Case No: EA-2019-001107-RN (previously EAT/0106/20/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 July 2021

Before :

HIS HONOUR JUDGE AUERBACH
(Sitting Alone)

- -

Between :

MS P CLARKE	**Appellant**
- and -	
THE RESTAURANT GROUP (UK) LTD	**Respondent**

- -
- -

MS P CLARKE, **The Appellant in person**
The Respondent, neither present nor represented

Hearing date: 30 July 2021

- -

JUDGMENT

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SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal was a litigant in person. Upon consideration of her claim form under rule 12 **Employment Tribunals Rules of Procedure 2013**, a judge determined that there were two complaints, being of (a) ordinary unfair dismissal, in respect of which the claimant lacked qualifying service, and which was dismissed; and (b) breach of contract, which was permitted to proceed.

On appeal the claimant contended that her claim form indicated that she was seeking to bring a complaint that she was unfairly dismissed for making a protected disclosure, and that the judge had erred by precluding such a claim under rule 12. The claimant had subsequently written a letter, which the tribunal had treated as an application for reconsideration of the rule 12 decision under rule 13. However, it appeared that that application had not been determined.

Held: the judge had erred by precluding a possible protected disclosure complaint at the rule 12 stage. A proposed complaint should be dismissed for lack of jurisdiction under rule 12 only in the clearest of cases. The claimant had done enough in the claim form to indicate that she was seeking to pursue a protected disclosure complaint. The particulars in the claim form did not properly explain what she contended she had done that amounted to the making of a protected disclosure, nor why she considered that the relationship had been terminated because of any such disclosure by her; but she was a litigant in person and these were matters that could properly be explored at the initial consideration stage under rules 26 – 28. The tribunal had power under rule 26 to request further information from her, and to consider whether there was jurisdiction to entertain the complaint and/or whether it had no reasonable prospect of success. If the tribunal proposed to dismiss the complaint under those rules, the claimant would have the safeguards that reasons would be required, and she would have the opportunity to request a hearing before a final decision was taken.

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The fact that the tribunal had also at a later hearing (when considering the breach of contract claim) determined that there was no direct contract between the claimant and the respondent, was not necessarily decisive against there being jurisdiction to consider a possible protected disclosure complaint, having regard to **Employment Rights Act 1996** section 47K.

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HIS HONOUR JUDGE AUERBACH

1. In July 2019 the claimant in the employment tribunal (the "tribunal") presented a claim form as a litigant in person. She stated that she had worked for the respondent from 18 January to 1 March 2019 as a "Sub-Contractor, Post Merger Integration and Synergy Work". In section 8 she ticked the boxes to indicate that she was claiming unfair dismissal, "other payments" and another type of claim with which the tribunal could deal. As to the last of those, she wrote:

> "Breach of Contract.
> Claimant also contends that the status of her employment is to be determined by the Tribunal given that she was employed as a sub-contractor but contends that she was treated as an employee."

2. What she wrote in box 8.2, for the background and details, included that the respondent had attempted to terminate the contract dishonestly and on the basis of error and of false reasons. The claimant also stated the following:

> "When requested by Mindbench Limited an alternative reason was provided around two days later on 16 February 2019, which had not been discussed with C at all and which is also apparently false and or lends itself to matters in the interest of public disclosure ..."

3. Box 10 asks whether, in a case in which a protected disclosure complaint is being made, the clamant wishes the relevant regulator to be informed. The claimant ticked that box.

4. The claimant also identified ACAS as a proposed second respondent to her claim.

5. On 16 October 2019 the tribunal wrote the claimant a letter headed: "Acceptance of Part of Claim". The letter read, in part:

> "Your claim form has been referred to Employment Judge Balogun who has decided that only the following complaint can be accepted namely breach of contract. The Judge has decided to reject your other complaint, namely unfair dismissal, because you do not have the necessary qualifying service."

6. With that letter were explanatory notes relating to claim rejection. The claimant instituted an appeal to the EAT. In the grounds of appeal at para. 7, the claimant indicated that she was seeking to appeal the decision to reject part of the claim of unfair dismissal, as she had stated that the matter

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involved determination of her employment status and public interest disclosure, and there was no qualifying time for a complaint under section 103A **Employment Rights Act 1996** ("ERA"). The claimant was also aggrieved that the tribunal had not registered ACAS as a second respondent; and she sought to pursue an appeal in that regard, as well.

7. The notice of appeal was considered on paper by Linden J. He decided that it should be considered further at a preliminary hearing in the EAT. He gave a direction for the claimant to provide further information about what she said was the basis of her claims and, in particular, her public interest disclosure or whistle-blowing complaint. In response to that direction, the claimant prepared and sent a document to the EAT entitled: "C's Schedule of Particulars."

8. The preliminary hearing took place before me on 10 March 2021. I heard from the claimant and there were also written representations from the respondent. The respondent submitted that the claimant had not properly identified what her case was as to any protected disclosure that she had made, or that any such disclosure was the reason for the termination of the relationship. The respondent also submitted that, in any case, the proposed whistle-blowing claim was untenable having regard to a judgment that had been given by the tribunal arising from a hearing on 15 May 2020 in relation to the breach of contract claim. That judgment read as follows:

> "The claim is dismissed, no evidence having been presented to show the existence of any contract, express or implied, between the claimant and the respondent."

9. At the preliminary hearing, I considered that the proposed challenge to the tribunal's decision conveyed in the 16 October 2019 letter should be permitted to proceed to a full appeal hearing. In particular, I considered it arguable that there was sufficient information in the claim form to indicate that the claimant was seeking to pursue a whistle-blowing complaint. Hence it was arguable that it was wrong to preclude consideration of such a complaint upon presentation of the claim, under rule 12 of the **Employment Tribunals Rules of Procedure 2013**, bearing in mind also the procedure providing for initial consideration of a claim and response under rules 26 and 27.

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10. In addition, whilst the tribunal had subsequently determined, on 15 May 2020, that there was no direct contract between the claimant and the respondent, I considered it arguable that that did not necessarily, by itself, preclude it having jurisdiction to consider a whistle-blowing complaint in relation to the termination of the relationship between them.

11. However, I dismissed the claimant's proposed appeal against the tribunal's failure to register her proposed complaint against ACAS.

12. The respondent put in an answer indicating that it intended to resist the appeal on the basis of the tribunal's reasoning and giving further reasons. It stated that it accepted that the tribunal could have dealt with the claim under rules 26 and 27, instead of rule 12. However, it also stated that the claimant had written a letter to the tribunal which had been treated as an application for reconsideration of the rule 12 rejection. The tribunal had indicated that that application would be considered at a telephone hearing on 31 March 2020, but the claimant had then failed to participate in that hearing. The respondent submitted that the claimant had therefore had an opportunity to put forward her case to the tribunal as to why the rule 12 decision ought to be reconsidered.

13. The claimant applied for that answer to be disallowed, as it had been served on her four days late. That application was rejected by the EAT's Registrar. During the course of argument this morning, the claimant has sought to revisit that matter, and maintains that the answer should not have been allowed by the Registrar to stand. She also maintains that the answer wrongly relies on the later judgment that found that there was no direct contract between her and the respondent, a judgment with which, she made it clear to me, she also disagrees. However, the claimant did not appeal the Registrar's decision to extend time in relation to service of the answer, and that aspect cannot now be re-opened. In any event, I consider that the Registrar's decision was plainly right, for the reasons that she gave, and, had there been a timely appeal against it before me, I would have rejected it.

14. I turn to say a little more about the sequence of events in the employment tribunal. There

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were a number of letters written by the parties raising various matters, including a letter written by the claimant on 18 November 2019, by which time her appeal against the tribunal's rule 12 decision was already under way. In the course of that letter she referred to that appeal, and to her reasons for seeking to challenge that decision. The tribunal then treated that letter as amounting to an application to the tribunal itself to reconsider that decision. A letter was subsequently sent by the tribunal indicating that the reconsideration application would be considered at a hearing on 31 March 2020.

15. However, by the time of that hearing on 31 March 2020, this was just one of a number of matters and applications that had been raised on both sides. Another of them related to whether the claimant was an employee of the respondent. That issue arose because she had provided her services through a company controlled by her, Enyne Limited, and via an agency, Mindbench Limited. At the preliminary hearing on 31 March 2020 the tribunal decided that this issue of employment status should be the first issue to be addressed, but also directed that it be considered at a further preliminary hearing. That was the hearing that in due course took place on 15 May 2020.

16. From the paperwork that I have seen, it appears to me that, at the hearing on 31 March 2020, the tribunal did not, in the event, resolve what it understood to be the claimant's reconsideration application in the relation to the rule-12 decision. Indeed, the claimant has informed me during the course of the hearing this morning, of correspondence which tends to suggest that the tribunal decided to leave that matter entirely in abeyance pending the outcome of this appeal against that decision.

17. I turn to the claimant's arguments at today's hearing. She had the opportunity to put in a fresh skeleton argument for the purposes of today's hearing. However, she sent in a further copy of the skeleton argument that she had put in for the earlier preliminary hearing in the EAT. As well as the arguments that she advanced then regarding there being a whistle-blowing complaint, it also set out the arguments she raised then regarding the tribunal's failure to register her proposed complaint against ACAS. I reminded her in our discussion this morning that I had dismissed that part of the proposed appeal at that earlier preliminary hearing, and it is no longer live, which she accepted.

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18. With regard to the proposed whistle-blowing complaint, the claimant's skeleton argument sets out a chronology of events and refers to various emails, which are in my bundle. It reiterates her case, that what she describes as the "alternative reason" provided to her for the termination of the relationship, on 16 February 2019, as she put it: "is apparently false and or lends itself to matters in the interest of public disclosure." In the further document that she put forward following the order of Linden J, and in her oral submissions today, the claimant says that false reasons had been given for the termination of the relationship, consisting of false allegations, and that she had reason to believe that these matters would or might form part of information given by the respondent to other staff, which, if so, would, she asserts, be a criminal offence.

19. The claimant raised a number of other matters during the course of her written statements and in her oral submissions to me this morning. But these were about subjects such as why she considers the respondent has wrongly broken its contract with her, and other subjects that are not directly relevant to the issue of whether the tribunal erred in the decision it took in its letter of 16 October 2019, which is the sole subject of this appeal.

20. I turn to the law. The **Employment Rights Act 1996** sets out, at s43A and following, the definition of the concept of a protected disclosure. This includes, at s43K, an expanded definition of the meaning of a worker and, hence, of the meaning of the employer of a worker for these purposes. S47B gives a worker the right not to be subjected to a detriment on the ground that they have made a protected disclosure, and s47B(3) incorporates, for these purposes, the extended definitions of worker and employer found in s43K.

21. S103A of the **1996 Act** provides that, for the purposes of the law of unfair dismissal, a dismissal for the reason or principal reason that an employee has made a protected disclosure shall be treated as unfair. In such a case, the ordinary qualifying service requirement of two years' employment does not apply.

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22. The relevant rules of the **Employment Tribunals Rules of Procedure 2013** are as follows.

> "Rejection: substantive defects
> 12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—
> (a) one which the Tribunal has no jurisdiction to consider;
> (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;
> (c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
> (d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;
> (da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;
> (e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or
> (f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.
> (2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).
> (2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.
> (2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.
> (3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.
>
> Reconsideration of rejection
> 13.—(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—
> (a) the decision to reject was wrong; or
> (b) the notified defect can be rectified.
> (2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.
> (3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.
> (4) If the Judge decides that the original rejection was correct but that the defect has been

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rectified, the claim shall be treated as presented on the date that the defect was rectified.
…

INITIAL CONSIDERATION OF CLAIM FORM AND RESPONSE
Initial consideration
26.—(1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Judge may order a party to provide further information).
(2) Except in a case where notice is given under rule 27 or 28, the Judge conducting the initial consideration shall make a case management order (unless made already) and may propose judicial mediation or other forms of dispute resolution.

Dismissal of claim (or part)
27.—(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—
(a) setting out the Judge's view and the reasons for it; and
(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.
(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.
(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.

Dismissal of response (or part)
28.—(1) If the Employment Judge considers that the response to the claim, or part of it, has no reasonable prospect of success the Tribunal shall send a notice to the parties—
(a) setting out the Judge's view and the reasons for it;
(b) ordering that the response, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the respondent has presented written representations to the Tribunal explaining why the response (or part) should not be dismissed; and
(c) specifying the consequences of the dismissal of the response, in accordance with paragraph (5) below.
(2) If no such representations are received, the response shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the response (or part) to stand or fix a hearing for the purpose of deciding whether it should be permitted to do so. The claimant may, but need not, attend and participate in the hearing.
(4) If any part of the response is permitted to stand the Judge shall make a case management order.
(5) Where a response is dismissed, the effect shall be as if no response had been presented, as set out in rule 21 above."

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23. To reiterate, the sole question that I have to decide is whether the tribunal was wrong, by its decision under rule 12, to preclude the possibility of further consideration of a possible whistle-blowing complaint. That was what the tribunal effectively did, by determining that the only complaints were of ordinary unfair dismissal (which the claimant was not entitled to bring because of lack of sufficient service) and breach of contract.

24. Rule 12 is part of the group of rules which deal with consideration of the claim form after it has first been presented. As the heading of rule 12 indicates, it provides for a claim form potentially to be rejected under a number of headings for "substantive defects". As was said by the EAT in **Higgins v The Home Office** UKEAT/0296/14, where a tribunal is considering rejecting a complaint under rule 12 on the basis of lack of jurisdiction or abuse of process, in particular, it should not do so unless the substantive defect is plain and obvious on the face of the claim form.

25. It seems to me that, when it comes to an issue that may arise, as to whether there is jurisdiction to entertain the complaint, caution is, indeed, required. The reference in rule 12 to the possibility of rejecting a claim "or part of it" does enable the judge to look at each of the individual legal complaints that may be asserted, and to consider whether each of those is a complaint of a type in respect of which the tribunal is the appropriate forum. For example, if, as is sometimes seen, a claim form presented to the employment tribunal includes a complaint of defamation, it would plainly be a proper exercise of the rule-12 power to reject a complaint of that sort, as employment tribunals simply have no power at all to consider claims of defamation, which must be brought in the civil courts.

26. But where the complaint is of a type with which the employment tribunal can potentially deal, but faces a potential obstacle, it is generally not appropriate to use the rule-12 power to dismiss such a complaint, except in a clear and unambiguous case.

27. The further procedure under rules 26 to 28 provides for the claim and response to be reviewed

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at the outset in all cases. It enables a judge to consider whether there are *arguable* complaints within the jurisdiction of the tribunal. If not, that may lead to the dismissal of a claim or part of one, under rule 27. The procedure contains safeguards. If the judge considers that a claim is not arguable, or not within the jurisdiction of the tribunal, reasons must be given. Further, before a dismissal takes effect, the rule provides that the opportunity be given for submissions to be made by the claimant opposing that. Further, if the judge is not persuaded by such written representations, a hearing must be fixed at which the claimant may be heard before a final decision is taken. Rule 26 also gives a judge the flexibility to request further information from the complainant about the proposed claim. While the rule 26 process does not apply until the respondent has put in its response, it is the very next stage after that. If there is a rule 27 hearing (to consider whether the claim or some part of it should be dismissed), the respondent is permitted to participate, but is not obliged to do so.

28. The procedure under rules 26 to 28 therefore enables complaints in respect of which, on examination, the tribunal properly concludes that it lacks jurisdiction, or that they have no reasonable prospect of success, to be disposed of at an early stage, with only limited involvement being required of the respondent. The 2013 rules also contain other provisions enabling preliminary issues to be listed for determination at a preliminary hearing and/or a complaint that has no reasonable prospect of success to be struck out under rule 37. But, again, that rule contains the safeguard of the right for the claimant to have a reasonable opportunity to be heard before such a decision is taken.

29. In the present case, the claim form indicated that the claimant was raising *some* issue to do with public interest disclosure, in box 8.2, and she also ticked box 10. She also indicated that she was raising an issue as to her employment status. Whilst acknowledging that she was a sub-contractor, she contended that she felt that she had been treated as an employee.

30. I do not think that ticking box 10 alone will necessarily always be enough, in every case, to indicate that a whistle-blowing complaint is, in fact, being put forward. In some cases it is apparent that box 10 has been ticked in error, because its meaning has not properly been understood, and it

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may be perfectly clear from the rest of the claim form that no whistle-blowing complaint is actually being asserted at all. But in the present case, the claimant did refer elsewhere (in box 8) to public interest disclosure. What she wrote in box 8 does not properly, by itself, explain or address all the elements of such a complaint. It does not explain what, if anything, she says that *she* did that amounted to a protected disclosure nor, clearly, why she says that termination of the relationship was *because of* any such protected disclosure made by her.

31. Nevertheless I consider that there was enough in box 8 to alert the judge considering the claim form that the claimant *might* be seeking to bring some sort of whistle-blowing complaint, over and above a complaint of ordinary unfair dismissal, and a complaint of breach of contract. Bearing in mind that the claimant was a litigant in person, there was enough here to suggest that it was appropriate for there to be at least some further inquiry, or opportunity for her to clarify the matter, before a judicial decision dismissing such a possible complaint was taken. I therefore conclude that this aspect was not suitable for dismissal through the rule 12 process, although it was eminently suitable for consideration through the rules 26 to 28 process.

32. I do not think the judge was wrong at the rule 12 stage to reject a claim of ordinary unfair dismissal, if one was being asserted, as such. The claimant was clear in the claim form about the start date and the end date of the relationship, and two years' service is a statutory condition of the right to be able to claim ordinary unfair dismissal, which the tribunal cannot modify. But the judge was, in my view, wrong to determine that there was no complaint other than ordinary unfair dismissal and breach of contract, at the initial acceptance stage. If the claimant was right in her contention that she fell to be treated as an employee, then the two years' service requirement would not attach to a complaint of unfair dismissal for whistleblowing. Even if she was not an employee of the respondent, the possibility that she might be a worker of the respondent within s47K ERA, so that she could still complain of termination of the relationship as a detriment, might need to be considered.

33. The respondent submits that the claimant has not, either in her original particulars or in her

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further particulars given to the EAT, demonstrated that she has an arguable case that the relationship was terminated because she made a protected disclosure. I have already noted that it is necessary for such a complaint to identify what the claimant herself said *she did* that amounted to a protected disclosure by her, and what her case is as to the reasons why it is to be inferred that the relationship was terminated because she made such a disclosure. I can see some force in the respondent's arguments that she has still not clearly done that in this case.

34. However, in my view, this is not a matter for determination by the EAT for the purposes of the decision I have to take today. The particulars that the claimant has provided to the EAT were not included with the original claim form that was before the tribunal when the judge took her rule 12 decision. Those particulars, and the parties' arguments about them, may fall to be considered by the tribunal under the rule 26 procedure or, if the complaint survives the rule 26 procedure, possibly at some later stage in the tribunal. But these arguments do not, in my view, show that the tribunal was not wrong in the decision that it took at the rule 12 stage, with which I am concerned.

35. I also do not agree with the respondent's argument that the claimant has in fact had a fair opportunity for the rule 12 decision to be reconsidered by the tribunal itself. It appears, as I have described, that, while the tribunal treated correspondence from her as amounting to an application for reconsideration, that application has not, in the event, been determined by the tribunal. I note also that, in remarks made at the 31 March hearing, the judge, who was, at that point, concerned most immediately with the breach of contract complaint, appears to have assumed that, if the claimant was not a direct employee of the respondent, then that would itself dispose of any possible whistle-blowing complaint. But, as I have indicated, I do not think that would necessarily follow.

36. As I have noted, the tribunal *has*, indeed, determined, in its decision arising from the hearing on 15 May 2020, that there was no employment contract between the claimant and the respondent. The claimant made plain to me this morning that she disagrees with that decision. I asked her whether she had appealed against it or applied for a reconsideration of it. She did her best to refer me to

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various correspondence from her papers, but it is not entirely clear to me to what extent that correspondence related to the 15 May decision, as opposed to the decision with which this appeal is concerned, from the decision conveyed in the letter of 16 October 2019.

37. It is, therefore, not clear to me whether there is any live challenge at present to the 15 May 2020 decision. But, as I have noted, even if that decision stands, whilst that would preclude a complaint being pursued for unfair dismissal for the reason of having made a protected disclosure under s103A (a necessary ingredient of which would be a direct contractual employment relationship), that would not necessarily, in itself, preclude a challenge to the termination of the relationship as a whistle-blowing detriment by a different route.

38. This appeal is, therefore, allowed, because it was wrong for the tribunal to decide at the rule 12 stage to preclude further consideration of a possible whistle-blowing complaint. To be clear, I have *not* decided that the claimant *does* have a viable whistle-blowing complaint, or one that should necessarily be permitted to proceed to a full hearing in the employment tribunal. I have only decided that a possible complaint of that sort should not have been effectively precluded at the rule 12 stage.

39. The matter will now return to the tribunal. It seems to me that the next step there should be that the respondent should be allowed to amend its response to indicate specifically what its response is to the whistle-blowing complaint. That is because it appears to me that, because of the rule 12 decision, it has not yet been given the opportunity to do that. The tribunal will also then need to consider this proposed complaint under rule 26, and whether it should be permitted to proceed beyond that hurdle. I note that it would be open to the tribunal also, if it considers it appropriate to do so, to direct that it be considered at a preliminary hearing. But, beyond these observations, I say nothing further, as what course this matter may take on its return to the tribunal, will be for it to decide.

Further Matters

40. A further matter raised by the claimant is that she wishes the case to be transferred to a

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different employment tribunal region. It is not ordinarily within the power of the EAT to direct that, upon remission, the matter return to a different employment-tribunal region. Allocation of cases to region, or transfer of cases from one region to another, are, in principle, matters to be dealt with by regional employment judges and/or the President of employment tribunals.

41. The claimant says that she believes that she will not be treated fairly if her matter is dealt with by any judge sitting at Croydon. She has also told me that she has, indeed, applied to the regional employment judge for her case to be transferred to another region. If there has been, or is, a judicial decision on her application for transfer with which she is unhappy, it would be open to her to appeal against *that* decision (within the usual time limit), if she can identify an arguable error of law. But there is no appeal before me today against any such decision that may have been taken. The only appeal that is before me today is against the 16 October 2019 decision. I therefore decline the claimant's application for me to direct that the matter should return to a different region.

42. A different question is whether this matter should or should not be further considered by EJ Balogun, as opposed to some other judge sitting in Croydon, upon its return there. I note in this regard that the rule 12 decision itself will not fall to be taken again, as I have directed that the matter should proceed on the basis that the possibility of a whistle-blowing complaint should not have been excluded at the rule 12 stage. The next stage in the tribunal, following the respondent having a fair opportunity to amend its response in relation to that complaint, will be consideration under rule 26.

43. Although that will involve a different process, nevertheless the rule 26 procedure in this case will require a judge to give some consideration to whether there is an arguable whistle-blowing complaint within the jurisdiction of the tribunal. Whilst I do not doubt the professionalism which EJ Balogun would bring to that task, because of the overlapping nature of the issue which will arise under rule 26, with the one that arose under rule 12, I think it would be better if the consideration at the rule 26 stage was undertaken by a judge other than EJ Balogun. I will direct accordingly.

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