error so that they can be properly challenged.

16. It is common ground between the parties that in order for an employee to be able to claim constructive dismissal, the employee must prove on a balance of probabilities that: -

(a) there was an actual or anticipatory breach of the contract of employment by the employer;

(b) this breach of contract of employment constituted a *fundamental* breach of the employee's contract of employment;

(c) the employee must have resigned in response to the breach and not for some other unconnected reason or in other words, the fundamental breach of the contract of employment was the "effective cause of the [employee's] resignation" (see **Jones v F.Sirl and Son (Furnishers) Ltd** [1997] IRLR 493, 494 paragraph 10) and

(d) the employee must not have delayed too long in terminating the contract in response to the employer's breach of the contract of employment .

17. It is common ground between counsel and is correctly accepted that the respondents acted in breach of its contract of employment with the result that requirement (a) above is satisfied. Although the Employment Tribunal did not make a finding in respect of requirement (d) above , Mr Quinn also accepts correctly in our view that in the words of his skeleton argument "this issue had it fallen for consideration by the Tribunal would have been resolved in [the appellant's] favour". Thus the issues that have to be resolved and which are in dispute between the parties on this appeal are those set out in requirements (b) and (c) above. The submissions of Mr. Randall which we have numbered (ii) and (iii) in paragraph 11 above deal respectively with each of those points.

(iii) Submission (ii) (Did the Employment Tribunal err by finding that the respondent had not committed a fundamental breach of the appellant's contract of employment and that in so doing the Employment Tribunal took into account irrelevant features?)

18. As we have already explained, the Employment Tribunal found that there was no fundamental breach though they made serious criticisms of the respondents in paragraph 12 of the Reasons where they stated that: -

"We therefore turn to the issue of the [appellant's] constructive dismissal claim.

It appears to us that the Respondent did not follow a fair process of dealing separately with their concerns as to the appellant's performance and conduct. In particular, the disciplinary meeting of 17 December breached many rules of fairness. There was no disciplinary and grievance procedure within the Respondent company and this is an omission as far as we were concerned, as even smaller companies should have such a scheme. The Respondent say they did get legal advice so they said in trying to follow the ACAS code of conduct which if they did we were surprised at the fact that they failed to follow it in such a material way. There was no justification for suspending the [appellant] prior to the disciplinary meeting of 17 August[this is accepted as an error for 17 December] and there was no full investigation allowing the facts to be established before the disciplinary meeting took place. No written statements were obtained and the [appellant] clearly did not have the full opportunity to state his case or answer specific allegations because he did not even know about them until the hearing itself. He was not advised that dismissal was a possible sanction and in our opinion could certainly not have had a fair appeal given that all shareholders and directors were involved in the disciplinary action that was being considered".

19. Mr Randall contends that the Tribunal erred in law in finding that the respondents had not committed a fundamental breach of the appellant's contract of employment because on the facts found by the Employment Tribunal, he contends that the only *permissible* conclusion open to it was that the respondents had acted in fundamental breach of the appellant's contract of employment. Mr Randall also submits that the Tribunal erred in law in taking into account at paragraph 13 of its Reasons the expressed genuine motives of the respondents when considering whether or not there had been a fundamental breach of contract as he contends that the test for breach of an implied term of trust and confidence is an objective one with the result that the respondents' subjective motivation is irrelevant. We will explain in paragraph 31 below why we are unable to accept the submission set out in the last sentence but we will now concentrate on the appellant's core submission, which is that the only *permissible* conclusion open to the Employment Tribunal was that the Respondent had acted in breach of a fundamental term of the contract of employment.

20. In support of his contention Mr Randall points out that the Employment Tribunal found (with the appropriate paragraph numbers of the Reasons inserted in brackets after each sub-paragraph) that:-

(a) "the respondent did not follow a fair process in dealing separately with their concerns as to the [appellant's] performance and conduct”[12];

(b) "in particular the disciplinary meeting on 17 December had breached many rules of fairness"[12];

(c) “there was no discipline or grievance procedure within respondent company and this is an omission as far as we were concerned as even smaller companies should have such a scheme"[12];

(d) there was no justification for suspending the [appellant] prior to the disciplinary meeting of 17 August (sic)"[12] but all counsel agree that this date was a typing error and the date should be 17 December 2003;

(e) “there was no full investigation allowing the facts to be established before the disciplinary meeting took place"[12];

(f) "no written statements were obtained and the [appellant] clearly did not have the full opportunity to state his case or answer specific allegations because he did not even know about them until the hearing itself”[12];

(g) "[the appellant] was not advised that dismissal was a possible sanction and in our opinion could certainly not have had a fair appeal given that all shareholders and directors were involved in the disciplinary action that was being considered"[12]

(h) “we do recognise in that in this case the respondent is to some extent the architect of their own situation because the procedure under which the [appellant] was disciplined were clearly flawed and so to use common parlance they are hardly ‘whiter than white’ even though the [appellant] has made what we regard as totally unreasonable complaint about the whistle blowing one”[16].

21. Mr. Quinn says that in order to see the complete picture, the Employment Tribunal found as facts and then also took into account that when the respondent decided to resign by his letter of 22 December 2003 that he

> **" ..was still in his job, he was still in charge of the desk, his remuneration was unaffected and on the face of it the respondent was keen to ensure that [the appellant] stayed and was even trying to ensure it if possible (even though they may have felt ultimately it was not going to happen)…. the unfairness of the respondent's procedure did not make his position untenable though it may have done at a later date depending on what the respondent did after that time" (paragraph 13 of the Reasons).**

22. In other words, the Employment Tribunal thought that the appellant resigned before a fundamental breach of contract had been committed by the Respondent and so he was not dismissed. The Tribunal also said of the respondents in paragraph 13 of its Reasons that

> **"ultimately we feel that they were trying to resolve the position amicably if that was possible. It is not to say that we have no sympathy for the [appellant] because we do. We understand why he was frustrated and perhaps it is even understandable why he resigned but he did so voluntarily when he did not have to and as he did so there has been no dismissal"**

23. In essence, the main submission made by Mr Randall - that only *permissible* conclusion open to the Employment Tribunal on the facts found by them was that the respondent was in fundamental breach of the appellant's contract of employment- really amounts to a contention that the decision of the Employment Tribunal was perverse in that it did not find that the respondent was in fundamental breach of the appellant's contract of employment.

24. The task for an appellant, who contends that an Employment Tribunal reached a decision that it was not permissible for it to reach on the facts or that Employment Tribunal's decision is perverse is a very onerous one as it is only in extreme cases that an appeal can succeed on these grounds. In **Yeboah v Crofton** [2002] IRLR 634, Mummery LJ explained in a judgment with which the other members of the Court of Appeal agreed at paragraph 12 that:-

> **"When the principal ground of appeal is, as here, perversity of the decision of the fact-finding tribunal, there is an increased risk that the appellate body's close examination of the evidence and of the findings of fact by the Employment Tribunal may lead it to substitute its own assessment of the evidence and to overturn findings of fact made by the Employment**

> **Tribunal. Only the Employment Tribunal hears all the evidence first-hand. The evidence available to the Employment Tribunal and to the Court of Appeal on an appeal on a question of law is always seriously and incurably incomplete. Much as one, or sometimes both, of the parties would like it to be so, an appeal from an Employment Tribunal is not a re-trial of the case. The scope of the appeal is limited to consideration of questions of law, which it is claimed arise on the conduct of the proceedings and the Employment Tribunal. The legal points must, of course, be considered in the context of the entirety of the proceedings and the whole of the decision, but with an awareness of the limitations on the courts competence to question the evidential basis for findings of fact by the Employment Tribunal. It is a rare event for the appellate body to have all the documents put in evidence in the Employment Tribunal. No official transcript of the oral evidence exists. If an order is made for the production of the chairman's notes, it is usually on a selective basis, related to the particular grounds of appeal, which should always be particularised on a perversity challenge. Most important of all, none of the witnesses give oral evidence on an appeal".**

25. That reasoning is also applicable when it is contended that an Employment Tribunal reached a decision that it was not permissible for it to reach on the facts. Mummery LJ later set out in paragraph 93 of his judgment in **Yeboah** the approach to be adopted by an appellate body to an appeal on the grounds of perversity by an Employment Tribunal by stating with our emphasis added that:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and law, would have reached".**

26. Thus the appellant on this present appeal has to show *not only* that the Employment Tribunal reached a decision, which no *reasonable Employment Tribunal* on a proper appreciation of the evidence and law, would have reached *but also* that there was an *overwhelming* case to that effect. We stress that it is this second and additional requirement that there has to be an overwhelming case, which makes the task of the appellant on this appeal so difficult. To make good his argument, Mr. Randall submits that a breach of the implied term of trust and confidence will necessarily amount to a fundamental breach of contract and he submits that submission is borne out by the decision of this Appeal Tribunal in **Morrow v Safeway Stores** [2002] IRLR 9 especially at paragraph 23. We are prepared to assume that this submission is correct and so the issue on this appeal is whether the respondent acted in breach of the implied term of trust and confidence. More controversially he contends that in the words

of his written skeleton argument "a decision to suspend an employee without justification will be a breach of the implied term of trust and confidence". In support of that proposition, he relies on the decision of the Court of Appeal in **Gogay v Hertfordshire County Council** [2000] IRLR 73 in which it upheld a decision that the suspension of an employee in that case constituted a breach of the implied duty of trust and confidence.

27. Mr. Quinn points out convincingly that in **Gogay**, it was emphasised that the manner in which the suspension had been carried out and what had been said to the employee that had led to the decision on the facts of that case that the suspension of the employee were crucial factors in determining whether the suspension of an employee constituted a breach of the implied duty of trust and confidence. Hale LJ (as she then was) in giving a judgment with which Peter Gibson and May LJJ agreed said at page 709 in paragraph 55 of the judgment with our emphasis added that:

> **"Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. The conduct in this case was not only to suspend the claimant, but also to do so by means of a letter, which stated, "the issue to be investigated is an allegation of sexual abuse made by a young person in our care". Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The question is therefore whether there was ' reasonable and proper cause' to do this".**

28. In our view, the suspension of an employee does not *automatically* mean that the employer has acted in breach of the implied duty of trust and confidence and no authority as been cited to us which says otherwise. Indeed the judgment of Hale LJ, which we have just quoted, indicates and implies that suspension by itself does not constitute a breach of the implied duty of trust and confidence. In order to determine if a suspension constutes a breach of the implied duty of trust and confidence it is, however, necessary to consider the surrounding circumstances in which the suspension was imposed, which include what was said to the

employee about the circumstances justifying the suspension, the length of the suspension, whether the employee has lost any income because of the suspension, whether the employee has been replaced and whether the terms of the contract of employment require the employer to provide work for the employee (see **William Hill Organisation Limited v Tucker** [1998] IRLR 313) and the length of the suspension in determining if the implied term has been broken.

29. Returning to the facts of the present appeal, we consider that the present case is far removed from **Gogay** because there was not surprisingly no accusation made against the appellant of anything as serious as the allegation of sexual abuse made in that case. Indeed, it will be recollected that the Employment Tribunal in the present case noted that no charges had been made against the appellant. Mr. Quinn, who unlike Mr. Randall, appeared at the hearing before the Employment Tribunal explained that the appellant did not contend before the Employment Tribunal that his suspension constituted a fundamental breach of his contract of employment.

30. The Employment Tribunal made a number of findings, which show that the respondents had behaved badly and which we have set out in paragraph 20 above, but also it must not be forgotten that the Employment Tribunal found, as we have explained in paragraph 21 above, some factors, which mitigate the effect of the respondents' behaviour such as that the suspension had been short, that the appellant was still in his job, that he was still in charge of his desk, must be similar to his department, that his remuneration was unaffected , that on the face of it the respondents were keen to ensure that he stayed and were even trying to ensure it if possible, even though they may have felt ultimately it was not going to happen. The Employment Tribunal also found that "ultimately we feel that the [Respondents] were trying to

resolve the position amicably if that was possible" (paragraph 13 of the Reasons) and that "we do believe that the respondents were genuine as to their concerns as the applicant's conduct and performance" (paragraph 12 of the Reasons). We should also add that there was no finding by the Employment Tribunal that any of the appellants' subordinates, who worked for the Respondents, were aware of the disciplinary proceedings against the appellant even though that was canvassed in the evidence.

31. All these factors set out in the last paragraph are relevant and they provide some support for the contention that the respondents had not acted in breach of the implied duty of trust and confidence. In deciding if there has been a fundamental breach of the appellant's contract of employment committed by the respondents, we bear in mind the words of Mummery LJ , which we quoted in paragraph 24 and 25 above and in particular, we appreciate that we must resist the temptation to decide whether we would have found a fundamental breach as such an approach would constitute forbidden reasoning.

32. So we have considered with care if the appellant can succeed in establishing what Mummery LJ called the "*overwhelming case*" that *no reasonable Employment Tribunal* could have found that there was a fundamental breach of the appellant's contract of employment committed by the respondents. We have concluded after having considered all the Employment Tribunal's criticisms of the respondents' behaviour and also the able submissions of Mr. Randall that we cannot find such an "*overwhelming case*" that no reasonable Employment Tribunal could have found that there was a fundamental breach of the appellant's contract of employment committed by the respondents. For the avoidance of doubt, we appreciate that many other Employment Tribunals and perhaps the members of this Appeal Tribunal might have taken a different view if they had been sitting on the Employment Tribunal hearing the

appellant's application in the Employment Tribunal; they might well have held that there had been a fundamental breach of the appellant's contract of employment committed by the respondents but this will not assist the appellant. At the end of the day, the crucial fact is that the appellant cannot show an "overwhelming case" that that no reasonable Employment Tribunal could have found, as the Employment Tribunal did in this case, that there was a fundamental breach of the appellant's contract of employment, which has to be proved before his appeal can succeed.

33. In reaching that conclusion, we have not overlooked the complaint of Mr. Randall that the Employment Tribunal appears to have considered in paragraph 13 of the Reasons relevant and probative "the Respondent's wider motivation for the need for disciplinary action when considering whether there had been a fundamental breach of contract" (paragraph 6.3 of the Grounds of Appeal). Mr. Randall contends that the Respondent's motivation for starting proceedings was irrelevant to the issue of whether there had been a fundamental breach of the appellant's contract of employment committed by the respondents. It must not be forgotten that the case for the appellant in front of the Employment Tribunal was that the respondents were so upset about his behaviour in relation to the EBT that they treated him so badly that he was forced to resign. We believe that this meant that the Employment Tribunal was actually required or at least entitled to consider what the respondents' attitude was to the appellant on and after 12 December 2003. In any event, even if that was wrong, we consider that on a proper reading of the Reasons, the Employment Tribunal was trying to ascertain on an *objective basis* what were the intentions of the respondents to the appellant and that is a perfectly permissible approach to be adopted. Thus the Employment Tribunal was entitled to conclude first in paragraph 12 of its Reasons that the Respondents were genuine about as to their concerns about the appellant's conduct and performance and second in paragraph 13 of the Reasons that on the

face of it, the Respondents were keen to ensure that the appellants stayed and was even trying to ensure it if possible even though they might may have felt that ultimately it was going to happen. These were all significant findings on the relevant issues, which were made on objective bases.

34. The upshot of this is that in the light of the need for there to be "*overwhelming evidence*" that no r*easonable* Employment Tribunal could have found that there was not a fundamental breach of the contract of employment committed by the Respondents, the appellant is unable to show that the Employment Tribunal's finding that the respondents did not commit a fundamental breach of the appellant's contract of employment was perverse. In consequence the finding that the appellant was not constructively dismissed cannot be impugned by or interfered with by this Appeal Tribunal with the result that his appeal against the Employment Tribunal's dismissal of the unfair dismissal claim must inevitably fail. As we heard argument on the effective cause issue, we will now comment on it but very briefly, as it is only now of academic interest.

(iv) *Submission (c) (Was the breach of the appellant's contracts of employment "the effective cause" of his decision to resign?)*

35. This issue only arises if we were wrong in concluding that we could not interfere with the finding of the Employment Tribunal that the respondents had acted in fundamental breach of the contract of employment. The submission from Mr Randall on this issue was that the Employment Tribunal had failed to make a finding as to the reason why the appellant resigned and that instead that it relied on its own erroneous finding that there had been no fundamental breach of contract by the respondents when considering the reason for resignation. Mr. Randall

says that the Employment Tribunal failed to grapple with the issue of whether the respondents' conduct was "the effective cause" of his decision to resign

36. In paragraph 13 of its Reasons, the Employment Tribunal said of the appellant's decision to resign with emphasis added that "we are not *sure* why he did so at that time" .We are troubled by this statement because by using the word "sure ", the Employment Tribunal might possibly have been adopting a higher threshold or a more onerous burden than one of "balance of probabilities", which is the appropriate standard of proof on constructive dismissal issues as we explained in paragraph 16 above; Thus it may be argued that the Employment Tribunal did not ask itself the real question which is whether or not the breaches of contract by the respondents were shown on the balance of probabilities to be the "effective cause" of the decision of the appellant to resign.

37. It is unnecessary for us to reach a conclusion on this issue in the light of our decision that the Employment Tribunal that the respondents had not committed a fundamental breach of the appellant's contract of employment was not perverse and so his claim for unfair dismissal failed.

IV. The Whistle Blowing Issue

(i) The Statutory Provisions

38. In order to explain the submissions on this issue, we must now set out some of the relevant statutory provisions. Section 103 A of the ERA 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".**

39. A "protected disclosure" is defined in section 43A of the ERA as meaning:-

> **"…a qualifying disclosure (as defined by section 43(B) which is made by a worker in accordance with any of sections 43C to 43H"**

40. In order to ascertain what disclosures are "qualifying disclosures", it is necessary to bear in mind the provisions of section 43B of the ERA, which state insofar as is relevant that:-

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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…..**

41. As we explained for a disclosure to be "protected disclosure," it has to comply with among other matters section 43C of the ERA, which states insofar as is relevant, that:-

> **"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith-**
>
> **(a) to his employer, or……"**

(ii) The Appellant's Submissions.

42. An important submission for the appellant on the whistle blowing issue is that the Employment Tribunal erred in law in its approach to this claim because the appellant's whistle blowing claim was based upon section 43B (1) (b) of the ERA., which we will refer to as "1B". Under that provision, what that needs to be shown is that the disclosure tends to show "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject". This provision has to be contrasted to with the immediate preceding provision in section 43B (1)(a), which we will refer to as "1A", and which requires the disclosure to tend to show "that a criminal offence has been committed, is being committed or is likely to be committed".

43. There is according to Mr Randall a great difference between these two provisions because 1B means that the person committing the breach may well be doing something perfectly innocently while acting on good advice. Thus, it is said by Mr. Randall that a classic example of where 1B could be involved would be a taxation agreement, which is subsequently considered to be unlawful without any suggestion in that case of a criminal offence being or having been committed or of any nefarious conduct. We will assume that those submissions are correct.

44. The appellant contends that the Employment Tribunal has erred in failing to appreciate that his claim was brought under 1B and not under 1A. He first points out that at paragraph 10 of the Reasons although referring to 1A of the ERA, the Employment Tribunal specifically set out the test that they were applying, which was one which:-

> **"… required [the appellant] to have a reasonable belief that the non-deduction of tax and NI etc because of the EBT, was an offence that had been committed by the employer".**

45. This Mr Randall says is plainly wrong and it is a reference to 1 A and not 1 B. According to the appellant's submissions, it is then also necessary to look at the further reasoning of the Employment Tribunal because paragraph 11 of the Reasons also shows that the Employment Tribunal was indeed applying the criminality test in the following passage when it stated that:

> **"We have heard from the BDO Stoy Hayward representative on this and we accept the distinction between tax evasion and a scheme which is fully disclosed to the Inland Revenue and which is simply an attempt to avoid tax which the revenue has to consider and if necessary close the relevant loophole at a later date(which has in fact happened in respect of the type of scheme that is under discussion in this case or at least is about to happen ".**

46. Mr Randall says that if the Employment Tribunal was applying the correct test under 1B, the above passage would have been entirely irrelevant because as he stated in paragraph 27 (b) of his written skeleton argument:-

> **"the disclosure would not have to relate to a 'tax evasion' scheme at all for it to fall within section [1B]; it would simply have to be unlawful".**

47. Next Mr Randall, points out the Employment Tribunal states in paragraph 14 of its Reasons when dealing with the costs application made by the Respondent with his emphasis added that :-

> **" The Employment Tribunal had found that there was no reasonable belief of any illegality and that the applicant's concerns related principally to his own financial position"**

48. According to Mr Randall, this quotation illustrates that the Employment Tribunal was not directing itself properly in law. Section 1B clearly covers circumstances in which the legal obligation relates to the employee himself and, in the circumstances of this case, his tax. This, he says, is confirmed by the decision in *Parkins v Sodexho* [2002] IRLR 109. In the circumstances Mr Randall contends that it was perfectly legitimate for the appellant to be concerned about his own financial position in this context.

49. Mr Randall also says the fact that there was no compulsion placed on the applicant to enter the scheme is also entirely irrelevant to the questions, which the Employment Tribunal was required to consider. Thus he submits it follows that the Employment Tribunal has misdirected itself as to the correct legal nature of the appellant's whistle blowing claim and this is unsurprising in view of the fact that the respondent also wrongly sought to characterise the claim as an allegation of criminal conduct according the respondent's submissions on this issue to the Employment Tribunal at paragraphs 2 and 10 thereof .

(iii) The Respondent's Submissions

50. In response, Mr Quinn points out that in spite of these errors the Employment Tribunal did appreciate that the case of the appellant was based on 1B as appears from its statements in paragraphs 8 and 11of the Employment Tribunal's Reasons but it seems clear that there were unfortunate errors committed by the Employment Tribunal. Our task is now to ascertain in the light of the approach advocated in **Jones'** case, which we set out on paragraph 5 above, whether we should allow the appeal on the grounds advocated by Mr. Randall or whether Mr. Quinn is correct in contending that irrespective of the correctness of Mr. Randall's points, the whistle blowing appeal of the appellant is in any event doomed to failure in the light of the conclusions on factual issues reached by the Employment Tribunal and which are not being challenged on this appeal. It is only fair that at this juncture, we should record that in his written skeleton argument, Mr Randall acknowledged that:-

> **"it is accepted that the appeal in relation to the whistle blowing issues is less straightforward because of the Employment Tribunal's relevant findings on causation. The appellant contends that if he succeeds on the other issues the findings on causation should not be permitted to stand".**

(iv) Was there a qualifying disclosure?

51. Mr Quinn contends that there are three findings of the Employment Tribunal, which show that the appellant did not have the "reasonable belief" required by section 43B of the ERA for there to be a "qualifying disclosure". The complaint of the appellant in paragraph 5 of his Particulars of Claim, which accompanied the appellant's original application to the Employment Tribunal, was that he had expressed his concerns "about the legality of an offshore tax scheme involving payments into an employees benefit trust". Further in paragraph 6 of the same document it is said that the appellant "is therefore particularly concerned that he is being forced to stay in a tax scheme which is potentially illegal". The first finding relied upon by Mr.

Quinn is the Employment Tribunal's decision is the conclusion in paragraph 11 of its Reasons where it said of the appellant's alleged concern about the illegality of the EBT that:-

> **"We accept that the applicant was genuinely concerned about the effectiveness of the BDO Stoy Hayward tax avoidance EBT offered to higher employees but we do not believe that this amounted to a genuine belief that the scheme was illegal"**

52. Mr Quinn also relies on another finding of the Employment Tribunal in paragraph 16 of the Reasons in which it stated of the appellant's alleged concern about the illegality of the EBT that:-

> **"So looking at this closely whilst recognising [the appellant] clearly did have some concerns about the [EBT] scheme we certainly did not believe this was a genuine belief as to illegality of the scheme, we do think the whistle blowing claim was opportunistic. We do not feel the [appellant] has acted in good faith in bringing the claim and that the [appellant] has done so to put pressure on the employer through litigation which is obviously not the purpose of the legislation. We believe the claim was an afterthought and we are surprised that it was raised by [the appellant]"**

53. In our view, those findings together with the third relevant finding in paragraph 14 of the Reason that in respect of the appellant , "the Employment Tribunal had found that there was no reasonable belief of any illegality" mean that there could not have been a "qualifying disclosure" because in adopting the wording in section 43B of the ERA, any disclosure was not with our emphasis added

> **"Information, which in the reasonable belief of the worker making the disclosure, tends to show one or more of the following.."**

(v) Was the reason (if, more than one, the principal reason) for the appellant's dismissal that the employee made a protected disclosure?

54. Mr Quinn also argues that there is an additional reason why the whistle blowing appeal is doomed to failure and that is because the Employment Tribunal did not consider that the resignation of the appellant was caused by or connected with his behaviour in respect of the EBT.

55. The Employment Tribunal said in paragraph 11 of its Reasons that: -

> **"We do not believe that he was prejudiced because of this then or in respect of the employer's future conduct because, as we will explain below, we believe that the undeniable conflict and tension arising between the employer and employee was unrelated to the applicant's late opposition to the EBT. In this respect one further factor that has assisted us in reaching this conclusion is that the employee never mentioned his belief that his opposition to the tax scheme was a factor in the way in which he was treated either through the disciplinary process or when he resigned or even through his first solicitor's letter. Whilst we have already said that we would understand his lack of knowledge as to the legal significance of possible detriment through making a whistle blowing claim there is no reason why the fact of his concern should not have been highlighted in a more obvious way to the employers at an early stage. In any event we do not believe that there is a qualifying disclosure and therefore there is no protected disclosure and in any event we do not think that any future detriment suffered by the applicant (including this dismissal) was because of his ultimate reluctance to join the EBT."**

56. In our view, this conclusion of the Employment Tribunal shows that the appellant cannot rely on the protection under section 103A which is set in paragraph 38 above because he cannot show in the words of that provision that:-

> **"the reason (if, more than one, the principal reason) for the dismissal was that the employee made a protected disclosure"**

57. This conclusion of the Employment Tribunal is not a surprising conclusion because the letter of resignation from the appellant to the respondents does not refer in any way whatsoever to the whistle blowing or to the EBT as the Employment Tribunal pointed out in the passage quoted in paragraph 55 above.. The relevant part of the appellant's letter of resignation states that:

> **"In view of the way in which the Company has acted towards me over the past week or so I have no confidence that I will be treated fairly. I have therefore decided that in order to prevent any further damage to my reputation I am resigning with immediate effect"**

58. Thus, irrespective of any other errors by the Employment Tribunal, the whistle blowing claim was bound to fail because of the Employment Tribunal's undisputed findings that the appellant could not comply with the statutory conditions to which we have referred. Nevertheless we should explain that, contrary to Mr. Randall's submissions, although the

Employment Tribunal erred by referring to the claim being brought under 1A, our view is that it probably did actually appreciate that it was dealing with a claim brought under 1B and not one brought under 1A ; this point was made clear by the Employment Tribunal in paragraphs 8 and 10 of its Reasons where it refers to 1B of the ERA. In any event, much more importantly we do not think that even if the Employment Tribunal made the errors to which we referred in paragraphs 44 to 47 above, they do not in material way undermine or contaminate its findings that the disclosure was not a "qualifying" disclosure.

59. For the purpose of completeness, we should point out that as we have explained in paragraph 51 above, the complaint of the appellant to the Employment Tribunal was of concerns about the legality of the EBT. The Employment Tribunal then went on to find that in paragraph 14 "there was no reasonable belief of any illegality" and thus we do not think there is anything in this point.

60. At the end of the day the Employment Tribunal made findings, which have not been challenged and which show that the appellant cannot rely on the whistle blowing provisions and so his appeal on this issue must fail.

V. The Costs Issue

61. The Employment Tribunal made an award of costs against the appellant and in favour of the respondents by invoking paragraph 1 of Schedule 1of the Employment Tribunals (Constitution and Rules of Procedure) Rules 2001(SI 2001 1171), which provides that:-

> **"Where in the opinion of the tribunal a party has in bringing the proceedings, or a party or party representatives has in conducting the proceedings act vexatiously, abusively, disruptively or otherwise unreasonably or the bringing of the proceedings by a party has been misconceived, because the tribunal shall consider making and, if it so decides may make (a) an order containing an award against a party in respect of the costs occurred by another party.."**

62. Mr Randall contends that the Employment Tribunal erred in awarding costs because it made errors on the unfair dismissal and on the whistle blowing claims which formed the basis of its grounds of appeals on those claims but we have rejected those submissions. So we have only to consider his contentions that the award cannot be justified because the Employment Tribunal erred in paragraph 15 of its Reasons in taking into consideration its belief that it was unlikely that it would have had to hear the case at all if the whistle blowing claim had not been included and the case should have been settled. We are prepared to assume that this submission is correct but that will then require us to adopt the approach advocated in **Jones'** case to which we referred in paragraph 5 above and which requires us to analyse the relevant conclusions of the Employment Tribunal

63. So we bear in mind that the Employment Tribunal found that:-

(a) **"there was no reasonable belief [on the appellant's part] of any illegality" (paragraph 14 of the Reasons);**

(b) **"because of the whistle blowing element there was a larger amount of preparation in this case and there was and much a longer (sic) and much more expensive hearing because were (sic) more complex and evidence (sic) having to be bought on a number of issues which would not otherwise have been required" (paragraph 15 of the Reasons);**

(c) **"we certainly did not believe that this was a genuine belief as to the illegality of the scheme and we do think the whistle blowing scheme was optimistic"(paragraph 16 of the Reasons);**

(d) **"we do not feel that the [appellant] has acted in good faith in bringing the claim and that the [appellant] has done so to put pressure on the employer through litigation which is obviously not the purpose of the legislation" (paragraph 16 of the Reasons);**

(e) **"we believe that the claim is an afterthought and we are surprised it was raised by the appellant" (paragraph 16 of the Reasons and**

(f) **"we do not believe that it was appropriate claim to bring before the Employment Tribunal" (paragraph 16 of the Reasons).**

64. Thus the Employment Tribunal concluded by stating that :-

> **"in consequence we do think this is a (sic) appropriate case where costs should be awarded. We do so, because we think the claim was both brought and (in respect of the ongoing whistle blowing claim) conducted unreasonably and also that it was a misconceived claim"**

65. In our view, the Employment Tribunal was quite entitled to reach this decision to make a costs order against the appellant in the light of its findings which we set out in paragraph 61 above. We add that the alleged error relied on by the appellant and set out in paragraph 60 above does not contaminate the Employment Tribunal's conclusion to award costs against the appellant. There is no argument on the quantum of the costs order. Therefore the appeal on costs must be dismissed.

VI. Conclusion

66. Before parting with this case, we should add that it must be some consolation to the appellant to appreciate that Mr. Randall has made every point that could be made on his part and that he has conducted the appeal in a sensible and reasonable way.

67. For the reasons, which we have sought to explain, the appeal must be dismissed.