Neutral Citation Number: [2018] EWCA Civ 1436

Case No: A2/2016/0718

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(LANGSTAFF J)
UKEAT/0260/15/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2018

Before:

LORD JUSTICE KITCHIN
and
LORD JUSTICE SALES

- -

Between:

Karen Kilraine	**Appellant**
- and -	
London Borough of Wandsworth	**Respondent**

- -
- -

Christopher Milsom and Rachel Barrett (instructed by Neves Solicitors LLP) for the **Appellant**
Susan Belgrave (instructed by **Sharpe Prichard LLP**) for the **Respondent**

Hearing date: 13 June 2018

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Approved Judgment

Lord Justice Sales:

1. This is an appeal from the decision of Langstaff J sitting alone in the Employment Appeal Tribunal ("the EAT") in a case concerning allegations of detrimental treatment of an employee, the appellant, after what are claimed to be protected disclosures were made by her. The principal issue of law in the case relates to the circumstances in which allegations made by an employee may constitute disclosure of "information" by the employee for the purposes of section 43B of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998) and the validity of guidance given about that by the EAT in *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38.

The legislation

2. Part IVA of the Employment Rights Act 1996 ("the ERA") sets out a regime for protection of whistleblowers in a work context. Protection is provided for a worker who makes a "protected disclosure", meaning a qualifying disclosure (as defined in section 43B) in accordance with any of sections 43C to 43H. For present purposes, the relevant provisions on which the submissions focused are sections 43B(1) and 43F(1):

> "**43B.— Disclosures qualifying for protection.**
>
> (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,
>
> (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.
>
> …
>
> **43F.— Disclosure to prescribed person.**
>
> (1) A qualifying disclosure is made in accordance with this section if the worker—

> (a) makes the disclosure [...] [2] to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
>
> (b) reasonably believes—
>
> (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
>
> (ii) that the information disclosed, and any allegation contained in it, are substantially true.
>
> …"

3. Section 43B(1)(b) was interpreted by the EAT in *Parkins v Sodexho* [2002] IRLR 109 to cover a disclosure made by an employee about what he reasonably believed was a breach of his contract of employment. Since then, the provision has been amended with effect from 25 June 2013 to include in it the phrase, "*is made in the public interest and* tends to show etc …", to impose an additional public interest requirement in order to modify the effect of the decision in *Parkins v Sodexho*: see *Chesterton Global Ltd v Nurmohamed* [2017] EWCA CIv 979; [2017] IRLR 837, [9]-[13] (Underhill LJ). This amendment is not material in this case, which concerns events prior to 2013.

Factual background

4. The appellant commenced employment with the respondent education authority on 1 September 2003 as an Educational Achievement Zone Literacy Advisor Teacher. She subsequently became an Education Achievement Project Manager. This involved her in projects aimed at trying to raise educational standards in schools.

5. The appellant's relations with other staff and managers at the respondent were not always smooth. Over the years, she made a number of complaints about others. The alleged protected disclosures by the appellant in issue on this appeal occurred in the course of the making of such complaints. Four alleged protected disclosures were in issue in the proceedings below, made on 21 July 2005, 25 January 2008, 10 December 2009 ("the third disclosure") and 21 June 2010 ("the fourth disclosure"). So far as concerns this appeal, it is only the third and fourth disclosures which remain in issue.

6. Shortly after the fourth disclosure, the appellant was placed on garden leave. On 1 September 2010 she was formally suspended on full pay pending a disciplinary investigation on charges that she had made unfounded allegations against colleagues on a number of occasions.

7. In early 2011, the respondent faced a major reduction in government funding for education initiatives. In the light of that loss of funding, the appellant was dismissed on 30 September 2011 on grounds of redundancy. At the hearing before the Employment Tribunal ("the ET") there was an issue whether the dismissal of the appellant had really occurred because of protected disclosures by her, but the ET found on the evidence it heard from the respondent's witnesses that the ground of dismissal was genuinely redundancy. That finding is not in issue before us.

8. The appellant commenced proceedings in the ET for unfair dismissal and for relief in respect of detriments to which she claimed she had been subject because of the protected disclosures. The proceedings were protracted. The appellant's claim was poorly focused. Eventually, the ET made directions which resulted in the appellant identifying the four alleged protected disclosures on which she sought to rely in the proceedings and an agreed list of issues being filed on 8 January 2013.

9. The hearing of the claim was scheduled to take place in June 2013, but was postponed on the application of the appellant because of her ill health. Notice was given that the claim would be heard over 8 days commencing on 9 July 2014.

10. Unfortunately, there was no agreement on the documents which should be before the ET. On 3 July 2014, the appellant served a witness statement of 377 pages. On 8 July, the appellant's representative delivered 13 lever arch files to the respondent, containing some 4,000 pages of documents for the hearing.

11. At the opening of the hearing on 9 July, at which the appellant was represented by Ms Iyer of counsel, the ET took the view that the appellant's witness statement was excessively long and the volume of documentation served one day before the hearing was unreasonable. The ET decided to give case management directions to enable the hearing to commence on Monday, 14 July. The appellant was ordered to prepare a shorter witness statement, not exceeding 50 pages, and the documentation was to be reduced. The appellant's revised witness statement and revised bundle of documents were supposed to be provided to the ET and the respondent on Friday, 11 July; but in the event they were only made available on the morning of 14 July, when the hearing resumed.

12. On the basis of its preparatory reading of the respondent's witness statements, the ET identified an issue whether any of the four alleged protected disclosures qualified as such as a matter of law. It took time on the morning of 14 July to read the relevant parts of the appellant's revised witness statement. The ET then raised with counsel for both parties that it might be sensible for the ET to decide as a preliminary issue, at the outset of the hearing, whether any of the four alleged disclosures qualified as protected disclosures for the purposes of section 43B of the ERA or could be relied upon. Counsel agreed that it would be sensible to proceed in this way. The ET therefore considered at that stage, as a preliminary issue, whether any of the four allegations should be struck out. It decided that three of the four allegations of protected disclosures should be struck out, including those in relation to the third disclosure and the fourth disclosure. Its reasons for this were explained in the final judgment given after the hearing.

13. Having narrowed the claim down in this way, the ET then proceeded with the substantive hearing in relation to the claims of unfair dismissal, automatically unfair dismissal and the remaining allegation of a protected disclosure (and the detriment in relation thereto). At this stage it heard evidence from the appellant and from the respondent's witnesses and made relevant findings of fact. It found that the appellant had been dismissed on the ground of redundancy (not by reason of any protected disclosure); that the dismissal was unfair, because of a lack of consultation with her; but that no compensation was payable, because it was clear that she would have been dismissed on that ground even had she been consulted. The ET dismissed the appellant's other claims.

14. It is the appellant's claim in relation to the third disclosure and the fourth disclosure which is in issue on this appeal.

15. The third disclosure was contained in a letter from the appellant to Mr Johnson of the respondent, dated 10 December 2009. The letter set out a complaint that the appellant had not been included in a meeting of the Performance and Standards Monitoring Group to present an annual report. In the EAT the appellant's claim was refined down to reliance on the following paragraph in that letter, and the sentence in it which I have highlighted:

> "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 [the appellant's line manager], yourself and others, and also despite successive and repeated failure to honour LA [local authority] 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."

(In the ET, the appellant had also relied on the preceding paragraph in the letter, and on the appeal to us Mr Milsom, for the appellant, sought to refer to that as well; however, it was no part of any ground of appeal for which the appellant had permission before us that the EAT had erred in focusing on the quoted paragraph in the way it did when considering the position in relation to the third disclosure; we were not asked for permission to amend to broaden the grounds of appeal to allow such a point to be taken; Ms Belgrave for the respondent was not on notice of the point and made no submissions about it; and in my view it would have been inappropriate and unfair to the respondent to allow any such amendment even if permission had been asked).

16. The ET directed itself by reference to *Cavendish Munro* and held that the letter of 10 December 2009 "does not disclose any information. Instead it makes allegations" ([28]). On that basis, in the view of the ET, the third disclosure did not amount to a qualifying disclosure within the meaning of section 43B(1).

17. The fourth disclosure was contained in an email dated 21 June 2010 from the appellant to Mr Gaskin, the human resources officer at the respondent's education directorate. The appellant said that she had reported a safeguarding issue to Liz Rayment-Pickard in relation to a particular school and received an unsatisfactory response. The passage relied on by the appellant in the refined submissions made on her behalf in the EAT was as follows:

> "She did not support me, as she claims, when I reported a safeguarding issue during [a meeting on 16 June 2010]. 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."

(In the ET, the appellant also relied on some other parts of the email and on the appeal to us Mr Milsom again sought to go back to rely on those other passages, but for similar reasons to those given in relation to the third disclosure it is appropriate to confine our consideration of this part of the case to the formulation of the fourth disclosure as presented in argument to the EAT).

18. The appellant's case at the hearing was that the information disclosed tended to show her reasonable belief that the respondent had failed to comply with a legal obligation to which it was subject, within the scope of section 43B(1)(b). However, the ET referred to the agreed list of issues and the appellant's witness statement (in the revised version) and found that the appellant had failed to identify what legal obligation she said she relied upon. A submission made by Ms Iyer at the hearing that the respondent was under a legal obligation deriving from the contract of employment to support the appellant in complying with her own safeguarding obligations was, in the circumstances, discounted by the ET as "a very recent thought" (i.e. one which was not in the mind of appellant at the time of the disclosure): [30].

19. The ET gave two reasons at [32] why the fourth disclosure did not amount to a qualifying disclosure within section 43B(1): (i) the email did not disclose any information – it amounted only to the making of allegations (again, it appears, applying the guidance the ET thought was to be derived from *Cavendish Munro*); and (ii) "[The appellant] had not articulated any genuine legal duty to support her, or shown that she reasonably believed that there was such a duty."

20. The appellant appealed to the EAT in respect of all four alleged protected disclosures. On that appeal she was represented by Mr Robison from the Free Representation Unit. The EAT dismissed her appeal.

21. As regards the third disclosure, at [30] Langstaff J disapproved of the way in which the ET had relied in its reasoning on a rigid dichotomy between information and allegations and accordingly at [32] he carried out his own analysis of the position. Langstaff J said this:

> "30. … 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.
>
> …
>
> 32. [The passage in the letter of 10 December 2009 highlighted above] 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 section 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."

22. As regards the fourth disclosure, Langstaff J upheld the appellant's appeal to the extent that he overturned the ET's ruling that the disclosure made an allegation and therefore could not constitute information for the purposes of section 43B: in his view, the disclosure made an allegation but it also gave information about what was or was not said at the meeting ([34]).

23. However, Langstaff J dismissed the appeal in relation to the fourth disclosure for two other reasons. First, at the hearing before him the appellant had abandoned the argument presented by Ms Iyer on her behalf before the ET regarding breach of her contract of employment, and instead relied on an alleged breach by the respondent (acting by Ms Rayment-Pickard) of its duties under section 11 of the Children Act 2004 and section 175 of the Education Act 2002. Each of those provisions imposes an obligation on the respondent to "make arrangements" for ensuring that its functions are discharged having regard to the need to safeguard and promote the welfare of children. Those duties had been referred to in a document bearing a space for the appellant's signature (but unsigned by her) and undated (save for the year, 2012), apparently drawn up to provide further and better particulars of her allegations in the proceedings (albeit in the document the obligations were said to be obligations of Ms Rayment-Pickard herself, rather than the respondent). There is no indication that this document was before the ET by the time the hearing commenced in July 2014, let alone that it was drawn to is attention. This aspect of the appellant's case was not referred to in the agreed list of issues, in her witness statement or in any other document placed before the ET at that hearing. It was not referred to in Ms Iyer's submissions for the appellant on the legal duty point for the purposes of section 43B. It was not referred to in the ET's judgment, as it undoubtedly would have been had it been raised. I conclude that the strong likelihood is that an argument based on these statutory provisions was not raised at the hearing in the ET. That seems to have been the view of Langstaff J as well: see [35].

24. Nonetheless, Langstaff J also accepted a submission by Ms Belgrave for the respondent that information presented in the fourth disclosure regarding the conduct of Ms Rayment-Pickard was not such as could be said to tend to show a breach of these statutory legal obligations by the respondent: see again [35]. The obligations operated at a high level of generality, requiring that the respondent have in place broad general arrangements to ensure that safeguarding concerns would be dealt with by proper procedures, including by notification to the school concerned. Even if the appellant had had these statutory provisions in mind at the time she made the fourth disclosure, there was nothing in that disclosure which indicated that the respondent had failed to put in place the necessary procedures or arrangements as required or was in breach of its statutory duties in any way.

25. Secondly, Langstaff J ruled at [36] that the ET had been entitled to conclude as a matter of fact that the appellant had not shown that she reasonably believed there was a relevant legal duty, although in error he said that this was a conclusion to which the ET had come having listened to the appellant give oral evidence in cross-examination. This was an error because the claim in relation to the fourth disclosure had been struck out by the ET at the outset of the hearing, before it heard any live evidence from witnesses. Langstaff J said that there was no developed challenge in the hearing before him to the ET's conclusion and that in his view it was entitled to rule as it did that the fourth disclosure did not fall within the terms of section 43B(1).

26. The appellant now appeals to this court on the two grounds for which Bean LJ has granted permission (having refused permission to appeal on all other grounds), namely that the ET erred in concluding that the third disclosure was not a protected disclosure and that it erred in reaching a similar conclusion in respect of the fourth disclosure.

Discussion

27. In the *Cavendish Munro* case the claimant was a director and employee of an insurance broking company who was removed from his directorship by the other two directors in circumstances which the claimant maintained involved breaches of his rights as a shareholder, director and employee and amounted to unfair prejudice for the purposes of a possible claim under the Companies Act 2006. Negotiations lasting about a month regarding his complaints failed to arrive at an agreement. The claimant then arranged for his solicitors to send a "without prejudice" letter to his fellow directors, in which the claimant put forward a settlement proposal, reserved his rights and threatened to take steps (i.e. issue proceedings) to protect his position in relation to all the complaints he had made. The complaints were described only in very general terms, with no factual detail: see [2010] IRLR 38 at [6]. The claimant was then dismissed with immediate effect. He issued proceedings in the ET claiming that he had been dismissed because he had made a protected disclosure in the form of the statements in his solicitors' letter, which he maintained constituted a qualifying disclosure within the meaning of section 43B(1) of the ERA as it stood at that time (i.e. in the version prior to amendment in 2013). The ET upheld his claim, but the EAT allowed the appeal by his employer. It held that the solicitor's letter did not contain anything which constituted a qualifying disclosure within section 43B(1).

28. The EAT in *Cavendish Munro* correctly noted at [20] that in section 43F, set out above, the ERA recognises that there can be a distinction between "information" (the word

used in section 43B(1)) and an "allegation". Both words are used in section 43F. At [24]-[26] the EAT said this:

> "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.
>
> 25. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43.
>
> 26. The Tribunal based its conclusion that Mr Geduld was dismissed because, through his solicitor's letter of 4 February 2008, he made a protected disclosure. In our judgment the letter sets out a statement of the position of Mr Geduld. In order to fall within the statutory definition of protected disclosure there must be disclosure of information. In our judgment, the letter of 4 February 2008 does not convey *information* as contemplated by the legislation let alone disclose information. It is a statement of position quite naturally and properly communicated in the course of negotiations between the parties."

29. In the present appeal, Mr Milsom contends that the guidance given in *Cavendish Munro* at [24] is incorrect and that the case was wrongly decided on the issue whether the solicitors' letter contained a qualifying disclosure. He submits that the concept of "information" in section 43B is capable of covering statements which might also be characterised as allegations; it is wrong to suppose that the categories of "information" and "allegation" are mutually exclusive, as he says the EAT did in *Cavendish Munro*.

30. I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.

31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

32. In my view, Mr Milsom is not correct when he suggests that the EAT in *Cavendish Munro* at [24] was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the EAT was seeking to say was that a statement which merely took the form, "You are not complying with Health and Safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the EAT was seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the EAT's reasoning at [24] is somewhat obscured in the headnote summary of this part of its decision, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".

33. I also reject Mr Milsom's submission that *Cavendish Munro* is wrongly decided on this point, in relation to the solicitors' letter set out at [6]. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the EAT in *Cavendish Munro* was right so to hold.

34. However, with the benefit of hindsight, I think that it can be said that para. [24] in *Cavendish Munro* was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that *Cavendish Munro* supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in *Cavendish Munro* also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).

35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard.

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.

37. I turn, then, to the two grounds of appeal.

Ground (1): the third disclosure

38. In my view, Langstaff J's reasoning and his conclusion, that the third disclosure is not a qualifying disclosure, are correct. He had identified an error of approach by the ET, so it was incumbent on him to determine whether its error was a material one. This means that he had to make an evaluative judgment whether the disclosure was of "information which 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." His approach was correct: unlike the ET he did not treat the concepts of "information" and "allegation" as mutually exclusive. He is a judge with great experience in the field of employment law, well used to making assessments informed by the employment context in a particular case, and his evaluation of the position is entitled to significant weight. Certainly, I could not say that his assessment was "wrong", as would be required if the appeal is to be upheld (see CPR Part 52.21(3)(a), formerly CPR Part 52.11). In fact, I agree with it. Accordingly, it is clear that the ET's decision in relation to the third disclosure was correct; the error in its approach was immaterial; and its conclusion was not affected by any error of law.

39. Mr Milsom submitted that Langstaff J's approach was too narrow. The judge failed to consider how the third disclosure was embedded in and formed part of an ongoing series of communications between the appellant and various officers of the respondent. The third disclosure should be taken, in effect, to incorporate by reference other disclosures made by the appellant at different times, which upon examination might be found to contain sufficient relevant factual content.

40. I do not accept this submission.

41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in para. [24] in the *Cavendish Munro* case, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with Health and Safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA

of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.

42. However, in the present case the appellant and her legal representatives did not identify any relevant context for the statement said to constitute the third disclosure which might inform or supplement its meaning; nor did they specify any part of that context which was said to supply the relevant minimum factual content which could satisfy the test in section 43B(1). Even at the hearing before us, Mr Milsom did not do this with any particularity. Langstaff J was entitled to proceed on the basis of the third disclosure as he identified it in his judgment. In the circumstances, it would have been unfair to the respondent to have approached the appellant's case in relation to the third disclosure in any other way.

43. For these reasons, I would reject Ground (1).

Ground (2): the fourth disclosure

44. In my judgment, the appeal on Ground (2) should also be dismissed, essentially for the two reasons given by Langstaff J. The fourth disclosure did involve disclosure of matters which had sufficient factual content so as potentially to qualify as disclosure of information for the purposes of section 43B(1); but, as he ruled, the ET was entitled to hold that this information was not such as 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.

45. First under this Ground I will deal with the second of the reasons given by Langstaff J. It is true that in relation to this part of his reasoning, his understanding of the facts was erroneous. He said that the ET reached its view to disallow the claim based on the fourth disclosure on by reason of a finding of fact made after hearing the appellant give evidence, on the basis of which the ET was entitled to find that she did not have any breach or potential breach of legal obligation in mind at the time of the fourth disclosure. However, in my view the basic point made by the judge was correct: the ET was lawfully entitled on the material before it at the start of the hearing on 14 July 2014 to decide that the appellant's claim that the fourth disclosure was a qualifying disclosure had no reasonable prospect of success on the facts and therefore to strike it out in the exercise of its case management powers.

46. As explained above, at the start of the hearing the ET made its assessment whether the appellant had any real prospect of success in claiming that the fourth disclosure was a qualifying disclosure on the basis of the agreed list of issues (which was supposed to explain the appellant's case, and did not identify any relevant legal obligation), the appellant's witness statement (which was proposed to stand as her evidence in chief, and again did not identify any relevant legal obligation which she had in mind) and the argument of the appellant's then counsel, who could only make submissions about a proposed legal obligation which was a later invention which the appellant did not have in mind at the relevant time. As I have explained, it was not suggested to the ET that section 11 of the Children Act or section 175 of the Education Act were relevant to this issue. On the materials and submissions presented to the ET, it was plainly entitled to

make the assessment it did, that the appellant's claim that the fourth disclosure was a qualifying disclosure within section 43B(1) had no real prospect of success, by reason of the absence of anything in the appellant's case or witness statement to suggest that she had a relevant legal obligation in mind at the material time. Accordingly, she could not satisfy the subjective requirement in section 43B(1) that she believed at the time of the disclosure that the information in it tended to show that someone had failed, was failing or was likely to fail to comply with a legal obligation. On the basis of that assessment, the ET was entitled to strike out that part of her claim, as it did.

47. As regards the first reason given by Langstaff J, by the time of the hearing in the EAT the only legal obligations which the appellant was seeking to rely upon in the context of the fourth disclosure were the obligations under section 11 of the Children Act and section 175 of the Education Act. Even if the appellant did in fact have these provisions in her mind at the time of the fourth disclosure, Langstaff J was entitled to make the assessment he did about the relevance of those provisions in the particular context in which that disclosure occurred. His assessment carries weight and cannot be said to be wrong. Again, I agree with it. To say that an individual officer of the respondent might have been unsupportive on one particular occasion in responding in relation to a safeguarding issue is not indicative of a failure by the respondent to make appropriate general arrangements in accordance with those provisions.

Conclusion

48. For the reasons given above, I would dismiss this appeal.

Lord Justice Kitchin:

49. I agree.