EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H Darmon	**v**	**Maven Investment Partners Ltd**

Heard at: London Central
On: 11 – 18 July 2017

Before: Employment Judge Hodgson
Mr K Church
Mr D Eggmore

Representation

For the Claimant: Mr E Capewell, counsel
For the Respondents: Ms S Belgrove, counsel

RESERVED JUDGMENT

1. **The claim of direct race discrimination is dismissed on withdrawal.**
2. **The claim of harassment fails and is dismissed.**
3. **The claim of unfair dismissal contrary to sec 103A Employment Rights Act 1996 fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on the claimant brought claims of direct discrimination, harassment, and dismissal for whistleblowing.

The Issues

2.1 The issues, as identified at the case management hearing on 29 June 2017, were confirmed.

2.2 There is a claim of direct race discrimination. The claimant relies on his nationality. He is French. The only allegation of direct discrimination is dismissal.

2.3 The claimant alleges harassment, the protected characteristic is race. There is one allegation of harassment which was that on 2 or 3 August 2016, Vincent Scavera, a colleague, said "I hate French people, they always think they are better than others."

2.4 There is a section 103A Employment Rights Act 1996 claim. The claimant relies on three alleged protected disclosures 15, 18, and 19 August 2016. The specific information said to be disclosed was unclear, and the claimant was ordered to provide clarification by 16:00, 30 June 2017. The specific information relied on was produced in a schedule at the hearing.

Evidence

3.1 We heard from the claimant, C1.

3.2 For the respondent we heard from: Mr Ian Toon, R3; Mr Ben Huda, R4; Mr Alexander Donnelly, R5; Mr Vincent Scavera, R6; and Ms Sandra Burggraf, R7.

3.3 We received a bundle, R1, and a chronology, R2.

3.4 Claimant produced further and better particulars of his alleged disclosures.

3.5 We received written submissions from both parties, R8 and C2.

Concessions/Applications

4.1 On day one of the hearing, the claimant sought to amend the claim to include a further alleged protected disclosures form 15 August 2017. The claimant was directed to file a specific amended particulars of claim, if he wished to pursue the application. The application was then considered on day two. Full oral reasons were given for refusing the application.

4.2 In summary, the application was refused because there was no hardship to the claimant in refusing it, but significant hardship to the respondent in granting it, as it would necessitate obtaining further evidence and could lead to an adjournment.

4.3 The additional information said to have been disclosed was, essentially, the same information said to have been disclosed on the other occasions. There was no suggestion that the claimant may not succeed on the

original disclosures, but could succeed on the fresh disclosure. Therefore, there was no attempt to differentiate between the causational effect of the disclosures already relied on and the further disclosure proposed by amendment.

4.4 There was no reason why the claimant could not rely on the circumstances said to constitute the further disclosure by way of factual background having regard to the evidence before the tribunal. Such facts must be considered as part of all the circumstances.

4.5 It followed that there was no hardship to the claimant, as the case was not being put in a different manner: there was no different causational argument. The addition of a further occasion when he was alleged to have made the same disclosure of the same information took the matter no further, but it would increase the evidential burden and may lead to adjournment.

4.6 The new allegations, albeit essentially dealing with the same alleged information, could not in our view be described as a minor amendment. It involved specific consideration of new factual circumstances and potentially further enquiry into the specific role of Ms Burggraf and any potential causational link to the dismissal. To the extent it was put forward as a new allegation, it would involve a consideration of the time limits, and it was clearly outside the time limit. There was no good reason for the late application. The claimant argued that he had forgotten about the second meeting with Ms Burggraf that occurred on 15 August 2016, until he was drafting his witness statement. However, even if that were true, it did not explain why the application not been made prior to the hearing.

4.7 In the circumstances, we found there was no hardship to the claimant in refusing the application, but potential hardship to the respondent. In addition, there was no adequate reason for the delay, and allowing the amendment would have led to an adjournment We therefore refused the application.

4.8 The claimant's written submissions withdrew the allegation of direct discrimination, but no explanation was given. At the start of the oral submissions, by consent, the claim of race discrimination was dismissed on withdrawal.

The Facts

5.1 The respondent, Maven Investment Partners Ltd, is part of the Maven Group which employs approximately ninety people globally.

5.2 The claimant commenced employment with the respondent as a trader on 8 December 2015. He was dismissed on 19 August 2016.

The claimant's role

5.3 The claimant role involved buying and selling securities. The respondent is not regulated by the Financial Conduct Authority in the UK nor the Securities Exchange Commission in the United States. The respondent has a number of contracts with various brokers. Those brokers may be regulated. There are contractual requirements between the brokers and the respondent which, effectively, require compliance with certain rules by the respondent, so that the broker can comply.

5.4 There are two types of sale with which we are concerned. The first is general sales whereby the security is owned and then simply sold.

5.5 In addition, some securities are not owned, but are sold. This is a process known as short selling. In short selling, there is a sale of security that is not owned by the seller, but is sourced from and borrowed from a third party. As a condition, the short seller promises to replace the borrowed security at some point in the future. In order to do this, it is necessary to have an agreement in place to source that security. This process is known as locating. Profit is generated because the security is sold at a specific price in the anticipation that the price will fall. It is then re-bought, and the difference represents profit.

5.6 Abuses occur when there is a short sale, but the security has not been validly located. In other words, there is no agreement in place for borrowing the security from a third party. This can have an effect on the market because the number of sales can produce a downward pressure.

5.7 There is a system of tagging. When a short sale takes place, it may be appropriate to specify that it is a short sale. The market does not see the tagging, but it is something that can be seen by the regulator. Tagging in itself has no specific effect on the market. It is the locating method which prevents the abuse of sales without the requisite third-party borrowing agreement: tagging in itself does nothing to ensure that process. Tagging simply flags a short sale for the purpose of any regulator.

5.8 The SEC in the United States requires tagging of short sales. Tagging is not always required in the European market.

5.9 In December 2015, the respondent acquired the services of the claimant and his colleague Mr Mr Olivier Chevillion, who was also a French national. Both were experienced traders. They joined as a two-person team. The claimant presented with significant trading experience. He had worked for a number of large names including Societe Generale, Credit Agricole, and ING. He had worked for a number of smaller hedge funds: C&D capital LLP, and Visium Asset Management. The claimant was to develop a strategy for trading equity stocks using quantitative algorithms. The strategy included taking long positions by buying a security with the expectation that it would rise in value and using short sales on the expectation they would fall in value. The portfolio developed included approximate 400 long stocks and 400 short stocks in 10 different strategies.

5.10 The respondent was supportive of the strategy. The capital risk limit was increased three times – 20 million in February 2016, to 30 million March 2016, to 40 million April 2016, and finally 60 million in August 2016. Despite this, no profit was made.

Training

5.11 The claimant participated in the respondent's induction programme. He received training on 15 December 2015 which identified the requirement to tag short trades in various jurisdictions, including the US.

5.12 The claimant undertook training on a trading system used by the respondent, Bloomberg's execution management system (EMSX). That system required a drop-down box to be completed which had three options including "sell" (for securities already held) and "short" (for short sales). The drop-down box must be completed with each sale.

5.13 During the course of his employment, there were various other directions given by email which reinforced the position.

Compliance monitoring

5.14 At no time during the course of his employment did the claimant ever tag accurately a short sale. Instead, all short sales were recorded simply as sales.

5.15 The respondent did have a compliance team. It was the responsibility of the compliance team to monitor compliance. Prior to the claimant's dismissal, the compliance team did not specifically monitor whether there was any tagging. It was not something they searched for. We have no credible evidence that the failure to monitor the tagging was a breach of any rule or requirement. Had compliance, as part of its system, monitored whether the sales were being tagged as short sales, it would have been obvious that the claimant was tagging no such sales, and this may have led to enquiry.

The claimant's breaches

5.16 Over the course of his employment, the claimant breached the respondent's procedures on a number of occasions. As noted, he never tagged short sales.

Events of August 2016

5.17 Mr Vincent Scavera was a colleague of the claimant and also a trader. He was senior. On 4 August 2016, another trader, Mr Nima Noorizadeh, alerted Mr Scavera to potential breaches by the claimant. He reported he had seen that a broker client, Mr Donaldson of Nomura, had written "Just important that you locate prior to shorting if you want to comply with US regs." He reported that the claimant had replied "I did, forgot to send those names to the correct…"

5.18 Mr Scavera and Mr Noorizadeh, then exchanged a Bloomberg chat concerning potential non-compliance with the locate provisions.

5.19 Mr Scavera reviewed the claimant's chat with Mr Donaldson, and spoke to the claimant. When he had this discussion, he also noted from the claimant's screen that the claimant was not tagging his short sales. Thus, the conversation on 4 August 2016 was initially about the importance of the locate procedure. However, as a result of that, Mr Scavera noticed the claimant's breach of the tagging procedure. He discussed it with the claimant and told the claimant he should go to compliance, as it was a breach.

5.20 It is reasonable to suppose that if the claimant had any doubt as to either procedure, he would have asked for an explanation. However, he asked for no explanation. We therefore conclude on the balance of probability, that the claimant understood both the locate procedure and the separate need for tagging.

5.21 Mr Scavera continued his chat with Mr Noorizadeh, as to his concerns. It is unusual to have such a Bloomberg chat, and he did it specifically because he was concerned by the claimant's attitude to compliance, and therefore was having a private chat on Bloomberg.

5.22 Mr Scavera was so concerned that he started a chat with the claimant on Bloomberg (R1/724). This is very unusual. He enquired "So you good with the US trades tonight?" The claimant said he was not. Mr Scavera asked him to check the trade over with Ms Noorizadeh, and stated he needed to tag short sales, to which the claimant replied "not set up yet." That entry was timed at 16:16:25. Ten minutes later at 16:26:11 Mr Scavera stated, "OK I wouldn't trade if you cannot tag correctly…" Shortly thereafter he also stated "Also please tell compliance about the trades yest that were mis tagged…"

5.23 It is the claimant's case that he did not see the last two entries from 16:26. He has suggested that the window was hidden and therefore he did not see it. He has also suggested that he shut the chat and therefore did not see it.

5.24 We have rejected the claimant's evidence. This Bloomberg chat was not routine. It is reasonable to conclude he should have realised its importance and paid attention to it. On the balance of probability, he would not have shut it after he had indicated that he may not be able to comply by suggesting the programme was not yet set up. Moreover, the direct oral evidence we have confirmed that had he left the chatroom it would have been recorded, but it was not recorded. We find that the claimant did read the 16:26 entries and his evidence on this point has been materially inaccurate.

5.25 Mr Scavera then went on holiday. When he returned, he checked the claimant's trades in the US. The claimant had made hundreds of trades, but he had not tagged a single one as a short sale. Mr Scavera asked the claimant to explain.

5.26 The claimant denies that there was any conversation about tagging short sales on that date. Instead, he suggests that there was just a general chat about the market. We do not accept the claimant's evidence. We have no doubt that Mr Scavera checked the position. He was concerned, as has been illustrated by the previous action. Given that he had already raised the matter with the claimant, and given that when he checked there were still non-compliance, we find there can be no doubt that he raised it with the claimant; the claimant's evidence in relation to this is materially inaccurate.

5.27 Mr Scavera told the claimant to stop trading short sales and repeated his instruction that the claimant should raise the matter with compliance.

5.28 Mr Scavera was so concerned that he raised the matter, again by Bloomberg chat, with another trader, Mr Satpreet Brar (R1/731). His communication was to the effect that he was concerned the claimant was still failing to tag short sales and that he had told him to go to compliance, but was concerned that he would not do so. He concluded by saying if the claimant had not gone to compliance by the next day, he would inform them.

5.29 On Saturday, 13 August, Mr Scavera logged onto the system and observed the claimant had still not tagged any short sales. He therefore escalated the matter to the directors, Mr Ian Toon, and Mr Ben Huda.

5.30 Mr Scavera had a further discussion with the claimant on 15 August 2016; the claimant apologised for not following Mr Scavera's instructions.

<u>Actions leading to the claimant's dismissal</u>

5.31 On 13 August 2016, Mr Scavera contacted Mr Ian Toon by phone. He summarised the position, including the following: the fact that Mr Donaldson had raised locate process concerns with the claimant on 4 August 2016; the events of 5 August 2016, including Mr Scavera telling the claimant to locate and tag US short sales and to report to compliance; the discussion on 12 August 2016, when Mr Scavera told the claimant to inform the compliance team; and the claimant's continuing trading, without tagging, on 12 August 2016.

5.32 It is also apparent that there were further conversations involving Mr Huda.

5.33 On 15 August 2016, at 2:41 Mr Toon sent a long email to the senior team, including Ms Burggraf, concerning the compliance issue. He was specifically concerned with the failure of short sell tagging in the US, together with locates generally. He stated that Mr Scavera's warning had gone unheeded. He went on to say, "What I'd be looking from them at a minimum is total honesty from this point. If that's not forthcoming then it's not going to work."

5.34 At approximately 7:15 British time, Mr Toon who was I n Hong Kong, called the claimant and Mr Chevillon. He told them there were compliance issues and that Mr Ben Huda would discuss it with them.

5.35 At 7:44, Mr Toon followed this up with a further email to the senior team, outlining the action taken.

5.36 Mr Ben Huda had been informed by Mr Scavera of the compliance problem over the weekend. Mr Huda then had a short discussion with the claimant when little was said, other than Mr Huda confirming that they had not tagged the trades properly, and that the claimant had not followed Mr Scavera's instructions.

5.37 At 11:13, Mr Toon sent an email to the senior team suggesting they must first address what had happened. He stated there was no market impact, he did not believe that the failure to tag would be a huge issue for the brokers, but did consider the biggest issue was how the two individuals should be dealt with. He noted there was a culture of non-compliance. He referred broadly to some historical matters: failure to reconcile accounts; failure to undertake wraps at the end of the day (another form of reconciliation); breaching risk limits; issues with locate procedures; and the failure of short sell tagging. He stated that what concerned him was the attitude of the claimant and his colleague. He was concerned that the claimant had received two clear warnings from another team member, but had done nothing and therefore Mr Toon questioned the culture.

5.38 Ms Burggraf met with the claimant on 15 August 2016; this resulted in a report sent by email at 13:35 (R1/1207). This email summarised her meeting with the claimant and his colleague. He confirmed that they understood the locate procedure. As regards tagging, it stated "In respect of tagging rules in the US you mentioned that you were not aware of the rules and assumed they were no short tagging requirements in the US as it is currently the case in Europe. The training you have attended here is on market abuse but you have not received specific training on US rules."

5.39 Ms Burggraf had previously reported to Mr Toon, at 11:26 on 15 August 2016, the detail of her meeting with the claimant. She reported that the claimant, and his colleague, stated they assumed there was no tagging in the US, as there was none in Europe. She confirmed that training had been provided in December 2015. She forwarded an email she had obtained from Mr Donnelly who was responsible for the training.

5.40 On 15 August 2016 at 11:48, Mr Toon wrote to Ms Burggraf and other directors he stated, "I can tell you we have had at least 2 sessions since they started in prop meeting on short sell tagging and locate requirements… The ignorance card doesn't wash for me." He asserted the training and guidance was clearly there.

5.41 By 06:13, 16 August 2016, it is clear that Mr Toon had resolved that the claimant must be dismissed. His email (R1/739) states, "I'm personally extremely p'ssed off… They knew exactly what they were doing, they were

just lazy and thought it wasn't important… If they admitted that and said sorry didn't realise you guys were serious, but we're going to change, I could handle it… To say they haven't traded before is just not true and doesn't wash… For me saying they did it because they didn't know is simply a lie, and I can't tolerate that… Add all this up and its gross misconduct and I don't see how I can trust them."

5.42 At 6:37, Mr Huda responded by email. In essence, he agreed that the claimant should be dismissed, but made a case for treating Mr Chevillon more leniently, as he had been away during two weeks the problems had arisen. He said, "This is the definitely the most damaging evidence of all and without some form of explanation/mitigation means Hadrien should go on the face of it."

5.43 We find that at this point, Mr Toon had decided that the claimant must be dismissed. Mr Huda had also considered the position and whilst he suggested that Mr Chevillon be treated more leniently, he agreed the claimant should be dismissed. Therefore, both had resolved to dismiss at that point.

5.44 On 17 August 2016, 2:07, Mr Toon reiterated in an email to Ms Burggraf and the senior team that he considered the claimant's explanation to be disingenuous and his overall conduct to be gross misconduct.

5.45 It is apparent that a process was put in place to review what had happened, identify the lessons and take remedial action. Ultimately, that led to a review of the training and a greater emphasis was placed on the need to ensure tagging occurred. Tagging also became something specifically monitored by compliance; compliance had not previously monitored whether tagging had occurred.

5.46 At 12:54 on 18 August 2016, Mr Ben Huda sent an email to Ms Burggraf which emphasises the fact that the decision had already been taken. He stated "We can no longer trust Hadrian and we will dismiss him when we have the paperwork to hand."

5.47 On 18 August 2016 at 15:45, Ms Burggraf met with the claimant. The claimant covertly recorded the meeting.

5.48 Ms Burggraf sent a summary of the meeting later. It is clear that they did discuss training. She identified a number of slides which referred to tagging. The claimant simply said that he'd "forgot," which is a clear reference to the training received. This meeting did not materially affect the decision to dismiss as the decisions had been taken earlier.

5.49 The claimant was dismissed during a meeting which took place by telephone on 19 August 2017. Mr Toon explained that owing to a number of factors that the claimant's strategy would be discontinued and his contract terminated immediately. It is clear there was then an extensive discussion, but it is not material to our decision.

5.50 The dismissal was confirmed by the letter of 19 August 2016.

The disclosures

5.51 The specific information said to constitute the disclosures is not set out in any, or any adequate, detail in the claim form. We have considered the further and better particulars filed by the claimant in response to the order of 29 June 2017. It is claimant's case that the disclosures of information fall into two specific categories. Category one is that "he had never been given any training on United States trades by the respondent." Category two is that "compliance had not been monitoring his trades as they should have been."

5.52 The claimant alleges that the disclosures were made on three separate occasions. First, he alleges that on 15 August 2016 he made the disclosures to Mr Huda. He alleges that he used the words "I've never been told it was a market rule," and, "I have never had any training on US trades."

5.53 We have not allowed the amendment to include the alleged further disclosures on 15 August to Ms Burggraf, but for the sake of completeness we would note that the alleged allegations made to her are not materially different.

5.54 It is necessary to decide whether the claimant did, in fact, use the alleged words on 15 August 2016. We have reached the conclusion, on the balance of probability, that he did not.

5.55 We know that he alleges to have made the same disclosure on 18 August 2016. That conversation was recorded, and we will consider it in more detail below. The claimant has not suggested that he believed his original disclosure was disingenuous, and that he modified it in some manner when making the further disclosures. Therefore, one would expect there to be consistency. The words actually used by him are to the effect "I didn't understand it [tagging] was a market rule. I didn't realise that it was a market rule, nor locate."

5.56 As regards disclosure relating to compliance, the words he alleged he used are, "We have been allowed to trade in the US for a period of three months without this being picked up by compliance." Even supposing he recorded those words accurately, there is nothing in his comments about compliance which suggests that there was a failure of some obligation to monitor.

5.57 It is possible that the claimant did, on 15 August 2016, say "I have never been told it was a market rule. I have never had any training on US trades." This would, of course, have been untrue. It is possible the claimant made that false allegation at that time, and thereafter resiled from the position knowing that he had lied. However, Mr Huda is very clear that there was no such conversation at the time. It was a brief conversation.

5.58 The balance of probability suggests that there would have been repetition. The allegations were not repeated. Therefore, we find they were not made.

5.59 Second, he alleges he made the disclosures to Ms Burggraf again on 18 August 2016. The wording he relies on includes "the tagging… I was aware about (that I had to) sell short. I didn't know it was a market rule."

5.60 This conversation was recorded. Therefore, the claimant has been able to quote from the transcript. It, therefore, should have been a simple task to identify the specific disclosures of information. There is no wording which specifically says that he had not been given training on United States trades by the respondent. The nearest the claimant comes to saying that he received no training is he did not know that either the locate process or the tagging process was a rule of the market. It is possible that he sought to imply that he had not received proper training.

5.61 As regards the compliance issue, he repeated words to the effect of "I didn't receive any warning. A warning comes from compliance." This falls far short of his alleging that compliance had not been monitoring his trades in default of some obligation. In his oral evidence, the claimant was unable to say how compliance had specifically failed. His alleged disclosure is that compliance had not been monitoring his trades as they should have been. However, at no time did he identify what compliance should have been doing which they failed to do.

5.62 Third, on 19 August 2016, again in a discussion for which there is a transcript, the claimant used words such as "I did not think at all Vinny was telling me it [tagging] was the rule market." He went on repeatedly to say "I didn't know it was a rule." This falls far short of alleging that he had not received training.

5.63 As regards compliance, he identifies wording such as "Every time I never received anything from the compliance rules." The words relied on do not allege that compliance had failed to do comply with an obligation. The claimant records he received no notification from compliance, but does not allege any specific failure of any monitoring process.

<u>The claim of harassment</u>

5.64 It is the claimant's case that on 2 or 3 August 2016, Mr Scavera used the words, "I hate French people, they always think they are better than others."

5.65 The claimant gives limited details about the circumstances. He states he was having a conversation with Mr Scavera and others (in his oral evidence he modified this to say it was just the two of them). It was then that the statement was made. He stated that Mr Scavera on realising he was talking to a French man said, "You, you are all right." The claimant alleges that six people were present who could have overheard the comment. It appears that one of those individuals, Mr Bradbury, was in

fact on holiday. Of course, the claimant could have made a mistake. We have heard from one of the alleged witnesses, Mr Huda, but he had no recollection of the comment. It is possible he may have been away from his desk.

5.66 We have not had any direct oral evidence from the others who may have overheard the alleged conversation.

5.67 Mr Scavera accepts that there was a certain amount of banter, but he denies making comment referring to French people on 2 or 3 August 2016. He alleges that several months earlier, around May 2016, he recalled one occasion during a group conversation when he said something like, "I don't like French guys because they are arrogant and think they are better than others, but I like French girls." He denies using the word hate, ever.

5.68 The claimant alleges that he was offended by the comment 2 or 3 August. He did not raise this alleged offence with anyone. He did not report the matter. He did not raise a grievance. The claimant could not give us the context of the conversation or explain how it came about or how the conversation then progressed.

5.69 In addition, the claimant suggested that racist jokes were told frequently, possibly weekly, by Mr Scavera. However, he was unable to give us any specific example.

5.70 The claimant made no note of the alleged comments. There is no evidence he discussed it with any individual. The claimant makes no suggestion that he discussed it with his fellow countryman and colleague with whom he worked extremely closely, Mr Chevillon.

5.71 We have reached the conclusion that, on the balance of probability, if the comment about hating French people had been made in a negative way, there would have been some contemporaneous evidence. Such evidence may have taken the form of a witness, a contemporaneous written note, or a contemporaneous discussion with a sympathetic colleague. Moreover, it is more likely than not the not only the offensive comment would have been remembered, but also the context in which it arose.

5.72 The lack of contemporaneous evidence, and the claimant's total inability to recall anything about the context, both lead us to conclude, on the balance of probability, that Mr Scavera did not use the phrase about hating French people on the 2 or 3 August 2016.

The law

6.1 Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996.

Section 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, is made in the public interest and 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, or is likely to be deliberately concealed.**
>
> **(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
>
> **…**
>
> **(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

6.2 The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(e); third, what was the belief of the employer making the disclosure; and forth, was the belief that there was a public interest reasonably held. All of these elements must be addressed or satisfied if the claim is to succeed.

6.3 Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. Mere allegations may not be a 'disclosure' for these purposes (see **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38. It should be recognised that the distinction between allegation and information may not be clear-cut. It will be necessary to consider the full context.

6.4 It may be possible to aggregate disclosures, but the scope is not unlimited and is a question of fact for the tribunal.

6.5 It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify even a legal obligation (even if mistaken), as opposed to a moral or lesser

obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

6.6 The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief.

6.7 'Reasonable belief' is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable belief whereas a less informed, but mistaken individual might. Each case must be considered on its facts.

6.8 The public interest element was added in 2013 in order to reverse the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the CA in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979.

6.9 Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32). Underhill LJ declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

> **.. the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker… The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool… but that is subject to the strong note of caution which I have sounded in the previous paragraph.**

6.10 In paragraph 34, Underhill. LJ accepted, subject to his note of caution as set out above, the following may be relevant: the numbers in the group who share the interests; the nature of the interest affected – how important is the interest; the nature of the wrongdoing (intention may be important); and the identity of the wrongdoer and its position in the community. Whilst he identified that these matters may be among those to be considered, he made it plain that it is for the tribunal to consider all the facts.

6.11 Underhill LJ expressly refused to rule out the possibility that a disclosure of a breach of a particular worker's contract will not be in the public interest. At paragraph 36 he stated:

> **…I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I**

> **would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never…**

6.12 Whilst it is clear that the ratio for the decision identifies the tribunal must consider all the circumstances, Underhill LJ also gave some general guidance. Starting at paragraph 26, he dealt with some "preliminaries." He reiterated that the tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> **First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula* (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**

6.13 Underhill LJ reiterated the need to consider what was actually believed at the time of the disclosure. He says at paragraph 29

> **… a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all…**

6.14 At paragraph 28 he noted that it was not for the tribunal to substitute its own view, but stated that importing tests from other areas of law may not be helpful.

> **…I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking…**

6.15 Harassment is defined by section 26 Equality Act 2010.

Section 26 - Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

6.16 In claims of harassment and discrimination it is always important to identify the specific allegation relied on, as those are the only complaints on which a tribunal can rule. The first question is whether the alleged circumstances occurred at all. In **Anya v University of Oxford and another** 2001 IRLR 399, CA, Sedley LJ stated:

> **9 This reasoning has been valuably amplified by Mummery J in *Qureshi v Victoria University of Manchester* (EAT 21 June 1996), a decision which Holland J in the present case in the Employment Appeal Tribunal understandably described as 'mystifyingly unreported'. It is therefore worth quoting at length from Mummery J's judgment.**
>
> ...
>
> ***The complainant***
> **The industrial tribunal only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it. If the applicant fails to prove that the act of which complaint is made occurred, that is the end of the case. The industrial tribunal has no jurisdiction to consider and rule upon other acts of racial discrimination not included in the complaints in the originating application. See *Chapman v Simon* [1994] IRLR 273 at paragraph 33(2) (Balcombe LJ) and paragraph 42 (Peter Gibson LJ). In this case, the principal complaints made by Dr Qureshi were the decision of the FRC not to support a recommendation for his promotion to the post of senior lecturer in October 1992 and the decision of the Dean of the Law Faculty in October 1993 not to put his name forward to the APC with a favourable recommendation for promotion to senior lecturer. The considerations of the tribunal and their decision should, therefore, focus on those complaints and on the issues of fact and law which have to be resolved in order to decide whether the complaints are well founded or not.**
>
> ***The issues***
> **As the industrial tribunal have to resolve disputes of fact about what happened and why it happened, it is always important to identify clearly and arrange in proper order the main issues for decision eg:**
>
> > **(a) Did the act complained of actually occur? In some cases there will be a conflict of direct oral evidence. The tribunal will have to decide who to believe. If it does not believe the applicant and his witnesses, the applicant has failed to discharge the burden of proving the act complained of and the case will fail at that point. If the applicant is believed, has he brought his application in time and, if not, is it just and equitable to extend the time? …**

Conclusions

Direct discrimination

7.1 The claim of direct discrimination was withdrawn during submissions, as noted above, and has been dismissed.

Harassment

7.2 There is one claim of harassment before us. It is the claimant's case that the following words: "I hate French people, they always think they are better than others," were said on 2 or 3 August 2016. We have considered whether those words were used on either of those dates by Mr Scavera. We have found that those words were not used. It follows that the allegation of harassment fails because the circumstances said to constitute the harassment have not been proven on the balance of probability.

7.3 We have not found that some similar wording was used on those days. Had there been some related, but slightly different wording used, it may have been possible to consider whether those words constituted harassment.

7.4 Mr Scavera does acknowledge that there was a reference, in or about May 2016, to French men being arrogant. That was said. We made it clear at the start of the hearing that the admitted treatment was not an allegation of harassment before us. It was open to the claimant to apply to amend in order to allege that the treatment admitted by Mr Scavera did in fact happen, and to argue that it occurred either in May 2016 or August 2016. In those circumstances, it would have been necessary to consider whether the amendment would be allowed and thereafter we would have gone on to consider whether, given the full circumstances, it constituted harassment. However, the admitted language is not an allegation of harassment before us.

7.5 We accept that Mr Scavera did make reference to French men being arrogant, in or about May 2016. The claimant does not remember any incident from around May 2016. He has not alleged any such incident constituted harassment.

7.6 It follows, as we have decided that the words relied for the alleged August allegation on were not used, they cannot constitute harassment.

<u>Whistleblowing</u>

7.7 The first question we must ask is whether there was a disclosure of information.

7.8 It is the claimant's case that there are two types of information: first, he had never been given any training on United States trades by the respondent; and second, that compliance had not been monitoring his trades as they should have been.

7.9 We specifically considered with the parties whether false or untrue statements that had no factual basis could nevertheless be said to be disclosures of information. Both parties took the view that a disclosure of false or untrue information was nevertheless, a disclosure of information. We do not necessarily accept that an assertion of a factual circumstance which is untrue is a disclosure of information. However, for the purposes of this judgment we do not have to resolve that issue.

7.10 There is a factual question concerning whether the information alleged to have been disclosed was actually disclosed. We have reached the conclusion that the claimant did talk generally about not being aware of the compliance obligations in the US. At no time did he specifically state that he had not received training on US trades. He did not, therefore, make the disclosure of the information on which he now relies. Nevertheless, it is clear that the respondent, presumably as a necessary inference, viewed the claimant's accusation, that he did not have the requisite knowledge, to be an accusation that he had not received adequate training. That is why the respondent checked what training had been given. It is arguable, therefore, that there was a disclosure of information. For the reasons we will come to, we do not have to finally decide that point.

7.11 The claimant did make it clear that compliance had not contacted him about any failure to tag short sales. That was a disclosure of information. However, the alleged disclosure of information on which he relies is that compliance had failed in its monitoring obligation in some manner. At no time has the claimant identified what obligation to monitor or what process he had in mind. It is difficult to see how an assertion that he received no warning from compliance should lead to any form of inference that compliance was not undertaking a required function. It cannot be said that the claimant's noting he had received no warning from compliance requires a necessary inference that compliance had failed in its duty to monitor.

7.12 If we assume for the purpose of this analysis that information was disclosed, the next question is whether the claimant had any public interest in mind at the time he made the disclosure.

7.13 It is clear that the claimant failed to expressly identify the nature of any public interest at the time he made a disclosure. There is no obligation on him to identify what public interest he had in mind, but the failure to identify any public interest expressly does lead to an enquiry as to whether there is any evidence that he had any public interest in mind at the time.

7.14 His claim form specifically refers to the claimant's reasonable belief and sets out a detailed paragraph concerning violation of US federal security law. However, the claimant now accepts that he knew nothing of such laws, and did not have any such laws in mind at the time he made the alleged disclosures. It is clear that the violation of US federal law was not in his mind. The claimant's witness statement fails to identify any thought process relevant to the public interest point. His statement says nothing, at all, about public interest. In the context of public interest, the claimant's statement makes no reference to the US federal securities law identified in his claim form.

7.15 To the extent he addresses the public interest point in his claim form, he relies upon matters which he accepts were not in his mind. In his statement, he makes no attempt at all to address what public interest he had in mind.

7.16 The only evidence the claimant gave about his belief that his disclosure had any public interest element at all was during cross examination when asked by the tribunal to explain. His answers is recorded in his own submissions as follows:

> **In answer to questions from the judge he stated that as an experienced financial professional he recognised without rules the financial market couldn't be a fair place to invest and so it was his duty to raise what he considered to be failures**.

7.17 We have to decide whether the claimant gave any thought at all to the public interest at the time when he made his disclosure, or whether this is simply a rationalisation after the event.

7.18 There is no contemporaneous evidence which would suggest that he gave any thought to the public interest at all. The reality is that the claimant ran into compliance difficulties from 4 August 2016 onwards. The material failure was brought to his attention on that date.

7.19 There was a further discussion of 5 August 2016, when he was told specifically not to trade and that he needed to report to compliance. He ignored Mr Scavera's comments.

7.20 He was told again on 12 August 2016, and he ignored Mr Scavera.

7.21 On 13 August 2016, Mr Scavera reported him to the senior management. It was at that point, when he realised that he faced a serious compliance issue, that he sought to deflect from himself any blame. It would have been possible for the claimant to simply accept his fault, and it is very likely that he would not have been dismissed had he done so. Instead he sought to muddy the waters by suggesting that he had insufficient knowledge. The claimant was not seeking to identify his own incompetence or his own ignorance. The clear implication was that the respondent had not trained him. That was the inference the claimant wished the respondent's managers to reach.

7.22 It is clear he had received training. Had there been any truth in his assertion that he did not sufficiently understand his responsibilities, we have no doubt that he would have raised this with Mr Scavera when he was first challenged. The claimant had the opportunity to raise any confusion he had with Mr Scavera about the locate process and the need tag the short sales, but he said nothing. Instead, in the exchange of 5 August 2016, he simply suggested that the system itself was not set up. What exactly he had in mind remains unclear. The actual system for tagging a short sale involved ticking a box from a drop-down menu. That system was always in place. We have concluded that the claimant's suggestion he had not received training was without substance and he was aware of this.

7.23 The suggestion that what he actually had in mind was a failure of the respondent to train him and that he had a wider concern about the public interest is without basis or merit.

7.24 If we were wrong in saying the claimant had no public interest in mind when making his disclosures and either he did not need to have any public interest in mind when making his disclosure, or that he did have some residual public interest in mind, we would still have to consider whether the disclosures were made in his private interest and if so, whether it is one of the exceptions which may be envisaged by **Chesterton**.

7.25 We have no doubt that this is a disclosure which essentially is about a private interest. Disclosures about private interests often refer to a breach of the employee's own contract. However, there can be other disclosures which are about other legal obligations which, nevertheless, essentially are made out of private interest.[1] To the extent that there is any suggestion that the respondent was in breach of some legal obligation by failing to train him, or by failing to monitor his trades, that was designed to deflect criticism of the claimant and to preserve his own employment.

7.26 Nevertheless, such a private interest disclosure could have a public interest and we have regard to paragraph 34 of **Chesterton**. It appears to us that the factors outlined at paragraph 34 of **Chesterton** may become relevant when it is accepted that an individual had some regard to the more general, public interest, position raised by his or her disclosure. It is less than clear to us when and how it is envisaged the factor should be applied when considering a claim. We note that **Chesterton** cautions against the tribunal simply applying its own objective view.[2] It would seem to us there are two possibilities. First, it may be that we are considering the extent to which the worker had the factors in mind when making the disclosure. This would go to the reasonableness of, and possibly the fact of , the worker's belief. Second, it may be that we are to have them in mind when objectively considering whether a worker's belief could be reasonable. It is possible that both approaches are envisaged, but it is less clear to us if it is envisaged that there can be an entirely after the event rationalisation when a worker had no regard at the time to the public interest. This is not a matter we need to decide for the purposes of this case.

7.27 Whatever the position, even if it could be argued there was some basis for finding the claimant had any regard to the public interest in making his disclosure, the factors identified at paragraph 34 would not tend to support a finding that such a belief could be reasonable. The numbers involved are low, it was only the claimant and Mr Chevillon who were directly affected. The alleged wrongdoing of the respondent was at a low level. It can not be said there was an absence of training, no monitoring, or no compliance. At the very worst, the respondent could have done better. The nature of the wrongdoing disclosed again is marginal. The market is largely protected by the locate rules. Failure to tag is not in itself something which protects the market: it simply informs the regulator that

[1] See Underhill LJ's comments at paragraph 37 of *Chesterton v Nurmohamed [2017] EWCA Civ 979*, and particularly his footnote number 5.

[2] See paragraph 28 of Chesterton where it is stated, "the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker."

there is a short sale. The identity of the wrongdoer is of limited relevance in this case.

7.28 It is difficult to see how the claimant's essentially private interest has any public interest element at all. We are not convinced an analysis of the factors identified at paragraph 34 of **Chesterton** materially adds to the analysis in this case.[3] We are to ask whether the disclosure of information in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or the matters in 43B(1)(a) – (e). The key question is whether the worker had a reasonable belief. First in our view the claimant had no belief that it was in the public interest. To the extent that there was any residual belief, it was not reasonable. It was not reasonable because the claimant knew he had received the training. When the error was spotted, it was pointed out to him; he was told to desist, and report the matter to compliance. As regards the second disclosure, the claimant had no basis for suggesting there had been any fault on the part of compliance. He had no reason at all to believe that compliance should have been specifically monitoring whether he was tagging trades or that there was some form of regulatory failure in which the public had an interest.

7.29 We find that the alleged disclosures, to the extent they happened at all, were made in the claimant's private interest and we find that any exception as envisaged by **Chesterton** does not apply here.

7.30 We would note that during the evidence, we asked the claimant what steps he took to acquaint himself with the relevant regulatory requirements when trading in the US. His evidence was that he took no steps at all. It is difficult to see how this is acceptable for a trader, even one who was working for the respondent and not subject to direct regulatory requirements. The claimant understood there was an overarching need for compliance with regulations. He had received training. He had emails concerning compliance. He had access to the compliance team and resources in their intranet.

7.31 The failure to acquaint himself at all with the appropriate regulations is a surprising position for the claimant to take, and his lack of concern for ensuring he operated in a compliant is at odds with his later assertion that his alleged disclosures were in the public interest.

7.32 The concept of private interest does not appear expressly in the Employment Rights Act 1996. We should say a little more about our approach to the concept of reasonable belief, lest our consideration of any private interest exception obscures our approach to the wording in the statute.

7.33 We take the view that the reference to reasonable belief is not simply a reference to an individual's subjective belief. Reasonable belief implies some objective analysis. That is not to say that a tribunal should

[3] Underhill LJ recognises that the matters identified at paragraph 34 are no more than a useful tool (see paragraph 37 Chesterton).

substitute its own view, clearly it should not, but what is required is to understand first the nature of the disclosure, second the breach of obligation the worker had in mind, and third the grounds for that belief. All of that is considered on the basis of what was known or should reasonably have been known to the claimant at the time. It is necessary to ask what was in the worker's mind at the time and the basis for it. That is the nature of the objective assessment. It is the nature of that assessment which prevents a tribunal simply substituting what it thinks would be reasonable.

7.34 At best the claimant could say that he had forgotten what training he had received. It may be possible that he had simply not considered what compliance needed to do. Had he checked, he would have realised that he had received the training and, as he later seems to admit, had forgotten it. He would have realised that compliance had no specific obligation to monitor whether an individual was tagging short sales.

7.35 The making of a false or careless allegation is a matter which is relevant to the reasonableness of the belief. In this case, the claimant's alleged disclosures, both relating to training and monitoring, were without merit, and were designed to deflect from his own wrongdoing. There is no public interest in that. We find the claimant did not reasonably believe he was making a disclosure in the public interest.

7.36 For the reasons given, the whistleblowing claim must fail. We should add for the sake of completeness, that there would be no possibility of establishing the relevant causational link.

7.37 It is the claimant's case that he was dismissed because the respondent realised that it failed to train him and realised that there been a failure of compliance. The dismissal is said to be some form of retaliation for the fact that he pointed out the respondent's failings. This case is not sustainable. The claimant was dismissed because Mr Toon, reasonably, and on the evidence, concluded that claimant had acted dishonestly. He was not dismissed because he had not tagged his short sales or complained about a failure by compliance to monitor his trades. He was dismissed because he ignored a senior colleague who told the claimant to tag the short sales, to report the matter to compliance, and not to trade until he was compliant. He ignored it specifically on 5 August 2016, and then again on 12 August 2016.

7.38 When the claimant was told again on 12 August 2016 that he was not complying, he ignored it. When he was later challenged about it, instead of being honest and saying that he realised now he had done something wrong and would never do it again, he sought to prevaricate and deflect blame. He sought to suggest that he did not know, and could not know that he was doing something wrong. Mr Toon reached the conclusion the claimant could not be trusted, Mr Huda agreed, and they resolved to dismiss.

7.39 The suggestion that they dismissed because they wanted to cover an inconvenient fact is without foundation. Following the difficulties caused

by the claimant, the training procedure was reviewed, addressed, and improved. Compliance were asked to start monitoring the tagging of short sales. Sacking the claimant in no sense whatsoever assisted in covering up any failings. Instead, it almost guaranteed he would bring it into the open should he pursue the matter. Further, if the claimant were right, in the sense that he was sacked so the respondent could cover up its own failure of compliance and training, it does nothing to explain why his colleague, Mr Chevillon, was treated differently.

7.40 The reality is the claimant was dismissed not because of his lack of compliance, or because he disclosed any information concerning training or compliance, but because Mr Toon and Mr Huda found he was dishonest about the reason for his own failure.

7.41 For all the reasons given, the section 103A whistleblowing claim fails.

Employment Judge Hodgson
8 September 2017