Appeal No. UKEAT/0243/19/VP (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 7 May 2020

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR BRIAN IKEJIAKU — APPELLANT

BRITISH INSTITUTE OF TECHNOLOGY LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR BRIAN IKEJIAKU (The Appellant in person)
For the Respondent	Mr RAD KOHANZAD (Counsel) Instructed by Peninsula Ltd Victoria Place Manchester M4 4FB

SUMMARY

UNFAIR DISMISSAL

JURISDICTIONAL/TIME POINTS

The Claimant was dismissed on 13 July 2017. Following a liability hearing, the ET upheld his claim of automatic unfair dismissal on the grounds of his protected disclosure on the day before his dismissal (s.103A ERA 1996). It also held that the Claimant had been subjected to detriment by the Respondent's introduction of a new contract in March 2016 on the ground of a protected disclosure in October 2015 (ss.47B/48(1A) ERA 1996); but adjourned to the Remedy hearing an outstanding issue on the time limit for that claim (s.48(3)(4)).

In its Remedy Judgment, the ET held (i) time issue : that the introduction of the new contract in March 2016 was a 'one-off' event with continuing consequences, not an act which 'extend[ed] over a period' and continued until his dismissal in July 2017; that it was reasonably practicable to present the complaint within the 3-month period; and that accordingly the s.48(1A) claim was out of time; and (ii) compensation for unfair dismissal : that the application for an 'ACAS uplift' (s.207A TULRCA 1992) should be refused, as disciplinary procedures, both generally and within the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), had no application to dismissal on the grounds of protected disclosures.

On the time issue, the EAT dismissed the Claimant's appeal, upholding the ET's decision that the introduction of the new contract was a one-off event with continuing consequences. On the ACAS uplift issue, the appeal was allowed. Whilst the ET was correct insofar as the Claimant's application related to disciplinary procedures, on a fair reading the application also extended to the Grievance section of the ACAS Code of Practice. As the Respondent rightly accepted, the protected disclosure of 12 July 2017 was a grievance within the Code's definition of a 'concern,

problem or complaint'; and thus potentially engaged the provisions of s.207A. Accordingly the matter was remitted to the ET for consideration of the application having regard to the Grievance section of the Code.

MR JUSTICE SOOLE

1. This is an appeal by the Claimant against two findings in the Remedy Judgment of the Employment Tribunal at East London (Employment Judge Russell and members), sent to the parties on 15 April 2019, following an earlier hearing on 21 January 2019. That hearing followed the Tribunal's judgment on liability, sent to the parties on 6 or 13 July 2018 which inter alia (i) upheld the Claimant's claims of automatic unfair dismissal, contrary to s.103A Employment Rights Act 1996 ('ERA') and (ii) (subject to an issue on whether the relevant claim had been brought in time) found that the Claimant had suffered detriment as a result of a protected disclosure to the Respondent in October 2015, contrary to s.47B ERA.

2. In addition to consideration of compensation, the consequential Remedy hearing was required to deal with the outstanding issue on liability in the detriment claim, namely whether it had been made in time. By the Remedy Judgment the Tribunal inter alia (i) held that the s.47B detriment claim was out of time and (ii) refused the Claimant's application for an uplift on his compensation pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA').

3. Following a Rule 3(10) hearing the Claimant's appeal against the Remedy Judgment was permitted to proceed on two grounds. First, that the Tribunal was wrong to hold that the detriment claim was out of time ('the time issue'). Secondly, that it was wrong to refuse a s.207A uplift of the compensation award ('the ACAS uplift issue').

4. The Claimant is a qualified solicitor and barrister in Nigeria. As below, he appears in person. The Respondent appears by Counsel Mr Rad Kohanzad, who did not appear below. The Respondent is a higher education establishment which had no direct power to award

qualifications but relied on arrangements with various universities to validate its courses. The Claimant began to work for the Respondent, as a senior lecturer in business and law, from February 2013, having previously worked there for a few months in 2011. Contrary to the Respondent's case that the effect of a contract signed by him on 25 February 2016 and commencing 1 March 2016 ('the new contract') was to change the Claimant's status from an employee to a self-employed consultant, the Tribunal held that the Claimant was an employee at all times from February 2013 until his dismissal on 13 July 2017. It held that the reason for the new contract was to resolve an ongoing dispute as to pay and payslips and to provide clarity to the arrangement. It did not change the legal nature of the employment relationship.

5. The Claimant made protected disclosures to the Respondent's Principal Director, Mr Farmer, in October 2015 and on 12 July 2017. The October 2015 disclosure was that he had contacted Her Majesty's Revenue and Customs ("HMRC"), which had confirmed that the Respondent was not paying his tax and National Insurance, and that it ought to have done so. The disclosure on 12 July 2017 was that he had been told by the Associate Dean, Mr Tanveer, to give a pass mark to some students who the Claimant had found to have been copying from each other in certain test scripts.

6. On the following day, 13 July 2017, the Claimant was dismissed. The Tribunal rejected the Respondent's case that the reason for termination was for "some other substantial reason", namely a reduced requirement for lecturers due to a decision by one of its partner universities to terminate their agreement. It held that the sole reason for his dismissal was his protected disclosure the day before. Accordingly the claim of automatic unfair dismissal under s.103A ERA succeeded.

A

7. As to the s.47B detriment claim, the Claimant had set out a list of alleged detriments in a schedule of allegations ('the Schedule') sent to the Tribunal on 30 October 2017: see Schedule section D. The agreed list of issues, as set out in the Liability Judgment, refers to items D2-11: see para. 2.15 of that Judgment.

B

8. Under Schedule item D7 the Claimant stated '*the C was <u>forced/tricked into a purported contract</u> when he was threatened dismissal as he refused to sign 2 other contracts that clearly stated he has no entitlements, & work in protest (para 5 and pg. 6 ET1).*' The 'purported contract' was the new contract signed by him on 25 February 2016, and commencing 1 March 2016.

C

9. The Tribunal considered each of the alleged detriments which it had identified from the Schedule. As to the October 2015 disclosure, it concluded at [103]:

D

> **"Overall, and whilst we do not accept the Claimant was tricked, we are satisfied that the October 2015 disclosure was a material and effective cause of the requirement that the Claimant sign the new agreement which purported to remove the Claimant's employment status from 1 March 2016"**

E

10. The Tribunal rejected the Claimant's case that the October 2015 disclosure was material to any of the other alleged detriments. In particular it noted that the first four Schedule items all related to the ongoing dispute between the Claimant and Mr Farmer "…about employment status, namely non-payment of tax and national insurance, failure to provide payslips or paid holiday and describing him as a consultant": It continued:

F

> **"There was no payment of tax, national insurance or holiday from the outset of the working arrangement in 2013. Indeed, it is the failure to pay tax and national insurance which caused and formed the subject matter of the disclosure itself. Insofar as deductions continued not to be paid, the protected disclosure was not a material and effective cause. We consider that the same is true after October 2015 of the Claimant's requests for payslips and paid holiday and the Mr Farmer's repeated assertion that the Claimant was a consultant. These issues around employment status and its consequences happened as much before as after the protected disclosure. The October 2015 disclosure was caused by the dispute about employment status, in that it was the continued failure to make deductions or provides payslips and the assertions that the Claimant was not entitled to pay slips or paid holiday because he was a consultant which caused him to go to HMRC and repeat the information to Mr Farmer. Once made, the dispute continued as it had before. The disclosure made in October 2015 was not a material and effective cause of the continuing problems thereafter"** [102].

G

H

11. As to the 12 July 2017 disclosure, the Claimant contended that the untrue particulars of the reasons for dismissal given by the Respondent amounted to a separate detriment. Noting that s.47B does not apply where the detriment amounts to a dismissal (s.47B(2)(b)), the Tribunal concluded that the reasons for dismissal, as given to the Claimant at the time and as given to the Tribunal, were all part of the s.103A claim of automatic unfair dismissal; and accordingly rejected any '*freestanding detriment claim*': [113].

12. The Tribunal concluded that **"…the only protected disclosure detriment claim which would succeed is the introduction of the March 2016 agreement. In the absence of any later detriment it appears to have been presented out of time."** However, noting that this issue had not been previously identified in the list of issues nor been the subject of submissions from the parties, the Tribunal concluded that it should be dealt with at the remedy hearing: [115]. In its Remedy Judgment, the Tribunal summarised its liability decision, in terms which included that **"the introduction of the new contract from 1 March 2016 was caused by the Claimant's earlier protected disclosure about payslips and tax status"**: [2(vi)].

13. It then set out the parties' rival submissions on the time issue:

> **"The Claimant submitted that the imposition of the new contract from 1 March 2016 was a continuing act and not a single one-off event. The Claimant sought to persuade us that the effect of that new contract was to change his situation in its entirety and encompassed everything that happened thereafter. He submitted that it had had an effect until the very last day of his employment, particularly as the Respondent had relied upon that contract as part of its reasons for summarily dismissing him. For those reasons, the Claimant submitted that his claim for protected disclosure detriment in respect of the introduction of the new contract was not out of time. Mr Smith disagreed on behalf of the Respondent. He submitted that this was not a continuing act, rather it was a single act with continuing consequences."** [3].

14. The Tribunal preferred the Respondent's submissions, concluding:

> **"The contract was signed at the end of February and came into force from 1 March 2016. It undoubtedly had a continuing effect as it thereafter regulated the legal relationship between the parties, but this is a continuing consequence rather than being a continuing act or course of conduct. As such, time began to run from 1 March 2016 and the claim was presented on 13 July 2017, considerably out of time. It was reasonably practicable for the Claimant to have presented the claim within time; as with our previous decisions on time, we took into account his legal qualifications, that he holds himself out in business as advising on employment issues and knew**

his rights and time limits. The Tribunal does not have jurisdiction to uphold the detriment complaint or grant the Claimant any remedy in respect of the same." [4]

15. Turning to compensation for unfair dismissal, the Tribunal made a basic award of £2,076.90 and a compensatory reward of £9,775.80. Further awards were made for unpaid holiday pay and failure to provide a written statement of terms and conditions.

16. The Claimant had also applied, pursuant to s.207A TULRCA, for an "uplift'" to the awards on the grounds that the Respondent had failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). The Tribunal refused that application, with some reluctance :

"24 The final issue is whether or not there should be an ACAS uplift. The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on discipline and grievance procedures). The Code does not apply to all dismissals. It expressly applies to disciplinary and grievance situations in the workplace. Disciplinary situations include misconduct and/or poor performance. It goes on to say that the Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry. The Code is silent as to whether or not it applies to automatically unfair dismissals by reason of a protected disclosure.

25 We considered carefully whether and to what extent the Code applied to the Claimant's dismissal, applying the words of the Code to the reason for dismissal found by the Tribunal. The Tribunal took into account that in certain "some other substantial reason" dismissals the Code will apply, for example where the employee faces a complaint which may lead to disciplinary action or where disciplinary proceedings are or ought to be, invoked against an employee. The difficulty in this case is that the sole reason for dismissal was the protected disclosure. That protected disclosure could never be a ground for possible disciplinary action. In those circumstances, there were not (nor could there fairly be) disciplinary proceedings against the Claimant to which the Code could apply.

26 The Tribunal considered it unjust that the ACAS Code is drafted in a way which appears not to apply to an automatically unfair dismissal such as this. The Tribunal did not feel able to broaden the Code's application to include a dismissal without any misconduct but solely for making a protected disclosure as it considered that this would be an unwarranted gloss and expansion on the words of the Code. With some reluctance, the Tribunal concluded that there should be no ACAS uplift. If we had been able to make an ACAS uplift, we would have awarded 25% given the Respondent's total failure to follow any procedure and flagrant disregard of basic fairness."

17. In his skeleton argument Mr Kohanzad took a preliminary point, unheralded in the Respondent's Answer dated 19 November 2019, that this Appeal Tribunal had no jurisdiction to entertain either ground of appeal. After some discussion he did not pursue the point. In my judgment, he was right not to do so.

The time issue

18. Section 47B(1) ERA provides : **"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

19. Section 48 provides, as material :

> **"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.**
>
> **…(3) An employment tribunal shall not consider a complaint under this section unless it is presented;**
>
> **(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection 3 -**
>
> **(a) where an act extends over a period, the "date of the act" means the last day of that period, and**
>
> **(b) a deliberate failure to act shall be treated as done when it was decided on…"**

20. The Claimant challenges the Tribunal's conclusion that his entry into the new agreement commencing 1 March 2016 was a "one-off" event with continuing consequences, rather than an act which "extends over a period" (s.48(4)(a)) and/or an act or failure to act which was 'part of a series of similar acts or failures" (s.48(3)(a)) which in either case ended with his dismissal on 13 July 2017.

21. The Claimant's notice of appeal contends that the Tribunal erred:

> "…because the new agreement…that came in place due to the protected disclosure…continued to be in place (continuing act or continuing state of affair) till the Claimant's dismissal on 13 July 2017…The agreement…is not an abstract entity but…is continuing till Appellant's dismissal."

This accords with the Tribunal's summary of his submissions in the Remedy Judgment [3].

22. However his subsequent 'Reply to Respondent's Resistance/Answer' develops an argument which in substance reflects his case under the first four of the Schedule items (D1-4), namely that the Respondent had until his dismissal committed continuing detrimental acts/failures to act in respect of payslips, tax, national insurance etc.; and that this was a consequence of the October 2015 disclosure. This indeed was the argument to which HH Judge Shanks referred in his short reasons given after the Rule 3(10) hearing, when permission was granted to proceed on this ground.

23. To the same effect his skeleton argument submits that the Tribunal should have ruled that the Respondent's *'*continuing reliance on the March 2016 contract not to pay tax and national insurance or provide payslips or holiday pay and to call him consultant and require invoices *was an act extending over a period or a series of acts/failures.'* The Claimant's oral submissions placed their focus on this argument.

Discussion and conclusion on the time issue

24. In agreement with the Respondent's contrary submissions, I consider that the Tribunal's reasoning and conclusion were plainly correct.

25. It is necessary first to distinguish between the concepts of 'act' (or 'failure to act') and 'detriment', albeit in reality they are often the same thing: see **Royal Mail Group Ltd v Jhuti** UKEAT/0020/16/RN per Simler P (as she then was) at [31], citing **Flynn v Warrior Square Recoveries Ltd** UKEAT/0154/12 per Langstaff P at [3]. Time runs from the date of the 'act', regardless of whether a claimant has any knowledge of the detriment that the act produces. Tribunals should not confuse a continuing detriment with a continuing act: **Jhuti** at [32-33].

A Accordingly, per Langstaff P in **Flynn** : **"…in any case that considers a question of whether a complaint is out of time, it is incumbent upon an employment tribunal to identify carefully the act, or the deliberate failure to act, that the Claimant identifies as causing him a detriment."** [5].

B

26. The Claimant's Schedule of alleged detriments does not draw the distinction between 'act/failure to act' and 'detriment'. The agreed list of issues in the Liability Judgment in turn reflects the Schedule and uses only the language of detriment : see [2.15-2.16]. However, as a

C matter of substance it is clear that the parties and the Tribunal treated each of the Schedule items (and in particular the critical item D7) as both an act (or failure to act) and a detriment

D 27. Having accepted the Claimant's case that he had made protected disclosures in October 2015 and July 2017, the Tribunal in its Liability Judgment then considered each of items D2-11 in the Schedule for the purpose of the two issues which it had identified at paras. 2.15-2.16. In addition the Tribunal considered D1 insofar as it referred to the Respondent's alleged

E non-payment of his tax and national insurance.

28. As appears from the Tribunal's analysis of the Schedule list (paras. 102-115), the only

F matter which it found to have resulted from the October 2015 disclosure was part of item D7. As noted above, this item reads : "the C was forced/tricked into a purported contract when he was threatened dismissal as he refused to sign 2 other contracts that clearly stated he has no

G entitlements, & work in protest (para 5 and pg. 6 ET1)." The parenthetical reference to the ET1 leads to pleaded allegations which include the Respondent's non-payment of tax and national insurance and failure to provide payslips; and to the Claimant being *"compelled"* (para.(5)) and

H *"forced"* (p.6) to enter the new contract commencing 1 March 2016.

29. As already noted, in its Liability Judgment the Tribunal had made clear that none of the matters in the Schedule list concerning his employment status, *"namely non-payment of tax and national insurance, failure to provide pay slips or paid holiday and describing him as a consultant"*, were related to the October 2015 disclosure [102]. The part of item D7 that the Tribunal did accept was the Respondent's requirement for him to enter the new contract; thus the passage already cited from [103], see also [115].

30. Consistently with this finding, the Remedy Judgment approached the time issue on the basis that the starting point was the Respondent's act of *"introduction"*/*"imposition"* of the new contract : see [2(vi)] and [3]. Its record of the rival submissions is on that same basis. Thus **"The Claimant submitted that the imposition of the new contract from 1 March 2016 was a continuing act and not a single one-off event"** whereas the Respondent **"submitted that this was not a continuing act, rather it was a single act with continuing consequences."** [3].

31. Contrary to the Claimant's submissions, I do not accept that the time issue can be approached on the basis that any other act, or any failure to act, comes into play. Thus the Claimant is not entitled to seek to rely on the various allegations about the Respondent's conduct in the dispute about his employment status, e.g. failure to pay tax/national insurance or provide payslips etc., as 'acts' or 'failures to act' for this purpose. To do so would be contrary to the Liability Judgment, which rejected the Claimant's case that these were causally related to the protected disclosure of October 2015. Accordingly the focus must be on the act of the requirement to enter the new contract. The provisions concerning "a series of similar facts or failures" (s.48(3)(a)) do not arise. The question is then whether the imposition/introduction of the new contract falls to be categorised as (i) a 'once and for all' act with continuing consequences, or as (ii) a continuing act, i.e. which extends over the whole period ending with the Claimant's dismissal (s.48(4)(a)).

32. This type of distinction has provoked considerable litigation : see in particular **Barclays Bank Plc v Kapur** [1991] 2 AC 355; **Sougrin v Haringey Health Authority** [1992] ICR 650 and **Okoro & Anor v Taylor Woodrow Construction Ltd** [2013] ICR 580. These authorities show that a typical, but not exhaustive, example in the latter category is where the employer's relevant act constitutes a rule or policy by reference to which decisions are made from time to time: see e.g. **Barclays** and the categorisation cited in **Okoro** at [18]. Examples in the 'one-off' category include the act of dismissal; refusal to upgrade (**Sougrin**); and the banning of construction workers from a site (**Okoro**).

33. The 'act' in the present case does not constitute a policy or rule. Nor, in my judgment, is there any other basis for concluding that the imposition of the new contract was an act extending over a period. On the contrary, and in agreement with the Tribunal, it was a plain example of a 'one-off' act with continuing consequences. Accordingly, the appeal on the time issue must be dismissed.

The ACAS uplift issue

34. Section 207A TULRCA provides, as material:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
>
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that -**
>
> > **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
> >
> > **b) the employer has failed to comply with that Code in relation to that matter, and**
> >
> > **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."**

Schedule A2 TULRCA includes claims of unfair dismissal.

35. The Code of Practice on Disciplinary and Grievance Procedures (2015) includes in paragraph 1 of its Introduction :

'This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

- **Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit they may need to be adapted.**
- **Grievances are concerns, problems or complaints that employees raise with their employers.**

The section headed 'Discipline' covers paragraphs 5-31 of the Code. The section headed "Grievance" covers paragraphs 32-47.

36. The Claimant submits that the Tribunal was wrong to conclude that the Code had no application to his case; and therefore to dismiss the application for an 'ACAS uplift' to his awards. The termination of his employment took place the day after his protected disclosure of 12 July 2017. That disclosure related to the instruction from Mr Tanveer to pass students who had copied the work of others; and was the direct cause of his dismissal. In terms of the Code of Practice, his disclosure constituted a grievance within its definition of *"concerns, problems or complaints that employees raise with their employers".* The Respondent had entirely disregarded the Code, and had then advanced the false reason for his dismissal.

37. By reference to s.207A(2), the claim of automatic unfair dismissal by reason of the protected disclosure concerned a matter to which the Code related; the Respondent had failed to comply with the Code in any respect; and that failure was unreasonable. As the Tribunal had held [26], the Respondent had totally failed to follow any procedure and had acted in flagrant disregard of basic fairness. The Tribunal had thus been wrong to conclude that the Code was drafted in a way which had no application to such a claim.

38. As to the Discipline section of the Code, the Claimant's initial oral submissions were that this was also in play. However I understood him ultimately to submit that his case was essentially focused on the Grievance section.

39. Mr Kohanzad responds on two essential bases. First, that the Claimant's case, based on the Grievance rather than the Discipline section of the Code, was not advanced before the Tribunal; and accordingly cannot be raised on appeal. Secondly, that the Tribunal rightly held that the Discipline section of the Code had no application to the claim.

40. Mr Kohanzad accepts that the disclosure of 12 July 2017 falls within the Code's definition of Grievances. Whilst disputing that any award should have been made in any event, he accepts that, had the 'Grievances' point been raised, s.207A would be potentially engaged. For that purpose it would be no bar that the claim was for automatic unfair dismissal under s.103A.

41. However the Claimant did not raise any such case before the Tribunal. Mr Kohanzad points in particular to the Claimant's Schedule of allegations. Under the heading 'Unfair dismissal' this states:

> **"No disciplinary hearing or any formal meeting regarding dismissal or warning (or anything whatsoever about termination of employment was held (both in Feb 2016 and Jul 2017 dismissal as the case may be and, the particulars of reason given for dismissal was inadequate and untrue: see 93(b) ERA 1996; no ACAS Code of Practice was followed particularly – 2, 4, 5, 6-13 etc (pg. 8, and para 14 ET1)."**

Under Section F, headed 'Breach of Contract', the Schedule states:

> **"during C dismissal in spite of complaints, there was no warning, no disciplinary hearing, no ACAS procedure was followed – see s.86 ERA 1996 termination of employment and see also ACAS Code of Practice particularly – 2, 4, 5, 6-13 etc (pg. 8, and para 14 ET1)."**

42. In consequence the Tribunal had confined its consideration to the question of whether the Discipline section of the Code could have any application to a claim of automatic unfair dismissal

on the grounds of protected disclosure. There was no obligation on a tribunal to consider whether an ACAS uplift should be awarded where the relevant issue had not been put before it. By analogy, in **Pipe Coil Technology v Heathcote** UKEAT/0432/11/JOJ Supperstone J had observed:

> **"However, there was no claim before the Tribunal that the compensatory award should be increased pursuant to section 207A of the 1992 Act. By the use of the word "claim", we do not intend to convey that there needed to be a formal claim; the matter needed, however, to be raised expressly before the Tribunal, in our judgement. No submissions were made on the Claimant's behalf before the Tribunal that the compensation should be increased pursuant to section 207A. The Tribunal cannot be criticised in the circumstances for not dealing with the point of their own motion. In our judgment, it is too late for this claim to be made in this appeal."**

43. Although in the present case there was a section 207A claim, Mr Kohanzad submits that the same principle applies in the absence of any claim for an uplift by reference to the Grievance section of the Code. The Claimant disputes this and contends that his case before the Tribunal was not confined to the Discipline section of the code.

44. On his second argument Mr Kohanzad submits that the Tribunal was right to conclude that the Discipline section of the Code could have no application to a claim under s.103A. The precise label for the reason for dismissal was not determinative on this point. The proper test for its application was whether a disciplinary process was or ought to have been initiated. For that purpose the critical question was whether the employee had faced an allegation that involved culpability : see in particular **Holmes v Qinetiq Ltd** [2016] IRLR 664 (Simler P) and **Lund v St Edmund's School Canterbury** UKEAT/0514/12 (Keith J). These are decisions on the materially similar provisions of the predecessor (2009) Code of Practice.

45. The Tribunal had correctly reflected these principles in its Judgment. Thus it had acknowledged "**…that in certain 'some other substantial reason' dismissals the Code will apply, for example where the employee faces a complaint which may lead to disciplinary action or where disciplinary proceedings are or ought to**

be invoked against an employee" [25], but had correctly held that the making of a protected disclosure could never be a ground for possible disciplinary action.

Discussion and conclusion on the ACAS uplift issue

46. For the purposes of this appeal as it relates to the Discipline section of the Code, it is sufficient to cite the statement of Simler P in **Holmes** that the relevant paragraphs :

> **"…demonstrate that it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee."** [12]

47. In the circumstances of this case the Tribunal was clearly right to hold that the Discipline section of the Code had no application. First, as it held, because a protected disclosure could never be a ground for disciplinary action, i.e. for an allegation involving the culpability of the employee. Secondly, because culpability formed no part of the Respondent's unsuccessful case on the true reason for the dismissal.

48. However, Grievance procedures are a different matter. As Mr Kohanzad rightly accepts, the protected disclosure of 12 July 2017, which founds the successful claim of automatic unfair dismissal, constituted a Grievance within the Code's definition of *"concerns, problems or complaints that employees raise with their employers"*; and so as potentially to engage s.207A. In consequence, the essential question is whether the Claimant confined his s.207A claim to the Discipline section of the Code.

49. As to his Schedule, the particular references to paragraphs of the Code (*"particularly – 2, 4, 5, 6-13 etc. (pg. 8, and para 14 ET1)*) do not include the paragraphs in the Grievance section, i.e. 32-47. However (i) the paragraph references are not expressed exhaustively; (ii) they include two paragraphs (2 and 4) from the Introduction section which concerns both disciplinary

A situations and grievances; (iii) para. 14 of the ET1 includes the broad language of *'No warning, no disciplinary hearing, no ACAS procedure…'*

B 50. Furthermore the Claimant's written submissions for the remedy hearing stated at paragraph 5 : *"The C submits that the Tribunal should consider increase on any compensation claimed and awarded due to R's failure to comply with relevant ACAS Code of Practice, including Codes 1-13 (if not the entire Codes)."* This is again expressed in broad terms; and its

C non-exhaustive references to the Code include the whole of the Introduction section.

51. As to the Judgment, this does not state that the application is confined to the Discipline section of the Code; and indeed para.24 notes that the Code *"expressly applies to disciplinary*

D *and grievance situations in the workplace."* However the subsequent discussion is confined to the Code as it relates to disciplinary procedures. In fairness to the Tribunal, this may well reflect the focus of the submissions at the hearing; and indeed the Claimant, in his oral submissions

E today, initially tended to merge his arguments on the disciplinary and grievance aspects of the Code.

52. Although his case could doubtless have been expressed more clearly in his Schedule and

F written/oral submissions for the Remedy hearing, I am not persuaded that their effect was to confine his s.207 claim so as to exclude consideration of the Grievance section of the Code. In reaching this conclusion, and notwithstanding his legal qualifications and experience, I also take

G account of the fact that the Claimant was unrepresented.

53. If the s.207A was not so confined, in my judgment it follows that the matter should be

H remitted for reconsideration of the application, having regard to the Grievance section of the

ACAS Code of Practice. In these circumstances the parties agree, and I accept, that the remission should be to the same Tribunal.

54. Accordingly the appeal on ground 2 is allowed to that extent. The appeal on ground 1 is dismissed.