KILRAINE (appellant) v. LONDON BOROUGH OF WANDSWORTH (respondent)

UKEAT/0260/15/JOJ

[2016] IRLR 422

Employment Appeal Tribunal, (EAT)

800 *Employment rights*

895.3 *Protection against detriment – protected disclosure*

Employment Rights Act 1996: s.43C

For whistleblowing generally see from *Harvey* CIII [1] and for disclosure to an employer or other responsible person see *Harvey* [668.03]

The facts:

The employee, Ms Kilraine, worked as an education achievement project manager with the defendant education authority ("the authority"). She alleged that she had suffered a detriment by reason of making four protected disclosures during the course of her employment. The first alleged disclosure had been made in 2005 to a director of a company, Altec Inspections Ltd, to the effect that Ms Kilraine had been discriminated against by Ofsted inspectors on the grounds of race and religion, she being Irish and supposed by the inspectors to be Catholic. The second alleged disclosure was made in 2008 and related to Ms Kilraine reporting that there was a health and safety issue concerning a young child openly masturbating in class. The third alleged disclosure was in 2009 and concerned a report to the assistant director of children's services to the effect that the authority was failing in its legal obligations in respect of bullying and harassment. Ms Kilraine contended that there had been "numerous incidents of inappropriate behaviour" towards her following that alleged disclosure. The fourth alleged disclosure was a report in 2010 to the human resources officer at the education directorate that Ms Kilraine's line manager had not supported her when she had raised a safeguarding issue in relation to a school. Ms Kilraine was subsequently suspended pending a disciplinary investigation on the basis that she had raised unfounded allegations against a number of colleagues on a number of occasions. She was dismissed by reason of redundancy, following which she brought a claim before the employment tribunal alleging victimisation discrimination. The tribunal, in dismissing the claim, held, in respect of the first alleged disclosure, that it had not been made to Ms Kilraine's employer and was not, therefore, a protected disclosure within the meaning of the Employment Rights Act 1996. Although s.43C(1), which concerned a qualifying disclosure to an employer, had been mentioned in additional information added to the ET1, it was not pursued at the tribunal. Instead, it was contended at the tribunal that the first disclosure fell within s.43C(2) of the Act, which concerned disclosures to a person other than an employer, on the basis that the authority's whistleblowing policy authorised the disclosure. The tribunal rejected that contention and held that Ms Kilraine had failed to show that the first disclosure had been made in accordance with a procedure authorised by the authority. In respect of the second disclosure, the tribunal held that it had been made outside the three-month period prescribed by s.47B(3) of the Act or within a reasonable further period. Under s.48(4) of

the Act, where an act extended over a period, the date of the act in question meant the last day of that period. In the present case, the tribunal took the relevant date of the act to be the last day. The tribunal's decision was based on the view that the alleged detriment was Ms Kilraine's suspension and the conclusion that the suspension had not been a continuing act. The tribunal held, in any event, that the dismissal had not been caused by the alleged protected disclosure and that the reason for dismissal had been redundancy as alleged by the authority. In respect of the third and fourth alleged protected disclosures the tribunal relied on *Cavendish Munro Professional Risks Management Ltd v Geduld*, which held, in respect of the wording of the Act, which required a protected disclosure to be the "giving of information", that the ordinary meaning of giving information was the conveying of facts, and which highlighted the difference between an "allegation" and "information". The tribunal held

that the third and fourth alleged disclosures did not amount to protected disclosures within the meaning of the Act because they had not disclosed any information, but rather each amounted to allegations.

Ms Kilraine appealed, contending that, in respect of the first alleged disclosure, the tribunal had overlooked s.43C(1)(b)(ii) of the Act, which had not been advanced by her counsel at the tribunal, notwithstanding that it had been mentioned in her original further and better particulars. It was contended that that amounted to abandonment by Ms Kilraine of a point that she had taken, and fell foul of the principle in *Segor v Goodrich Actuation Systems Ltd*, which held that a tribunal should take care where a litigant sought to concede or abandon a point. It was contended, relying on *Glennie v Independent Magazines (UK) Ltd*, that the tribunal had discretion to permit the argument to be raised even if it had not been pursued below. Concerning the second alleged protected disclosure, it was submitted that the tribunal, in holding that the matter was out of time, had not approached the issue in accordance with s.48(4) of the Act, which provided that, where an act extended over a period, the "date of the act" meant the last day of that period. In respect of the third and fourth alleged disclosures, Ms Kilraine submitted that the tribunal had erred in finding that they had contained allegations and not information. Concerning the fourth alleged disclosure, an issue arose as to whether there had been a breach of any duty to make arrangements imposed on Ms Kilraine's line manager under s.11 of the Children Act 2004 and s.175 of the Education Act 2002.

The EAT (Mr Justice Langstaff) by a reserved judgment given on 26 January 2016 dismissed the appeal.

The EAT held:

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(1) The tribunal had not erred in respect of the first alleged disclosure. The failure to take a point of which there had been a note made in advance did not fall four square within that which was said in *Segor*. No discretion would be exercised to permit the matter to be argued at the present stage. It was plain that the way it had been argued had been a conscious and developed decision. The principles of finality were such that arguments should be taken before a fact-finding tribunal and not stored up later to be recited in appeal. There might be exceptions, however, there was nothing that could be classed as exceptions in the particular circumstances of the present case.

(2)The tribunal had taken the wrong approach with respect to its conclusion that the suspension had not been a continuing act. It was settled law that a disciplinary suspension was clearly an act extending over a period, within the meaning of the Act. Further, a suspension linked with disciplinary proceedings should be viewed as a whole and was to be regarded as an act extending over a period. The question was whether the tribunal's error invalidated its decision as a whole. The difficulty for Ms Kilraine was that the tribunal had heard all the facts and had concluded that, so far as the suspension was concerned, it had had nothing to do with the protected disclosure. The tribunal had found that Ms Kilraine had been suspended for the reason given by the authority, namely redundancy. That was a finding that had been open to the tribunal. Consequently, despite the tribunal's error of analysis, the claim could not succeed. It followed that the argument, so far as the second protected disclosure was concerned, would be rejected.

(3) In respect of the third alleged protected disclosure, the tribunal had been justified in concluding as it had. Taking the word

“inappropriate” away from the relevant sentence, it said nothing specific and was far too vague. It was difficult to see how what had been said alleged a criminal offence, a failure to comply with legal obligations or any of the other matters to which s.43B(1) made reference. Employment tribunals had to take care in the application of the principle arising out of *Cavendish Munro* and should not be too easily seduced into asking whether an alleged protected disclosure was information or an allegation when reality and experience suggested that, very often, “information” and “allegation” were intertwined. The question was whether the a given phrase or paragraph was one or the other. That was to be determined in the light of the statute itself. The question was simply whether it was a disclosure of information.

(4) The tribunal had been entitled to reject the fourth alleged protected disclosure as actually coming within the terms of the Act. On the facts, there was no obvious reason why what had been said by way of information, assuming it to be such, could fall foul of any duty under s.11 and s.175, even if they had been in the mind of Ms Kilraine at the relevant time. Further, the tribunal had been entitled to conclude that Ms Kilraine had not shown that she had reasonably believed that there had been such a duty. It followed that the tribunal had been fully entitled to reach the eventual conclusions that it had and, on the basis that it had made those findings of fact, it had been bound to do so.

Cases referred to:

Barclays Bank plc v Kapur [1991] IRLR 136 HL

Cast v Croydon College [1998] IRLR 318 CA

Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT

Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA

Glennie v Independent Magazines (UK) Ltd [1999] IRLR 719 CA

Jones v Governing Body of Burdett Coutts School [1998] IRLR 521 CA

Kumchyk v Derby City Council [1978] ICR 1116 EAT

Secretary of State for Health v Rance [2007] IRLR 665 EAT

Segor v Goodrich Actuation Systems Ltd UKEAT/0145/11, 10 February 2012, unreported EAT

Tait v Redcar and Cleveland Borough Council [2008] All ER (D) 17 (Apr) EAT

Weare v HBOS plc [2008] All ER (D) 279 (Oct) EAT

Appearances:

For Ms Kilraine:

ROBIN ROBISON, Free Representation Unit

For the London Borough of Wandsworth:

SUSAN BELGRAVE, instructed by Sharpe Pritchard LLP

1

MR JUSTICE LANGSTAFF:

Introduction

This is an appeal against a decision of a tribunal at London (South) – Employment Judge Zuke, Mrs Davidson and Mr Adkins – whose decision was sent to the parties on 25 September 2014. The claimant was, at the end of her career with the respondent education authority, employed as an education achievement project manager. Her employment ended on 30 September 2011; the reason given for that was redundancy. She claimed during the course of her employment in the five or six years preceding her dismissal for that reason to have suffered detriment by reason of, and that her dismissal was due to, her making protected disclosures. She identified four of these by the time the case came to the tribunal.

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At the hearing, the tribunal determined to concentrate first upon the issue of whether any of the four was a protected disclosure within the Employment Rights Act 1996 ('ERA') and if so whether that disclosure was within time.

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There were four disclosures scheduled to the tribunal

decision. The first was one made on 21 July 2005 to a Mr Wallis, a director of Altecq Inspections Ltd, to the effect that the claimant had been discriminated against by Ofsted inspectors on the grounds of race and religion; she being Irish and being supposed by the inspectors to be Catholic. The second was on 25 January 2008. That related to a response by a school to the claimant reporting that there was a health and safety issue with respect to a young child openly masturbating in class. The third was on 10 December 2009 made to a Mr Johnson, the assistant director of Children's Services, to the effect that the respondent was failing in its legal obligations in respect of bullying and harassment. The fourth was on 21 June 2010 to the human resources officer at the education directorate, a Mr Gaskin, that the claimant's line manager, Liz Rayment-Pickard, had not supported her when she, the claimant, had raised a safeguarding issue in relation to a school.

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Following the last of those alleged protected disclosures, the claimant was suspended pending disciplinary investigation. The suggestion was that she had raised unfounded allegations against a number of colleagues on a number of occasions. That suspension remained in place until the dismissal.

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The tribunal decision

The tribunal set out the conclusions it reached in respect of each of the alleged disclosures. As to the first, it concluded that it had not been made to the claimant's employer. The submission that had been made to it, as recorded by the tribunal, was made by counsel on her behalf. She submitted that the disclosure fell within s.43C(2) ERA and argued (see paragraphs 20 and 21) that the respondent's whistle blowing policy then in force authorised the disclosure. The tribunal rejected that upon the basis that there was nothing in the policy that did so, nor was there anything to which it was specifically referred in respect of the Ofsted complaint procedure. It therefore agreed with the submission made by Ms Belgrave, who appeared for the respondent below as she does before me today, that the claimant had failed to show that the first disclosure had been made in accordance with a procedure the use of which was authorised by the respondent.

6

To understand the ground of appeal, it is necessary to set out the provisions, in so far as they are relevant, of the ERA 1996 as it was at the time. Many readers will recognise that it has since been changed. Section 43A said:

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

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Section 43B, defining a qualifying disclosure, says that that is one that:

> '… 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,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

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

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Section 43C, headed 'Disclosure to employer or other responsible person', provides:

'(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

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.'

9

The decision was made in respect of an argument pursued under s.43C(2). The alleged disclosure was made to Ofsted. It is not difficult to see that it might have been argued under s.43C(1)(b)(i) or (ii). The claimant had set out in further and better particulars of her ET1 that she had made a disclosure to Mr Wallis at Altecq and it was a protected disclosure made to the right person, and she put in brackets '43C 1 b [sic]'. The tribunal did not mention in its judgment anything about s.43C(1)(b).

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As to the second disclosure, the tribunal accepted that it was a protected disclosure. As to that, however, it decided that it was made too late. Secondly, it concluded that the detriments said to arise from making the second disclosure had not been shown by the claimant to be made at all because of that disclosure (see paragraphs 52–58). It rejected the case that the dismissal had been caused by the protected disclosure and concluded that the reason was and was only redundancy as the respondent had alleged.

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As to the third and fourth alleged protected disclosures, the tribunal relied upon the principle identified in *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, in which at paragraph 24 Slade J, giving the judgment of the Appeal Tribunal, said in respect of the wording of the statute, which requires a protected disclosure to be the giving of information:

> '24. Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information.'

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The decision as to the time limit reached in respect of the second disclosure was in part based upon the view that an alleged detriment was the suspension. As to that, the tribunal said (paragraph 41):

> '41. The tribunal decided that the claimant was entitled to pursue a complaint that she was subjected to the detriment of the instituting of disciplinary proceedings in June 2010. Indeed, being as generous as we could to the claimant, we permitted her to pursue a complaint that the last act complained of was her suspension on 1 September 2010. Ms Iyer [counsel for the claimant below] submitted that it had not been reasonably practicable for the claimant to present a claim to the tribunal within three months of that date, namely 30 November 2010.'

13

The argument as to whether the suspension came within the terms of the Act such that it was in time was not apparently put to the tribunal. In s.47B(3) the period of three months is prescribed for the making of a complaint that an employee has been subjected to a detriment in contravention of s.47B. It has to be brought within three

months or within a reasonable further period if it was not reasonably practicable to bring it within that three month period. Section 48(4) provides that for the purposes of the provisions in subsection (3), to which I have just referred:

> '(a) where an act extends over a period, the "date of the act" means the last day of that period, …'

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If therefore to suspend an employee is to do an act that extends over a period, the date of the act is to be taken as the last day of that suspension; the tribunal here took it as the first. The argument, however, advanced on behalf of the claimant did not query that approach. It adopted it. It argued that it was not reasonably practicable, thereby taking no point that the time limit had not in fact expired (if indeed it had not) because of the provisions of s.48(4). The tribunal examined the allegation as to reasonable practicability, and it rejected the claimant's contention.

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Finally, as to the tribunal decision, I should note that in respect of the fourth of the disclosures the tribunal had three reasons for rejecting it as not amounting to a protected disclosure within the Act. The first, as I have noted, was that it did not disclose any information; it was making an allegation. Secondly, the claimant had not articulated any genuine legal duty to support her. Thirdly, she had not shown that she reasonably believed that there was such a duty.

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The appeal

Out of a wide ranging notice of appeal three grounds remain, identified by HHJ Shanks at a hearing under rule 3(10) after the whole of the notice of appeal had earlier been rejected by Lewis J on the sift. Before me Mr Robison, who appears under the aegis of the Free Representation Unit to advance the appeal, argues that the essential characteristic of the appeal is that points were advanced below that were inadequate to deal with the case of the claimant and that although he recognises that there is a general reluctance to take unargued new points upon appeal, the Appeal Tribunal had a jurisdiction to do so and should exercise it in the claimant's favour in the particular circumstances of this case.

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In respect of disclosure 1 he argues that the tribunal had overlooked s.43C(1)(b)(ii). That had been raised by the claimant in her original further and better particulars. The note, in fact, I have is s.43C(1)(b) in those Particulars as opposed to s.43C(1)(b)(ii), but I think that does not really matter. Mr Robison recognises that the tribunal's decision shows that the submission made by counsel on behalf of the claimant did not advance that ground but instead focused entirely upon s.43C(2). This amounts, he submits, to an abandonment by the claimant of a point that she had taken. At paragraph 11 of the decision of this tribunal in *Segor v Goodrich Actuation Systems Ltd* UKEAT/0145/11, 10 February 2012, unreported, the Appeal Tribunal said:

> '11. … A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance. Though it is always for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow. As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous.'

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Mr Robison argues that the case of *Glennie v Independent Magazines (UK) Ltd* [1999] IRLR 719, Familiar Authority 10 in the bundle of authorities for the EAT, a decision of the Court of Appeal, demonstrates that there is a discretion in this tribunal to permit the argument to be raised even if it was not pursued below. He referred to extracts from the judgment of Brooke LJ setting that out, but he did not dissent from the judgment of Laws LJ at paragraph 18 that summarises the decision in these terms:

'18. … The Employment Appeal Tribunal possesses a discretion, which must be exercised in accordance with established principles, to allow a new point to be raised before it for the first time. It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time. The reasoning of Robert Walker LJ in *Jones v Governing Body of Burdett Coutts School* [1998] IRLR 521 is, with great deference, consonant with this. A new point ought only to be permitted to be raised in exceptional circumstances, as Robert Walker LJ held at p.44B. If the new issue goes to the jurisdiction of the Employment Appeal Tribunal below, that may be an exceptional circumstance, but only, in my judgment, if the issue raised is a discrete one of pure or hard edged law requiring no or no further factual inquiry. There is a public interest, beyond the interests of individual parties, that statutory tribunals exercise the whole of but exceed none of the jurisdiction which Parliament has given them upon such facts as are proved or admitted before them …'

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The summary by HHJ McMullen QC in the subsequent case of *Secretary of State for Health v Rance* [2007] IRLR 665, Familiar Authority 11, at paragraph 50 sets out the same point (see principle number 5). I note also, however, that in that paragraph at principle 7 HHJ McMullen QC noted that authority was to the effect that the discretion was not to be exercised where by way of example:

'…

(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason …

(c) The point was not taken below as a result of a tactical decision by a representative or a party; *Kumchyk* [v Derby City Council [1978] ICR 1116] at p.1123, approved in *Glennie* [*v Independent Magazines (UK) Ltd* [1999] IRLR 719] at paragraph 15.

…'

895.3

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Ms Belgrave does not recall anything to suggest why the claimant's counsel took the course she did. I have concluded that in this case I should not exercise my discretion to permit the matter to be argued now. It seems plain to me, first, that the decision to argue it in the way it was argued was a conscious and developed decision; given the way in which the tribunal has recorded the argument, it could be nothing else. The precise section had not been foreshadowed by the claimant herself in further and better particulars, but counsel had participated in drawing up the list of issues and is on the face of it an experienced advocate. Whatever the reason was, it smacks to me of a forensic decision to argue the case in that particular way. It failed. The principles of finality are such that arguments should be taken before a fact-finding tribunal and not stored up later to be recited on appeal. There may be exceptions, but I regret that I cannot agree with Mr Robison's submission that there is here something that might be classed as exceptional in the particular circumstances. It may often be the case that representatives pursue particular arguments in the thought that it would best suit the circumstances of the case for reasons that inevitably will remain private to them.

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There is a further reason, as it seems to me, for thinking, separately, that the argument here is unlikely to have succeeded even if the disclosure had been thought to be a

protected disclosure. Although the tribunal did not examine the particular detriments said to result from the disclosure, it did examine others and in general terms expressed itself impressed by the respondent's witnesses. That is a general view that a tribunal is entitled to come to. There is nothing therefore about the general flavour of the tribunal's reaction to the evidence that suggests that it would be proper for me to regard this failure to take a point as an aberration by counsel that would be exceptional.

895.3

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The failure to take a point of which there has been a note made in advance does not, in my view, fall four square within that which is said in *Segor*. The facts of that case, as Ms Belgrave points out, were highly unusual. Indeed, the EAT said as much in the opening sentence of paragraph 2. It was a case in which the representative, not herself in practice as a legal professional, had been unclear as to whether she was or was not making a particular concession that the tribunal, in the end, thought she probably was – it was the lack of clarity in that that was central – but a further unusual feature of the case is that the whole point of the hearing was because the tribunal had concerns that the issue to be discussed before the tribunal was one in which a claim for indirect discrimination might be difficult to resist. The claimant at the hearing did not put matters on that basis. It was therefore highly surprising to the tribunal that the matter was put as it was. In a sense, it cut against what they had thought they had been there to decide in the first place. There is no flavour of any of that in the case before me today.

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I accept the general thrust of Mr Robison's argument, which is that this is a case to be determined, so far as the first alleged disclosure is concerned, by consideration of the discretion, which it is recognised this tribunal has, to permit a new argument to be taken for the first time on appeal. As I have said, I do not in this case permit it.

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The second protected disclosure gives rise to the second ground of appeal. Here, Mr Robison submits that the tribunal in holding that the matter was one in which the claim was out of time, the detriment being alleged being the suspension, had not approached the issue in accordance with s.48(4). He relied in particular upon a decision that was made by this tribunal, presided over by Underhill J, as he then was, on 2 April 2008, the case of *Tait v Redcar and Cleveland Borough Council* UKEAT/0096/08, [2008] All ER (D) 17 (Apr). The issue in that case was whether or not an act of suspension that was thereafter continued was an act extending over a period within the meaning of the statute. The tribunal had thought it was not because it was a decision made at the date the suspension started. At paragraph 8 the Appeal Tribunal gave its reasons for rejecting the tribunal's approach:

> '8. We were referred to the principal authorities on the meaning of the phrase “an act extending over a period” in the equivalent provisions of the discrimination legislation – in particular *Barclays Bank plc v Kapur* [1991] ICR 208 and *Cast v Croydon College* [1998] ICR 500. (Neither counsel originally cited *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530; but Mr Falkenstein in his submissions in reply invited us to look at it for the purpose of preparing this judgment and we have done so.) The authorities recognise the distinction between “a continuing act/situation/state of affairs” (all phrases used by Lord Griffiths in *Kapur*: see at pp.213F–H and 215C–D), which does “extend over a period”, and a “one-off” act, albeit with continuing consequences, which does not; and they help to elucidate the – on the face of it – slightly awkward concept of an “act” which “extends over a period”. With the benefit of that elucidation, it seems to us that a disciplinary suspension is clearly “an act extending over a period” within the meaning of the statute. Although there is no doubt an initial “act” of suspension, the state of affairs thereafter in which the employee remains suspended pending the outcome of the disciplinary proceedings can quite naturally be described not simply as a consequence of that act but as a continuation of it. Mr Leiper sought to persuade us that acts “extending over a period” should be confined to cases

where the employer has in place a policy or "regime" which applies on a continuous basis. It is true that the reported cases are mostly concerned with facts of that kind – no doubt because they give rise to particular difficulties of analysis – but we see no reason to believe that they are the only possible example; and that view is supported by *Hendricks*, albeit that the kind of "continuing act" there considered was very different from that in the present case. We accordingly accept Mr Falkenstein's submission that the suspensions complained of at 1.3.1 and 1.3.2 were not simply one-off acts … but extended over a period …'

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The tribunal went on to say that a suspension linked with disciplinary proceedings should be viewed as a whole and therefore to regard it as anything other than an act extending over a period would be very odd.

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I not only agree with that statement of principle but am in good company in doing so. In the case of *Weare v HBOS plc* UKEAT/0300/08, [2008] All ER (D) 279 (Oct) a decision of this tribunal of 28 October 2008, Elias J, as he then was, held that the principle applied to grievances as it did to suspensions or at least was capable of doing so. Whereas I do not reject the possibility that there may be some acts of suspension that in truth may not necessarily be acts extending over a period, it seems to me that those situations are likely to be rare. In my view, therefore, the tribunal here took the wrong approach.

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The question, however, that then arises is whether that invalidates the decision as a whole. The difficulty that the claimant faces in this respect is that it did hear all of the facts. It came to a conclusion that so far as the suspension was concerned it had nothing to do with the protected disclosure. It set out the facts at paragraph 66 and said in the last paragraph under that number:

'66. …

It is clear to the tribunal that the reason why the claimant was suspended is the reason given [by the respondent's witnesses]. If we had found that we had jurisdiction to consider the complaint that the claimant's suspension was a detriment contrary to s.47B, we would have rejected that complaint. We would have been entirely satisfied by the respondent that the reason for the suspension was the reason given, and that it had nothing whatsoever to do with the protected disclosure.'

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That is a finding of fact. It is a finding of fact that was open to the tribunal. A consequence is that despite the error of analysis by the tribunal here the claim could not succeed. However, this ground too would give rise to a similar point as that which arose in respect of the first ground. That is because, as I have already pointed out, the issue of whether suspension was an act extending over a period was never actually articulated to the tribunal. It is clear that counsel addressed the case upon the basis that time had expired upon the start of the suspension and not upon its conclusion. That is why she argued 'not reasonably practicable'. The same considerations apply here as they did earlier. In my view, there is nothing to explain why counsel took that approach. The tribunal themselves make no reference to the expiry of time; they were simply not alerted to the point. If a point is a good one, it should be taken; it should not be stored

up for later.

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Whatever doubts I might have had about whether I might exercise my discretion in this particular case, and I think I would not, they, however, are put to bed by the finding that I have just recited of fact as to the reason for the suspension. It follows that on a twin basis I reject Mr Robison's argument in so far as it relates to the second protected disclosure.

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I turn now to the cases in respect of the third and the fourth disclosures. These were rejected. So far as the third is concerned, this was upon the basis that it was an allegation and not a matter of information. I would caution some care in the application of the principle arising out of *Cavendish Munro*. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between 'information' and 'allegation' is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point.

31

That said, I turn to the third alleged disclosure. This was in a letter of 10 December 2009. The paragraph upon which Mr Robison relied was this:

> 'I think that it is also important to remind you, that what has been achieved over the years has been despite bullying and harassment that was tolerated, and at times, not least at present, encouraged over that time by Stephen Pain, Liz Rayment-Pickard, yourself and others, and also despite successive and repeated failure to honour LA and individual agreements to extend my role and to provide career development. *Since the end of last term, there have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*. As an example, I have brought to your attention the inappropriate behaviour of Liz Rayment-Pickard, and despite your undertaking have received no feedback.' (Emphasis added.)

895.3

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The passage highlighted by me is that upon which Mr Robison focused his submissions. It provides information, he submitted. There had been incidents of inappropriate behaviour. Though the tribunal thought that this was not information, it is not difficult to see how difficult it would be to bring that within the scope of the protected disclosure provisions. If one takes away the word 'inappropriate' from the highlighted section, it says nothing that is at all specific. It does not sensibly convey any information at all. On this basis, I consider the employment tribunal was justified in concluding as it did, but even if I were wrong on that, it is difficult to see how what is said alleges a criminal offence, a failure to comply with legal obligations or any of the other matters to which s.43B(1) makes reference. It is simply far too vague. 'Inappropriate' may cover a multitude of sins. It has to show or tend to show something that comes within the section.

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As to the fourth and final protected disclosure, the central passage in an email to Mr Gaskin described a meeting with Ms Rayment-Pickard on a specific date, 16 June 2010. Here, Mr Robison suggested that the allegation was clearer. He had recognised some of the problems with the third, but by contrast there was here a clear statement, he said, giving information that when the claimant had reported a safeguarding issue a particular response was given by her manager:

> 'She did not support me, as she claims, when I reported a safeguarding issue during the same meeting. Her response, which shocked me was “I can't comment, I am never there during the school day, only before … or after … so I can't comment”. This was, repeated, belittling and I tried very hard to engage her as my line manager in the report.'

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Although, as it seems to me, this does make an allegation, it does also, as it seems to me, give information about what was or was not said during the meeting. But the tribunal in its decision had more reasons than that for rejecting the case in so far as it relied upon this disclosure. It did not accept it as a qualifying disclosure, because it had not been shown that there was any legal duty to which Ms Rayment-Pickard was subject that she had broken by what she had said, nor had the claimant shown that she had reasonably believed that there was such a duty.

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There is no suggestion in what the tribunal say that its attention was drawn to s.11 of the Children Act 2004 or s.175 of the Education Act 2002. I am told by Mr Robison that he has seen documents prepared in advance of a preliminary hearing that showed that there had been reference from the claimant's camp to those sections at about that time, but they certainly did not surface in the decision. Be that as it may, I rose in the course of this appeal in order to look at the text of s.11 and s.175 respectively. Ms Belgrave submits, and, in my view, rightly in view of the text of the statutes, that they impose a duty to make arrangements. These are broad general arrangements to be made by a local authority, by one of the councils to which s.11 refers, or public bodies, to ensure that safeguarding concerns are dealt with by a proper procedure. She argues that the context here was that the procedure involves notifying the school first and that it is a matter of some importance that where procedures are laid down that they be followed. In the light of that, there is no obvious reason why what was said by way of information, assuming it to be such for the moment, could fall foul of any duty under those sections even if they had been in the mind of the claimant at the time or had been articulated. I accept that reasoning.

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Further, it seems to me that the tribunal came to a conclusion of fact when it said that the claimant had not shown that she reasonably believed that there was such a duty. That is a conclusion that the tribunal was entitled to come to having listened to the claimant and having considered whatever questions were asked in cross-examination. It is not developed; it is terse, and it may beg questions as to quite what the basis was for the tribunal's coming to that conclusion, but it did so, and there is no developed challenge as such to that particular conclusion. On this basis too, therefore, I have concluded that on the findings that the tribunal made it was entitled to reject the fourth alleged protected disclosure as actually coming within the terms of the statute.

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Summary

It follows that in so far as I have been asked to exercise my discretion to permit new points to be taken, I have declined to do so. Though in respect of two matters I have indicated that my view is different from that apparently taken by the tribunal, or at least so far as the last protected disclosure is concerned might well be, there is other material in the decision that shows that the tribunal was fully entitled to reach the eventual conclusions it did and indeed on the basis that it made those findings of fact was bound to do so. It follows that, despite the best efforts of Mr Robison, in keeping with the service that the Free Representation Unit provides for litigants, this appeal must be, and is, dismissed.