Appeal No. UKEAT/0122/17/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 12 October, 13 & 14 December 2018
Judgment handed down on 17 April 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR NASSER ARJOMAND-SISSAN — APPELLANT

EAST SUSSEX HEALTHCARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: Gaby Hardwicke Solicitors 33 The Avenue Eastbourne East Sussex BN21 3YD
For the Respondent	MS REHANA AZIB (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

VICTIMISATION DISCRIMINATION - Protected disclosure

The Claimant was employed by the Respondent as an Information Management and Technology Manager between December 2005 and February 2016 when he resigned. By his claim presented in August 2015 and subsequently amended, he made complaints of race discrimination, unfair dismissal and whistleblowing. The latter comprised claims of detriments suffered between December 2009 and February 2016 in consequence of protected disclosures made between February 2007 and March 2015. Following a 12-day hearing all claims were dismissed. In respect of the whistleblowing claim the ET found that there were two protected disclosures and a number of detriments, but that there was no connection between the disclosures and the detriments.

Permission was granted to proceed to a Full Hearing of his appeal on some of the grounds relating to the whistleblowing claim. The essential grounds were that the ET (i) for the purpose of section 43B(1) **Employment Rights Act 1996** confused the specificity required (a) within the disclosure and (b) in the case before the Tribunal: **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416 cf. **Bolton School v Evans** [2006] IRLR 500; and (ii) in holding that certain of the disclosures were not qualifying disclosures within section 43B(1) and therefore were not protected disclosures, reached conclusions which were perverse.

The EAT dismissed the appeal, holding that there had been no error of law or perversity.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant (Mr Nasser Arjomand-Sissan) against the decision of the London South Employment Tribunal (Employment Judge Martin and members) sent to the parties on 1 February 2017 whereby the Claimant's complaints of race discrimination, unfair dismissal and whistleblowing were all dismissed, following a hearing over the course of 12 days in June and July 2016. The appeal is against the dismissal of the whistleblowing claim and on those grounds which were allowed to proceed to a Full Hearing.

2. The Claimant is a British citizen of Iranian descent. The Respondent is responsible for hospitals in East Sussex including the Eastbourne DGH and Conquest Hospital, Hastings. The Claimant was employed by the Respondent as an Information Management and Technology ("IM&T") Manager between 5 December 2005 and 24 February 2016, when he resigned from his employment. He initially worked in the Therapies Department where his line manager was the head of Therapy Services, Dr Robert Jones. In January 2010 he was moved from the Therapies Department to the Operations Department.

3. By his ET1 claim form presented on 27 August 2015 and subsequently amended, he claimed that over a period spanning February 2007 until March 2015 he made a number of protected disclosures and in consequence suffered numerous detriments between December 2009 and February 2016: sections 43A-F, 47B and 48(1A) **Employment Rights Act 1996**.

4. The alleged disclosures fell into two broad periods and subjects, namely (a) 2007-2009, largely concerning the conduct of Dr Jones; and (b) 2012-2015, largely concerning the data produced by the Accident & Emergency and Stroke Departments.

5. During this period there were a number of investigations carried out both internally by the Respondent and through external audit by the South Coast Audit ("SCA"), a not for profit consortium hosted by South Downs Health NHS Trust providing internal audit and counterfraud services to the NHS across the South of England. One result of SCA involvement was an interim report dated 22 November 2007 by a counterfraud specialist, Mr John Butler.

6. A further feature of this period was that the Respondent went into special measures following a report by the Care Quality Commission ("CQC") in 2015. As the ET's Judgment recorded (paragraph 32), that report:

> **"… showed the Trust was about the bottom 20% of all Trusts in England for staff engagement; there was a culture whereby staff were afraid to speak out to share their concerns openly; staff are worried about the consequences of speaking out; the data shared with external stakeholders and the board was criticised; there were fears of reprisal; staff were unclear about lines of accountability; concerns about the quality of support from HR and challenging relationships with senior staff with styles of communications being inappropriate in a professional arena. Following the report, the Respondent went through a major reorganisation."**

The Statutory Provisions

7. Section 43A provides:

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

8. Section 43B(1) provides:

> **"(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][1] 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,**

[1] These words inserted with effect from 25 June 2013, except in relation to a qualifying disclosure made before that date.

(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."

9. Sections 43C-G provide for qualifying disclosures to be made to the employer and other persons; and require such disclosures before 25 June 2013 to be made in good faith.

10. By section 47B(1):

"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure."

11. By section 48 as material:

"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…

(2) On a complaint under subsection … (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

…

(3) An employment tribunal shall not consider a complaint under this section unless it is presented -

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

The Pleaded Case

12. The alleged protected disclosures were identified in paragraph 11 of the Particulars of Claim ("POC") to the ET1. In response to a request for particulars, a further schedule was prepared ("FBP"). At the outset of the hearing the Tribunal requested and received from counsel for the Claimant, Mr David Mitchell, a further summary of the alleged disclosures ("the Schedule"). This was prepared with column headings which identified by reference to each alleged disclosure its content; date; to whom made; and cross-reference to the relevant section of

A the POC, FBP, witness statement of the Claimant and hearing bundle page. The final column of the Schedule identified the relevant categories in section 43B(1).

B 13. Thus, by way of example, the first alleged protected disclosure in the Schedule identified its content as "*Inaccurate recording of data re. patient referrals and true waiting list figures for Therapy Services*", gave its date (20.02.07) and the person to whom it was made (Ms Kathryn Scully ("SCA")); and provided the cross-references to the POC paragraph (11.1), FBP page (1/53-54), witness statement paragraph (42) and bundle page (1/198). The final column identified the relevant section 43B(1) categories as "*(a) fraud (b) legal obligation (d) health and safety of patients ultimately affected (f) deliberate concealment*".

C

D 14. At the outset it is relevant to note that the original Notice of Appeal included a ground that it was procedurally unfair for the ET to focus on this Schedule and thereby to apply a "prescriptive approach" which required the Claimant to establish each protected disclosure by specific reference to his pleaded case, written evidence and contemporaneous documentation; and that in consequence the ET had considered each protected disclosure in a vacuum from the general background and context in which it was made. In her Judgment following the Preliminary Hearing Simler P rejected this ground of appeal, observing that (paragraph 27):

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F

> **"… First, it is critical (particularly in a case like this when 19 protected disclosures and 33 detriments and different causes of action ranging from whistleblowing to race discrimination to unfair dismissal are relied on across a span of a period of seven years) that the issues are identified in advance. The claim form is the document in which a claimant is expected to set out his claim and to identify his protected disclosures and the detriments on which he relies. In this case, the Claimant had the opportunity to amplify his position in a schedule and in his witness statement. It is neither fair to the respondent nor to the tribunal for a case to proceed on a rolling basis with additional matters emerging halfway through the evidence. The pleaded case is, as the former President said in *Chandhok v Tirkey* [2015] IRLR 195, the starting and finishing point, and if a matter is not pleaded in the pleaded case a tribunal is entitled to proceed on the basis that it is not relied on."**

G

H 15. As noted by Simler P, the Schedule identified 19 matters relied on by the Claimant as protected disclosures, spanning about 7 years. A separate list identified 33 alleged consequential

detriments between December 2009 and February 2016. The issues were otherwise identified in an agreed List. As material to this appeal, these issues included:

> **"6. In respect of each disclosure:**
>
> **a. Was it made (and to a proper person (s43C-G))?**
>
> **b. Was it a qualifying disclosure (s.43B(1))?**
>
> **c. Was it made in good faith (pre-25.06.13) or, thereafter, in the reasonable belief of C, in the public interest?**
>
> **7. Did C's disclosures materially influence R's treatment of him as set out in the table of detriments below (supposing those detriments took place)?**
>
> **…**
>
> **17. Are C's unauthorised deductions, protected disclosure detriment and race victimisation claims brought in time (s.23(2) & (4) ERA, s.48(3) ERA & s.123(1) & (3) EqA?"**

The Judgment

16. The ET's Judgment summarised the relevant statutory provisions including sections 43A-B, 47B and 48(1A) and (2), but did not recite the provisions concerning the time for bringing the various complaints.

17. In its section on relevant authority, the ET referred to decisions on the extent to which it was necessary, in a case where the worker was relying on section 43B(1)(b), for the disclosure itself to identify the relevant legal obligation. Thus **Fincham v HM Prison Service** (UKEAT/0925/01): "*… there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employee is relying*" (paragraph 33); and **Bolton School v Evans** [2006] IRLR 500 EAT: "*It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a potential legal liability*": cited in ET Judgment paragraph 16.

18. The next section of the Judgment was headed "*Overview*". Having recorded its finding that there were two protected disclosures, namely disclosures 3 (3 May 2007) and 18 (5 February 2014), it drew a distinction between the period before and after the Claimant's move to the Operations Department in January 2010. Thus:

> **"28. Given the period of time between these disclosures and taking into account where the Claimant was working at the time they were made (he was working for the Therapies Department when the first disclosure was made and under different management in the Operations Department when the second disclosure was made) the Tribunal does not find that them [sic] to be part of a continuing act. The time span is too great to make any meaningful link between them. The Tribunal finds that once the Claimant moved from the Therapies department in January 2010 all matters that happened before this time ceased in that the new management team he was working under were unaware of the protected disclosure or his complaints of race discrimination. This is considered further below."**

19. In similar vein, the next section headed "*An overview of the Claimant's employment*", stated:

> **"33. During his employment the Claimant worked in various departments with different managers. In each department there was a separate management structure and once the Claimant had moved to a different department any involvement with his previous managers ceased. The tribunal has found that there was no collusion between the management of the different departments."**

20. Having particular regard to these paragraphs of the Judgment, counsel for the Respondent Ms Rehana Azib takes a preliminary point that these findings amount to conclusions on both causation and jurisdiction which trump all or part of any success on the grounds of appeal, all of which relate to the findings on protected disclosures. This is disputed by counsel for the Claimant, Mr David Mitchell on behalf of the Claimant. The interplay of the various issues makes it more convenient to deal with this objection after I have reached my conclusions on the grounds of appeal.

The Tribunal's Approach

21. The ET stated that its approach would be first to make findings in respect of each alleged protected disclosure; then in respect of each alleged detriment; and then consider whether any

detriment (if/as found) happened because of a protected disclosure (if/as found) or for some other reason: paragraphs 31, 135.

22. The ET then went in turn through the disclosures. Of the 19 which were identified it concluded that two were qualifying protected disclosures, i.e. disclosures 3 and 18.

23. The ET then considered the 33 alleged detriments. It found a number of detriments, but concluded that none related to the two protected disclosures. It also found that a number of the detriments were out of time. Accordingly the whistleblowing claim failed.

Ground 3: Misapplication of section 43B(1) ERA

24. This concerns alleged protected disclosures 9, 13 and 16. The central issue on this ground of appeal concerns the ingredient in section 43B(1) which requires that the relevant disclosure in the reasonable belief of the Claimant "*tends to show*" one or more of the matters which are specified in its sub-paragraphs (a)-(f).

25. The central contention is that the ET approached that ingredient on the erroneous basis that it was necessary for the Claimant, when making a disclosure of information and within its terms, expressly to identify the matter within the section 43B(1) categories which the information tended to show. Thus e.g. in the case of sub-paragraph (b), it is submitted that the Tribunal proceeded on the erroneous basis that it was necessary for the disclosure itself to identify the legal obligation in question; and in the case of sub-paragraph (d), that it was necessary for the disclosure to specify the danger to health or safety. That approach imposed too high a burden on a Claimant. First, because the ingredient is qualified by the reasonable belief of the person

making the disclosure. Secondly, because the language is of "*tends to show*". Thirdly, because it was contrary to authority.

26. As to "*tends to show*", the authorities demonstrated that the words impose a relatively light burden. Thus in **Babula v Waltham Forest College** [2007] ICR 1026, Wall LJ observed:

> **"79. It is also, I think, significant that section 43B(1) uses the phrase "tends to show" not "shows". There is, in short, nothing in section 43B(1) which requires the whistle-blower to be right. At its highest in relation to section 43B(1)(a) he must have a reasonable belief that the information in his possession "tends to show" that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer made in good faith (section 43C(1)(a))[2].**
>
> **80. … The purpose of the statute, as I read it, is to encourage responsible whistle-blowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute."**

See also **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979 per Underhill LJ at paragraph 8.

27. Thus, in the case of category (b), the precise legal obligation does not need to be identified by the worker within the disclosure: **Bolton School**; **Fincham** already cited; see also **Eiger Securities LLP v Korshunova** [2017] ICR 561 where Slade J observed that: "*The identification of the* [legal] *obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong*" (paragraph 46).

28. Mr Mitchell contrasted the guidance in **Blackbay Ventures Ltd t/a Chemistree v Gahir** [2014] IRLR 416 at paragraph 98. This was concerned with the presentation of the claim before the tribunal; and in particular the detail of the legal obligation which was required at that stage,

[2] The requirement of good faith being relevant only to the alleged disclosures before 25 June 2013.

not that which was required within the disclosure itself. Thus before the tribunal "*Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation*" (paragraph 98.5). He submitted that in the present case the ET had confused the specificity of information which was required within the disclosure with that which was required before the tribunal.

29. In the case of health and safety under sub-paragraph (d), the standard was again not exacting. Thus in **Fincham** the employee's statement that "*I am under pressure and stress*" sufficed for this purpose (paragraph 30).

30. On a wider canvas, the context of a disclosure was crucial. Thus in **Kilraine v London Borough of Wandsworth** [2018] IRLR 846 per Sales LJ: "*It is true that whether a particular disclosure satisfies the test in s.43B(1) should be assessed in the light of the particular context in which it is made*" (paragraph 41). Furthermore the policy of protection for whistleblowers was emphasised in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240 per Underhill LJ at paragraph 94:

> **"… it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgment about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. …"**

31. In contrast to these principles, the Tribunal had adopted an unduly prescriptive and legalistic analysis to the Claimant's disclosures, and had thereby closed its mind to the policy of the legislation, the reality of the workplace situation and the context in which the disclosures were made.

A 32. Mr Mitchell submitted that these errors of approach vitiated the ET's conclusions in respect of three of the disclosures, i.e. 9, 13 and 16.

B **Ground 3: Disclosure 9**

33. The relevant disclosure was a letter dated 10 August 2009 sent on behalf of the Claimant to Mr Les Saunders.

C 34. The content of that letter was described in the Schedule as "*Access rights to TIARA, access to a delete button, manipulation of waiting list figures, accuracy of data inputted, Therapy Services Unit not working in real time & bullying in dept*".

D 35. The ET set out the relevant parts of the letter (paragraph 81), including the statement that the Claimant:

> **"… first raised concerns to management of the access rights to all users of the Tiara system. [A]ll users of the Tiara system have total access to the system which can lead to an abuse of the system whether deliberate or intentional. This concern has been ignored.**
>
> **[Nasser] has tried to raise a concern with the management team that he had about the Tiara team having access to a delete button on their screens when data inputting. The organisation needs to ask ETHITEC whether there are any deleted patient data files. The need to understand this is that the patient data is being lost, which may impact on full patient history being recorded incorrectly. This may have an impact should there be a complaint or litigation. It has been ignored.**
>
> **[Nasser] has informed management that the waiting list figures have been manipulated. The impact of this is not only is this masking the length of the waiting list, but there is a potential loss of income. This can be explained further but in principle it is where a patient has been seen, the correct procedure to process the payment has not been completed. No action or explanation has been given to Nasser as to why this is not being addressed."**

G 36. The Schedule identified the relevant section 43B(1) categories as "*(a) fraud (b) legal obligation (d) health and safety of patients ultimately affected (f) deliberate concealment*". Against "legal obligation" (only), there was a footnote reference back to an earlier footnote that

H "*C will say this is an "obvious case" of breach of a legal obligation per Blackbay … at para 98.5*".

37. In the identified section of the POC (11.7), the Claimant stated that by this letter he made disclosures which included: "*(a) That the widespread nature of the access rights of all users of the TIARA system could lead to abuse of the system and data protection breaches. I was told by David Baker to "leave it"*", and (c) "*That waiting list figures were being manipulated with the impact that not only was this masking the length of the waiting list but also giving rise to a potential loss of income*"; see the similar terms of his witness statement at paragraph 72(c).

38. The FBP (paragraph 11.7) included references to this as "*potentially criminal conduct in that it amounts to a fraud upon the PCT and/or the Department of Health as the Trust was able to secure funding to which it would not otherwise be entitled; further and/or alternatively it enabled the Trust to avoid financial penalties for concealing true waiting list figures and other performance data*"; to "*a statutory alternatively a contractual duty for the Trust to supply data upon its compliance or otherwise with national standards/benchmarking. It is an express alternatively an implied obligation that the data it supplies will be accurate or at least that it will not knowingly submit misleading data. By reason thereof this was a failure to comply with a legal obligation*"; that "*To the extent that the staff concerned were complicit in supplying misleading data and/or concealing that misleading data had been supplied, they were in breach of their express and/or implied duties under their employment contracts*"; and that "*Manipulation of data to secure undeserved funding has the effect of diverting NHS resources away from places where greater funding is warranted. This inevitably causes patient's health and safety in other parts of the NHS to be adversely affected*"; and to "*manipulation*" of data which "*would have potentially breached the DPA giving rise to either criminal or alternatively civil sanctions*".

39. In rejecting this as a protected disclosure, the ET stated that it accepted the Respondent's submissions which it set out. These included that the disclosure letter "*... does not make any*

references to health and safety, fraud or specific legal obligations and neither are these issues set out at paragraphs 70-72 of his witness statement" (paragraph 83).

40. The ET concluded:

> **"84. The Tribunal considered whether this was the type of case where a Claimant need not set out the legal obligation on which he or she relies. These cases apply as set out in above [sic], where it is clearly apparent from reading the document what is being alleged. In particular, the Tribunal notes that there is no reference to data protection within this letter and nothing within the letter which could lead the reader of the letter to appreciate that this is what was being said. In the Claimant's witness statement paragraph 72 he says that the letter raises a protected disclosure, including "*that the widespread nature of the access rights of all users of the Tiara system could lead to the abuse of the system and data protection breaches*". The Tribunal accepts that the letter does refer to potential abuses of the system. However, it does not refer explicitly or implicitly to breach of data protection legislation. For example, the Claimant doesn't say that the users of the system are not authorised.**
>
> **85. The Tribunal also referred to the witness statement of Ms Rose. However, as with the Claimant's witness statement, although she makes mention of various breaches, on a reading of the letters itself the Tribunal does not accept that the Claimant has raised issues of fraud, breach of legal obligation, health and safety of patients being ultimately affected or deliberate concealment."**

41. Mr Mitchell submits that these conclusions erred in five particular respects. First, the ET in substance confined its analysis to breach of data protection legislation, i.e. to factor (b) in section 43B(1); and did not engage with (a), (d) or (f). At the heart of the disclosure was a case about the deliberate manipulation of figures to get money. That was information which in the reasonable belief of the Claimant tended to show criminal fraud within (a); danger to health and safety within (d); and deliberate concealment within (f). In each case that was "obvious" within the meaning of the authorities.

42. Secondly, the ET had for this purpose wrongly focused its attention on the terms of the disclosure, rather than on the Claimant's case before the Tribunal. This was apparent from the first sentence in paragraph 84; and suggested a misreading of **Blackbay Ventures**. A whistleblower was not required to identify the legal obligation within the disclosure.

A 43. Thirdly, and in any event, the ET was wrong to state that the letter did not refer implicitly to breach of the data protection legislation.

B 44. Fourthly it had taken no or no adequate account of the relevant particulars that had been provided in the POC, FBP and Schedule.

C 45. Fifthly, it took no account of the context in which the disclosures were made. They all had to be assessed against the background of disclosure both internally and externally to the SCA.

D 46. In response, Ms Azib made the following general submissions about the correct approach to this issue.

47. First, it was necessary to focus on the case which had been pleaded: **Charnock**.

E 48. Secondly, where the tendency to show a matter (and in particular a legal obligation) was said to be "obvious", it was still necessary to provide at the hearing before the Tribunal some reference to the source of the obligation. It was telling that this had not been provided. There

F had to be something more than merely believing that certain actions were wrong.

G 49. Thirdly, the necessary focus was on the terms of the disclosure, written or oral. Accordingly the Tribunal needed to know which documents or conversations were said to constitute the protected disclosure. Hence it was appropriate to require, as this ET had done, a Schedule which made this clear.

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50. Fourthly, the ET had demonstrated a general approach to the assessment of the material which was not over-prescriptive, but which took account of common sense and the general background. Thus in finding that disclosure 3 was a protected disclosure it observed that the relevant information "*as a matter of common sense*" represented a concern about fraud, breach of legal obligation and health and safety: see paragraph 49. Likewise in respect of disclosure 18, where it accepted that the word "cheating" would denote fraud or breach of a legal obligation "*on a common sense basis*": paragraph 128.

51. Returning to disclosure 9, Ms Azib submitted that the Tribunal had not adopted an erroneous approach to the question of "tends to show". The first sentence of paragraph 84 demonstrated its express consideration of whether this was a case where the legal obligation was obvious and did not need to be set out. The only legal obligation to which the Claimant made reference in his POC and witness statement was in respect of data protection; and then in very general terms.

52. The final sentence of paragraph 84 ("*For example, the Claimant doesn't say that the users of the system are not authorised*") demonstrated that the ET was not taking an overly prescriptive approach; but on the contrary would have been willing to imply a reference to breach of data protection legislation if that were justified by the terms of the disclosure.

53. As to health and safety in this context, the ET had expressly accepted her submissions that "*It was not reasonable for the Claimant to believe that patient data would be lost or the full patient history would be recorded incorrectly. The actual patient information about treatment, medication, etc was contained in the patients' clinical notes which were held separately and the Claimant was at all times aware of this*": paragraph 83. Nor could the reference in the letter to

the potential impact "*should there be a complaint or litigation*" be sufficient to imply a reasonable belief in tendency to show actual or likely danger to health or safety.

54. As to the reference in the disclosure letter to "*manipulation of waiting list figures*", that could not demonstrate a reasonable belief that the disclosure tended to show criminal fraud. The allegation was focused on a potential loss of income, not e.g. that it involved claiming money to which the Trust was not entitled. The ET's conclusion in respect of fraud reflected the vagueness of the references within the disclosure, not a misapplication of the test.

55. As to category (f), in the absence of information which satisfied (a), (b) or (d), there could be and was no basis for finding a tendency to show deliberate concealment within (f).

56. Furthermore, the ET had accepted her submission that the comments in the letter were not made in good faith, thus defeating the claim based on this pre-25.06.13 disclosure in any event. Thus in paragraph 83 the ET accepted the submission that "*The dominant or predominant purpose of raising these concerns was to supplement his own grievance complaints and to avoid disciplinary action. The comments were not made in good faith or in the public interest*".

Conclusion on Ground 3: Disclosure 9

57. I am not persuaded that the ET acceded to the submission that the disclosure was not made in good faith. Although paragraph 83 states that it accepts the Respondent's submissions and then includes this in its recitation of "relevant" submissions, the following paragraphs (84 to 85) make no specific reference to the point. If the ET had accepted that the relevant disclosure had not been made in good faith, I consider that it would have dealt with the point as a distinct matter and set out its reasons. I turn to the substantive challenge.

58. I am satisfied that the ET did understand and apply the full ingredients of the legal test which it had to consider under section 43B(1). In the section of its Judgment on the relevant law, having identified the first requirement that there must be a disclosure of "information", the ET continued: "*The Tribunal will have to find that the Claimant actually believed that that information tended to show one or more of the matters set out in paragraphs (a)-(f), and also that it was reasonable for that belief to be held*": paragraph 12.

59. Then, in the course of its findings on disclosures 1 and 2, the ET again referred to that correct test. Thus: "*In isolation the Tribunal does not find this to be a protected disclosure as the Claimant is giving his opinion as opposed to information which in his reasonable belief tends to show the breach of health and safety, legal obligation fraud or concealment*": paragraph 43. References to tendency to show are also found in paragraphs 40, 46, 62 and 118. Whilst the ET did not set out all the necessary ingredients each time it considered an alleged protected disclosure - and it would be a better practice to do so - I am not persuaded that at any stage it lost sight of what had to be established.

60. In its section on the law, the ET also correctly noted the authorities which make clear, in respect of section 43B(1)(b), that the disclosure does not need to identify in strict legal language the legal obligation on which the whistleblower is relying; and that the potential legal liability may be obvious and/or a matter of common sense from the information provided: paragraphs 16 to 17 citing **Fincham** and **Bolton School**. That the ET took the same correct approach in respect of the other categories in section 43B(1) is apparent e.g. from the "common sense" approach which it took in reaching its conclusion that disclosures 3 and 18 were protected: paragraphs 49 and 128.

61. These examples equally demonstrate that the ET did not confuse the specificity which is required (i) within the disclosure and (ii) before the tribunal. I am not persuaded that paragraph 84 (and in particular its first sentence) and/or paragraph 85 (and in particular its final sentence) show any such error.

62. In any event, I see no basis on which the ET could have come to any different conclusion on the material and case before it. As to section 43B(1)(b), the Claimant's case was that it was "obvious" that the information tended to show breach of a legal obligation (Schedule) and/or that in his reasonable belief it tended to show data protection breaches (POC and FBP). An assertion of obviousness has to be tested against the ability to identify, before the Tribunal, the legal obligation(s) in question. The ET rightly concluded that the letter did not refer explicitly or implicitly to breach of data protection legislation; nor was any breach of legal obligation obvious. There was nothing in the case before the Tribunal which provided anything more specific.

63. As to health and safety, the ET accepted the Respondent's submissions that it was not reasonable for the Claimant to believe that patient data would be lost or the full patient history recorded incorrectly; and rejected the case presented on section 43B(1)(d). Neither the terms of the disclosure letter - including the vague reference "*should there be a complaint or litigation*" - nor the pleaded case provide any basis to challenge that conclusion.

64. As to criminal fraud and section 43B(1)(a), I do not accept that the absence of reference in the Judgment to the statement in the letter that "*the waiting list figures have been manipulated*" provides any reason to question the ET's approach to its decision or its conclusion. As previously noted, in its acceptance that disclosures 3 and 18 were protected, the ET had demonstrated a "common sense" approach to the question of whether the information tended to show fraud. In

this case the allegation in the letter referred to the "*potential loss of income*": see also the POC (11.7) and the Claimant's witness statement. This contrasts with the FBP (11.7) which made the assertion of potential "*fraud … to secure funding to which it would not otherwise be entitled; … and/or … to avoid financial penalties*".

65. The Judgment would have been clearer if it had made express reference to the issue of manipulation of waiting list figures. However in my judgment its rejection of the claim based on criminal fraud and section 43B(1)(a) was soundly based, given the terms of the letter. There was no basis to construe it in the terms which the FBP sought to imply.

66. As to reliance on section 43B(1)(f), this is contingent on success on at least one of the other matters; and thus falls away.

Ground 3: Disclosure 13

67. This disclosure relates to alleged manipulation of accelerating stroke improvement data, direct access and CT scan data for the Stroke Department. It is contained in an email said to be dated 13 (in fact 19) August 2013 from the Claimant to a number of colleagues: Judgment paragraph 102.

68. The ET concluded that the email did not refer to these matters "*generally for the stroke department*", but was "*specific to a particular patient*": paragraph 107. It concluded "*The Tribunal finds that there is no reference to manipulation of data, fraud, impropriety, deliberate concealment or any health and safety concerns within this email. … The Tribunal does not find this to be a protected disclosure*": paragraphs 108 to 109.

69. The email relates to two patients (X430714 and XC70545) and contains replies from the Claimant to queries raised about information which he had previously supplied. The context is the target for stroke patients to have a CT scan within 24 hours of admission to A&E. As to X430714, the query concerns an apparent discrepancy between information from the Claimant which shows a "fail" on the target for that patient and information on the daily output sheet to the contrary. The Claimant responds that there was no discrepancy: "*the above patient is showing having breached 24-hour CT scan on both mine and the daily output*". As to XC70545, the query is that the patient appears to have had a CT scan within 50 minutes of admission "*so should show as achieving 24-hour*". The Claimant's response is that having looked at the patient's CT scan history, "*I have found that there is new CT Scan code that we were not aware* [of]" and that "*this patients* [sic] *is showing as to have had 3 CT scan between 21/07/2013 and 23/07/2013 as follow ...*".

70. The ET's citation from the email stops at that point. In consequence it does not refer to the next line where the Claimant states "*(this ct code is new and was unknown to us)*", nor to the passage over the page which raises the "*... question as to why the earlier head and neck ct scan request is not showing in A&E system??*", and continues "*The above ct scans for that this patient* [sic] *has had in such short and close time to each other brings a bigger question?*".

71. The POC for this disclosure (11.12) elaborated those concerns and concluded that "*The clear suspicion was that this coding had been entered afterwards to demonstrate compliance with the targets when no such scan had taken place. I am not aware that my concerns were ever formally investigated*". These matters were essentially replicated in the Claimant's witness statement: paragraphs 153 to 160.

72. Mr Mitchell focussed on the case of the second patient (XC70545). The effect of the information was that the Claimant was questioning whether the alleged scan on 21 July 2013 was genuine.

73. The Judgment fell into error in five respects. First, the ET had omitted from its recitation of the email replies the important references noted above. These were the significant passages which demonstrated the Claimant's suspicion that a new code had been invented after the event.

74. Secondly, paragraphs 107 and 108 erroneously twice referred to "*a particular patient*" when the replies related to two patients. In any event, even if it were confined to one or two patients, that would not disqualify it from being a protected disclosure.

75. Thirdly, the Judgment took no account of the context in which this information was provided, namely his wider concern about the manipulation of such data. In this way the ET was "putting on blinkers".

76. Fourthly, the effect of paragraph 108 was to apply the wrong test, namely to require that it must "show", rather than "tend to show", the matters identified in (a), (b) or (d) of section 43B(1). As to (d), health and safety must be affected by false inclusion of a fake CT scan.

77. Fifthly, the ingredient of reasonable belief was not considered. However he accepted that this did not matter if it were to be concluded that the ET had implicitly been satisfied on this ingredient.

78. In response, Ms Azib submitted that the ET's Judgment must be assessed against the pleaded claim in respect of the contents of the email. Its essence was contained in the final sentence of POC paragraph 11.12, namely "*The clear suspicion was that this coding had been entered afterwards to demonstrate compliance with the targets when no such scan had taken place"*. However there was nothing in the email to support this. Neither the Claimant's observation that "*this code is new*" nor his hint about a "*bigger question*" provided any reason to conclude that the disclosure in the relevant email contained information which tended to show (in the Claimant's reasonable belief) the false entry of a scan; nor therefore any of the matters in (a), (b), (d) or (f).

79. In consequence there was no basis to challenge the Judgment. Paragraphs 107 and 108 were correct and reflected a proper reading of the email. There was no error of law in the approach. The claim simply failed on the evidence.

Conclusion on Ground 3: Disclosure 13

80. I am not persuaded that there is any possibility that the Tribunal fell into error when reaching its conclusion in respect of disclosure 13.

81. True it is that the Judgment contains an incomplete citation of the relevant email; and in particular does not cite the Claimant's reference to a "*new CT scan code*" nor his concluding remark about "*a bigger question??*". Furthermore the ET did not expressly direct itself to the ingredients of the section 43B(1) test; and again expressed itself in terms that it found in the email "*... no reference to manipulation of data, fraud, impropriety, deliberate concealment or any health and safety concerns*": paragraph 108.

82. However for the reasons previously given I am satisfied that the ET did understand and apply the correct test. In any event I see no arguable basis on which a tribunal directing itself expressly to the full statutory language, and the authorities on the extent of specificity required within the information, could have concluded that the email constituted information which in the reasonable belief of the Claimant tended to show any of the matters in section 43B(1)(a) and/or (d) and/or (f). There is nothing in the email, in its full terms, which arguably raises the case that there has been the false entry of a scan. In particular the references to a "*new code*" and a "*bigger question??*" are simply far too vague to provide any such basis.

Ground 3: Disclosure 16

83. As the Schedule identifies, this disclosure was contained in an email from the Claimant to Ms Goldsack on 16 October 2013. It forms part of a chain of emails concerning a patient (X494102) who had shown signs of a stroke when seen in the TIA clinic. The question was whether certain target times had been achieved. Two were in play, namely (i) a 1-hour target for a CT head scan from time of admission, and (ii) a 4-hour target from A & E arrival until admission to the Stroke Unit.

84. The email concerned a debate on the 4-hour target. The patient had been seen in the TIA clinic at Conquest Hospital. He was showing signs of a stroke and was sent immediately for a CT head scan which was recorded at 12.39 hours. The patient was then taken to A&E at Conquest Hospital, arriving at 14.30. Following treatment there, the patient was sent to Eastbourne DGH Stroke Unit, with a recorded time of departure of 17.39 and arrival at 18.00. The debate was whether the 4-hour period began at the TIA clinic or in A&E. An email on 15 October from Andy Bailey to a number of people, including the Claimant, stated the latter. Thus "*Clock start*

from A&E arrival, yes? So 1430 to 1800 (3.5 hours) … So, direct admission in less than 4 hours?".

85. The Claimant's email of 16 October (at 13.56) was to the effect that time started from arrival at the TIA clinic. Thus: "*I wanted you to know that, this patient has had stroke while in TIA clinic at conquest site, hence they had sent patient immediately for head CT Scan. Therefore this makes the patients arrival to hospital from the point TIA clinic, and that where the clock would start for stroke. I don't want to be seen as someone who is putting up obstacle, if to the best of my knowledge I see that patients data is incorrectly been looked at in terms of information, than I should and do want to feel that I can high light it to management without being getting crucified. Will there be any possibility to meet with you a.s.a.p. please, and Andy B in meeting too if you wish?*"

86. In an email the previous day (15 October at 16.37) the Claimant had queried the time taken from Conquest A&E to Eastbourne Stroke Unit. Thus "*... not sure as how this patient journey from conquest A&E to Eastbourne stroke ward took 21 minutes in the rush hour??*"

87. The POC in respect of this disclosure (11.15) was focused on the email of 15 October 2013, contending that a journey time of 21 minutes would not have been possible at any time; and continuing "*Given the time critical nature of stroke treatment, it was of concern that the patient was admitted to A&E when they were already in the Stroke Clinic receiving clinical care and why the timings of the transfer between Conquest and Eastbourne DGH were so obviously inaccurate*". The email of 16 October was dealt with as follows: "*My concerns were overruled by Andy Bailey and so I raised the matter directly with Sarah Goldsack requesting a meeting*".

88. The ET noted that the email of 15 October was not on the Schedule. However it read it as part of the sequence of events leading up to the disclosure on 16 October 2013: see paragraphs 117 and 118. It concluded:

> **"118. … Even if the Tribunal had accepted this as another disclosure relied on by the Claimant, the Tribunal does not find the email of 15 October 2013 to be a protected disclosure in any event as whilst it provides information, it does not show information that tends to show breach of a legal obligation, that health and safety is being compromised or concealment. It is simply highlighting a problem which needs to be investigated. Similarly, the email dated 16 October 2013 (which was identified as a protected disclosure on the Claimant's schedule) does not refer to any breach of legal duties, fraud, health and safety issues or concealment. As the Respondent submits this is just a narrative of stroke patient data. The Claimant does not expand further in his witness statement about this disclosure and the Tribunal finds that it is not protected."**

89. Mr Mitchell submits that the ET failed to take account of the context of the email of 16 October, which was the Claimant's concern that data was inaccurate and was being manipulated. As a matter of pleading he pointed to the FBP for this and other disclosures (11.11 to 11.15) which referred to "*Various disclosures regarding manipulation of Accelerating stroke improvement data, and direct access and CT scan data for the Stroke Department*". For the purposes of section 43B(1)(a), (b), (d) and (f) it described this as "*potentially criminal conduct in that it amounts to a fraud upon the CCG and/or the Department of Health as the Trust was able to secure funding to which it would not otherwise be entitled; further and/or alternatively it enabled the Trust to avoid financial penalties before concealing true performance data*"; and a breach of statutory alternatively contractual obligation to supply data which was accurate and/or complied with national standards/benchmarking. As to health and safety, "*Manipulation of data to secure undeserved funding has the effect of diverting NHS resources away from places where greater funding is warranted. This inevitably causes patient's health and safety in other parts of the NHS to be adversely affected*".

90. Against that background, the specific contention of the Claimant was twofold. First, that there was non-compliance with the 4-hour target. Secondly, the journey time of 21 minutes from Conquest Hospital to Eastbourne was not possible; and hence must have been falsified in an

attempt to show compliance, alternatively was evidently inaccurate. By his disclosure email of 16 October the Claimant was elevating his concerns to Ms Goldsack.

91. All these allegations were of potentially fraudulent conduct. As to health and safety, on the Respondent's own figures the 4-hour target was breached (12.39 to 18.00), thus raising further concern for the health and safety of the patient.

92. Returning to the alleged error of law, the Tribunal's conclusion that the email of 16 October "*does not refer to any breach of legal duties, fraud, health and safety issues or concealment*" (paragraph 118) repeated the erroneous confusion between the requisite contents of the particular disclosure and the Claimant's task before the Tribunal.

93. In response, Ms Azib submitted that the Claimant's case on the pleadings was confused. The Schedule identified the disclosure as the 16 October email. However, the POC (11.15) was focused on the 15 October email and only made glancing reference to the 16 October email in its final sentence ("*My concerns were overruled by Andy Bailey and so I raised the matter directly with Sarah Goldsack requesting a meeting*").

94. As to the 16 October email, its central contention was that "*... if to the best of my knowledge I see that patients data is incorrectly been looked at in terms of information, than I should and do want to feel that I can high light it to management without being getting crucified*". That was not information tending to show manipulation and fraud but concerned a difference in interpretation. It was, as the ET found, just a narrative of data. That was a fair reflection of the way in which the case was pleaded and the contents of the disclosure. There was no evidence of deliberate concealment. The dispute was about how the data is interpreted, i.e. when does the 4-

hour clock start running. As to health and safety the Claimant was not contending that the relevant scans had not been carried out. There was no error of law in the approach.

Conclusion on Ground 3: Disclosure 16

95. I agree with Ms Azib's submission that the presentation of this part of the claim was confusing. The Schedule identified the relevant disclosure as the email of 16 October 2013, which is focused on the 4-hour target. The identified section of the POC referred to his preceding email of 15 October 2013 (16.37) and focused on the length of the journey from Hastings to Eastbourne in rush hour: see also FBP paragraph 11.15.

96. Accordingly the ET rightly focused its attention on the identified email of 16 October. In any event it considered the 15 October email: paragraph 118. The effect of that paragraph was to conclude that neither of the two emails contained information that tended to show any of the matters relied on under (a), (b), (d) or (f). In referring to the email of 15 October it applied the express language of "tends to show". When turning to the email of 16 October it stated that "*Similarly,* [it] *does not refer to any breach of legal duties, fraud, health and safety issues or concealment*". Although expressed in that way, in my judgment it was thereby applying the same test of "tends to show" to which it had just referred; and was not thereby confusing the specificity required within the disclosure and before the Tribunal.

97. In any event, I see no basis on which a reasonable tribunal, directing itself expressly to the statutory language and the authorities, could have reached any different conclusion.

Perversity

Ground 10: Disclosures 1 and 2

98. There is no dispute as to the test which must be satisfied in order to conclude that a decision of the ET is perverse. This requires that "*... an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached*": **Yeboah v Crofton** [2002] IRLR 634, per Mummery LJ at paragraph 93.

99. Disclosures 1 and 2 related to alleged "*Inaccurate reporting of data re. patient referrals and true waiting list figures for Therapy Services*". They were made on 20 February 2007 and 9 March 2007 by emails from the Claimant to Ms Kathryn Scully of SCA.

100. His email of 20 February 2007 in particular stated:

> **"I need to know if in the physiotherapy services we are going to need to register all referrals, regardless of patients having therapy or not.**
>
> **As it stands in my team we only get the slips come through for patients that have had their treatment started, and those patients that have been referred by GP, consultant or any other source that do not make appointment or don't get a reply to letters sent out to them do not get registered, hence this does not show the true figure of referrals and also I'm not able to give report on what number of patients not ever attending.**
>
> **I need you to let me know that we should be registering all patients, so I can get the department to listen to me."**

101. The Claimant's first email of 9 March (12.04) included:

> **"Kathryn this email is absolutely confidential to you only.**
>
> **I believe you are meeting Robert Jones on Monday 12th.**
>
> **As IM&T manager of therapy services I do strongly believe that all referrals that therapy services received should be recorded on to tiara in-house system, regardless of if any appointment with first contact comes out of it or not, I have already set up data integrity for capturing all correct data and separating referrals with appointments and ones that never do attend.**
>
> **This will allow main I-house system (Tiara) provide all information that will be needed by all directorates of the trust, i.e. finance reasons or legal reasons.**
>
> **My feeling is that Robert and Paul will resist this as they may not want the true figures to be known for some reasons, …"**

102. Ms Scully replied:

> **"Thanks for this - I have said it as part of the report that all referrals should be recorded and that clarification has to be provided on this as both a patient and a financial requirement.**
>
> **I'm bringing one of my managers with me and I believe he will want to have all referrals recorded also like me. Would you be happy if he came with me to see you after or would you prefer he would not?"**

103. The Claimant's second email of 9 March (15.12) included:

> **"Hi Kathryn,**
>
> **Thank you for your reply.**
>
> **Yes I have seen it on your recommendation and agree totally with it. But as I said, they don't seem to want to keep proper and correct (accurate information on number of referrals that is received also which will end up showing how long it has taken form patients referral received to patient having had their first appointment (treatment) [sic].**
>
> **If you feel what we may discus can stay confidential, than I don mind if one of your managers comes as well [sic]."**

104. The Schedule identified the section 43B(1) factors as (a), (b), (d) and (f). In the case of (b), the footnote again stated that this was an "*obvious case*" of breach of a legal obligation, citing **Blackbay**. The identified contention in the POC (11.1) included the statement that:

> **"… In particular on 9 March 2007 I expressed concerns in an email about data integrity and my belief that Robert Jones and Paul Phillips, Superintendent Physiotherapist Out-patients, would resist the true waiting list figures for Therapy Services (including the high number of duplicate referrals where a GP would refer a patient who had not been seen, a second time) from being known."**

See also the like terms of the Claimant's witness statement (paragraph 42).

105. The ET held that, both individually and collectively, these emails did not constitute protected disclosures. Viewed in isolation, the 20 February email "*… is a request for information and clarification and does not give information that tends to show a breach of legal obligation, that the health and safety of patients will ultimately be affected or deliberate concealment*" (paragraph 40); the first email of 9 March is the Claimant "*… giving his opinion as opposed to information which in his reasonable belief tends to show the breach of health and safety, legal*

obligation fraud or concealment" (paragraph 43); the second email of 9 March "*... makes an allegation that managers do not want to keep correct and accurate information with no actual examples of facts set out. There is no explicit or implicit mention of fraud, a breach of legal obligations, health and safety or deliberate concealment*" (paragraph 45).

106. Viewing the three emails collectively (paragraph 46):

> **"… The Tribunal first looked to see if there is anything in any these emails [sic] which would tend to show fraud, breach of legal obligation, that the health and safety of patients would ultimately be affected or deliberate concealment. The Tribunal does not find that the emails show this either explicitly or implicitly and therefore find that these emails whether taken individually or collectively cannot amount to a protected disclosure."**

107. Mr Mitchell did not challenge the correctness of the self-direction in paragraph 46 but submitted that the conclusion was irrational. The sequence of emails, and in particular the sentence beginning "*My feeling is that Robert and Paul will resist ...*" in the first email of 9 March and "*... they don't seem to want to keep proper and correct (accurate information ...*" in the second, manifestly tended to show wrongdoing, namely in deliberate dishonest conduct falling within any of the four identified heads of section 43B(1). It was no part of the Claimant's case that Mr Jones was doing this inadvertently.

108. He pointed also to the words "*i.e. finance reasons or legal reasons*" in the first email of 9 March. Furthermore the conclusion that the email of 20 February was merely "*a request for information and clarification*" was unsustainable in the light of its contents.

109. In response, Ms Azib submitted in respect of disclosure 1 (the email of 20 February 2007) that the ET was right to interpret it as a request for information and clarification; and to reject that it tended to show any of the matters alleged. In the email the Claimant was not saying that patients who should be referred were not getting referred, nor that patients were not getting

A treatment. On its proper interpretation (and emphasising the opening words "*I need to know*") it was a request about how to record data of patients who did not respond. In any event the ET's conclusion could not be characterised as perverse against the high legal burden.

B

110. As to disclosure 2, in the first email of 9 March 2007, the reference to "*finance reasons or legal reasons*" was too generic to satisfy the test. As to "*My feeling is that Robert and Paul will resist this as they may not want the true figures to be known for some reasons*", this was mere

C speculation not the provision of information. The ET's description of this as "*opinion as opposed to information*" was a fair reflection.

D 111. As to the second email of 9 March, the ET's conclusion (paragraph 45) was likewise a fair assessment which reflected the terms of the disclosure. Having considered the emails individually, the ET had then properly considered them collectively; and in doing so considered

E both their explicit and implicit terms (paragraph 46). This demonstrated that the ET was not looking at the question prescriptively.

Conclusion on Ground 10: Disclosures 1 and 2

F 112. For the reasons essentially advanced by Ms Azib, I do not accept that the conclusions of the ET were perverse.

G 113. The first email of 20 February was properly characterised as a request for information as to how to record data of patients who did not respond. The first email of 9 March was properly characterised as opinion, rather than information which tended to show any of the identified

H matters. In particular the words "*finance reasons or legal reasons*" are far too slender a peg for the contrary conclusion.

114. The second email of 9 March likewise failed for the reasons given. Indeed this is the example where the Tribunal did set out the full test which has to be satisfied, namely information which in the reasonable belief of the Claimant tends to show the relevant matter in section 43B(1): paragraph 43.

115. The Tribunal then looked at the documents collectively and reached an unimpeachable conclusion, and set against the correct test.

Ground 11: Disclosure 5

116. This relates to the Claimant's alleged disclosure to Ms Green, Ms Darling and Mr Simkins at a meeting on 30 August 2007, concerning "*Robert Jones developing Activity Sample Database for personal gain*" (Schedule). The challenge is to the ET's conclusion that it was unable to find that this constituted a protected disclosure because of the lack of any evidence from the Claimant or the Respondent's witnesses about what the Claimant actually said at the meeting, save for the fact that he was thanked for being open and honest: paragraph 61. It is submitted that this conclusion is contradicted by the ET's contrary findings in other passages of the Judgment, namely paragraphs 145, 199 and 216; and by its finding that disclosure 3 was a protected disclosure.

117. Disclosure 3 was made orally by the Claimant to Mr Christian Lippiatt (HR) at a meeting on 3 May 2007. The terms of the disclosure were evidenced by a note of the meeting made by Mr Lippiatt four months later, on 3 September 2007. The note records the Claimant's concern about the work required of him by Mr Jones to develop a database; and that he was "*very concerned that he was being asked to undertake work whilst being paid by East Sussex Hospitals*

NHS Trust for another NHS Trust and also for the benefit of Robert's private company": paragraph 48. The ET held that it was a protected disclosure: paragraphs 49 to 51.

118. The ET returned to Mr Lippiatt's note when considering the case on "detriment 1". At paragraph 144 the ET records that "*The reason he wrote the note at that time was that he had been asked by HR about the meeting because the Claimant complained about the extra hours that he was working on the database for Dr Jones for which he was not remunerated and which also took him away from his NHS duties. He told this to Ms Monica Green, (HR director), Jane Simkins and Jane Darling (Mr Saunders's manager) on 30 August, 2007, mentioning that he had spoken to Mr Lippiat the previous May about this issue. This prompted them to ask about this and Mr Lippiat then wrote this note*" (paragraph 145). Mr Mitchell submits that this is evidence of what the Claimant said at the meeting with Ms Green and others on 30 August 2007.

119. Then at paragraph 199 (concerning detriment 10), having referred to the disclosure made by the Claimant to Mr Lippiatt in May 2007, the ET stated "*The issues contained in this disclosure were then raised in a meeting with human resources at the end* [of] *August or beginning of September 2007*".

120. At paragraph 216 (concerning detriment 17), the ET again referred to the Claimant's disclosure to Mr Lippiatt in May 2007. It found that Ms Green knew of this:

> **"… because she was the person who met with the Claimant on 30 August, 2007 and the next day the Claimant sent an email to Ms Green: "*I forgot to mention that around 3rd of May 2007 I had a meeting with CHRISTIAN LIPPIATT at conquest site, with regard to my issue with Robert Jones and the Activity Sample Application (database), as I needed some advice. If you like, you can speak to him with regard to this matter. Apologies for forgetting to say this yesterday.*""**

121. Mr Mitchell submitted that these demonstrated that the Claimant had on 30 August 2007 repeated what he had said to Mr Lippiatt on 3 May; which repetition had then led to the latter's

note of 4 September 2007. That note in turn had been relied on by the ET in support of its finding that a protected disclosure (number 3) had been made to Mr Lippiatt on 3 May. Thus the ET's conclusion on disclosure 5 was contrary to its findings in those paragraphs; and to its finding on disclosure 3.

122. In response Ms Azib submitted that where an alleged protected disclosure was said to have been made orally, it was essential to identify the relevant evidence. The only evidence was contained in the POC, the Claimant's witness statement and the statements of Ms Green and Ms Darling. The relevant paragraph of the Claimant's witness statement provided no more than the following (paragraph 52):

> **"Underlying all of this was the Respondent's investigation into the Activity Database led by SCA, which further contributed to the breakdown in the working relationship between myself and Robert Jones. I was asked to attend a confidential meeting with Monica Green, Jane Darling and Jane Simkins, which took place on 30 August 2007. This meeting was to discuss a number of my disclosures and after it I was thanked for my openness. I was assured that I would be fully protected as a whistleblower and was asked to keep my disclosures confidential whilst the investigation continued. In common with the majority of meetings held with the Respondent to discuss these issues, no notes or minutes were ever taken or if they were they were never circulated to me. No documents have been disclosed to me in response to a Data Subject Access Request submitted on my behalf by my solicitors on 29 May 2015 … despite them expressly being asked for …"**

The POC were in virtually the same terms: paragraph 11.5. The ET's findings on disclosure 3 could not be used to convert alleged disclosure 5 into a protected disclosure.

123. As to the three paragraphs, paragraph 145 (in particular its third sentence "*He told this to Ms Monica Green …*") did not amount to a finding as to what was said by the Claimant at the meeting on 30 August. The relevant finding was contained in paragraph 61; namely that there was no evidence of what was actually said on that occasion.

124. As to paragraph 199, the statement that "*The issues contained in this disclosure were then raised in a meeting with human resources at the end [of] August or beginning of September 2007*"

again did not deal with the terms of what was actually said at that meeting. That was the disclosure which had to be identified, in order to decide in turn whether it met the statutory test of a qualifying protected disclosure.

125. Likewise, nothing in paragraph 216 identified the terms of the alleged oral disclosure at the meeting of 30 August. It was not enough to say that the topic or issue had been referred to. It did not follow that everything that he had said to Mr Lippiatt on 3 May was also said at the meeting on 30 August. Thus the Claimant had failed to provide the necessary evidence for this disclosure; as the ET had rightly held. Accordingly the finding could not be characterised as perverse.

Conclusion on Ground 11: Disclosure 5

126. I am not persuaded that there is inconsistency between the finding in paragraph 61 and the various matters stated in paragraphs 145, 199 and 216, or the ET's conclusion on disclosure 3.

127. The identified disclosure 5 was made orally on 30 August 2007. As the Tribunal records in paragraph 61, it had received no evidence either from the Claimant or from the Respondent's witnesses (Ms Darling and Ms Green) as to what was said.

128. As to paragraph 145, its third sentence has to be read in the context of the evidence recorded in paragraph 216. This shows that the Claimant did not mention his conversation with Mr Lippiatt until his email on the day after the meeting of 30 August, i.e. 1 September. That email in turn only referred to "*my issue with Robert Jones and the Activity Sample Application*

(database)". Thus no further information is provided by the Claimant as to what he actually said at the meeting on 30 August.

129. As to paragraph 199, this only refers to the issue, not the detail of what was said. Paragraph 216 is concerned with Ms Green's subsequent knowledge of the disclosure to Mr Lippiatt on 3 May 2007, following receipt of his note of what the Claimant had said to him.

130. In my judgment the ET's conclusion on this alleged oral disclosure on 30 August 2007 properly reflected the absence of evidence as to what was said at that meeting; and involves no inconsistency or perversity.

Ground 12: Disclosure 6

131. This relates to an oral report made by the Claimant to Mr Butler, the SCA counter-fraud specialist, concerning Dr Jones' alleged development of the Activity Sample Database for personal gain. The Schedule identifies the content by reference back to disclosure 3; the relevant date as 4 September 2007; and refers to paragraph 11.3 of the POC and paragraph 53 of the Claimant's witness statement.

132. The Judgment on this disclosure starts with an erroneous reference to a disclosure to Mr Butler on 30 August 2007[3]: paragraph 62. I infer that this is a slip to the date given for the preceding disclosure (5) in the Schedule. In any event, the Judgment subsequently considers the Claimant's interview with Mr Butler on the Schedule date of 4 September 2007: paragraph 65.

[3] "2017" is evidently a typographical error.

133. The ET referred to paragraph 11.3 of the POC and correctly noted that it "*does not refer to any disclosure being made to Mr Butler*". The ET then cited paragraph 53 in full:

> **"On 6 September, 2007 I reported this issue to John Butler, local counter-fraud specialist, at SCA. I was also asked by him to supply data concerning registrations and appointments in the Department (as well as other information) on an ongoing monthly basis."**

134. The ET then noted that the issue which the Claimant had "*reported*" to Mr Butler was about Dr Jones and the activity database. This evidently reflected the preceding paragraph (52) of his witness statement which concerned the meeting with Ms Green and others on 30 August 2007.

135. The ET continued (paragraph 63):

> **"… This does not assist the Tribunal in establishing what the Claimant actually said to Mr Butler and whether what was said, could amount to a protected disclosure. Therefore, the Tribunal looked to see if there was any other documentary evidence which could shed light on what was said during the Claimant's meeting with Mr Butler."**

136. For that purpose it considered Mr Butler's subsequent interim report (22 November 2007) and noted that this included reference to an interview with the Claimant on 4 September 2007. The ET concluded that "*… there is nothing in the report itself, that would suggest that the Claimant said, either explicitly or implicitly, that there was fraud, breach of legal obligation, that the health and safety of patients was ultimately affected or deliberate concealment*": paragraph 65. Turning to "*… Mr Butler's finding … that advice was to be sought by the local counter-fraud specialist regarding criminal action in connection with Mr Jones's private use of intellectual property by way of the Trust's developed database and/or abuse of position …*", the ET concluded: "*However, this does not assist the Tribunal in establishing what the Claimant said to Mr Butler and whether that amounted to a protected disclosure*": paragraph 66.

137. Mr Mitchell submits that it was perverse to dismiss the disclosure of 4 September as a protected disclosure in circumstances where the Tribunal had accepted that the disclosure on the same topic to Mr Lippiatt on 3 May 2007 (disclosure 3) did amount to a protected disclosure; and on a proper analysis of the inferences to be drawn from Mr Butler's report.

138. He pointed to the following particular contents of that report. In its introduction, Mr Butler referred to complaints raised on 3 September 2007 against Dr Jones which included "*undertaking private work within NHS time and unauthorised use of NHS facilities including a Trust developed data base by his private consultancy company*". Under "*Objectives*", the primary objectives included substantiating the facts of the case, identifying any other fraudulent actions and assisting the Trust to take any remedial action: "*This may include criminal action and/or disciplinary action against identified officers and the recovery of losses through civil action*".

139. Under "*Findings*", Mr Butler stated that "*Due to concerns that Trust equipment and or facilities were or had been used for personal benefit … Nasser Sissan, was interviewed on 4th September 2007. He confirmed that he had been requested by the subject in or about September 2006, to develop an activity sample database …*" (paragraph 1.1). The Claimant had explained that he had been "*informed verbally by the subject* [i.e. Mr Jones]*, that the development of an 'Activity Sample' data base had been agreed with senior management, although he never any* [sic] *written confirmation of this and that he was tasked with its development*" (paragraph 1.2). Then (paragraphs 1.4 to 1.9):

> **"At the time of handover of database, Sissan requested written confirmation of the East Sussex Hospital and the Devon PCT business case approval and what if any financial payment East Sussex Hospital would be receiving for its use.**
>
> **As Nasser Sissan did not receive the requested approval, he put a time capsule on the database to prevent any long term unauthorised use.**
>
> **When the time capsule operated in June 2007, there were a number of emails from people within the Devon PCT regarding their denied access.**
>
> **The emails were not replied to by Nasser Sissan.**

These were not followed up or challenged by the subject, which would normally be the expected action of a manager.

The subject stated that it was in April 2007 that he decided not to proceed with the database as originally planned and informed Devon after 8th August 2007 that the database would not be available."

140. Under the section headed "*Income Generation*", the report stated: "*It was confirmed that no joint working agreement or protocol was held and that no payments had been made or expected by any other Trust in relation to the shared use of a database*" (paragraph 3.2).

141. Under the section headed "*Consultant Post Proposal*" the report stated that concerns had been raised about the business case and proposal for the full time consultant's post at Conquest Hospital, "*... suggesting that the figures supplied by the subject, may have been manipulated to ensure that the post and funding was granted*". It recorded that the original business case figures "*quoted 1362 patients per year activity on the Conquest Hospital site activity*"; that figures obtained from Tiara now showed 715 contacts with 656 patients for the year commencing April 2006; that the Claimant has supplied comparison figures for Eastbourne DGH which confirmed 677 contacts for that period. The report then stated that "*At present there is no explanation or identified reason for the difference of over 100% in the figures originally supplied and those held on the Trusts TIARA system*" (paragraphs 4.5 to 4.9).

142. In the section of "*Conclusions*", the report stated: "*Without contacting some of the people in e-mails outside the trust, it would not be possible to confirm with any absolute degree of certainty, that the database was used for personal financial gain, although it appears from a number of the e-mails seen that this was intended to form at least a part of the consultancy work*" (section 4 paragraph 1.4). Furthermore "*The figures provided by the subject in support of the consultants post, appear to be factually incorrect, as the Trusts* [sic] *own figures from TIARA are*

less than half of those stated" (paragraph 5). Mr Mitchell submitted that these conclusions must have been based on information received from the Claimant.

143. Under the section headed "*Recommendations*", there was included: "*Trust developed databases or other documents should not be used for any personal or financial gain without the express written permission of a senior manager, ideally of at least director level*" (section 5 paragraph 3) and that (paragraphs 7 and 8):

> **"7. The trust to consider disciplinary action with regard to the breaches of trust policies and use of intellectual property of the Trust for personal gain.**
>
> **8. Advice to be sought by the Local Counter Fraud Specialist regarding criminal action in connection with the subjects' [sic] private use of intellectual property by way of the trust developed database and or abuse of position."**

144. Set against this material which was before the ET, Mr Mitchell submitted that it was perverse to conclude that "*... there is nothing in the report itself, that would suggest that the Claimant said, either explicitly or implicitly, that there was fraud, breach of legal obligation, that the health and safety of patients was ultimately affected or deliberate concealment*" (paragraph 65). At least in respect of fraud and breach of legal obligation there was ample evidence that the Claimant had provided information which in his reasonable belief tended to show such matters.

145. In response Ms Azib returned first to the pleaded case, including the Schedule references. The relevant paragraph in the POC (11.3) contained no reference to a disclosure. The identified paragraph in the Claimant's witness statement (53) related to a disclosure on 6 (not 4) September 2007, was fully cited in the Judgment and took the matter no further.

146. Whilst acknowledging that disclosure 3 involved the same subject matter as alleged disclosure 6, i.e. alleged development of Activity Sample Database for personal gain, it did not follow that the same things were or must have been said on each occasion. Disclosure 6

concerned what was said by the Claimant to Mr Butler in his interview on 4 September 2007. The only evidence of that would have to be found in Mr Butler's report. That was what the ET duly considered and analysed in paragraph 65 of its Judgment.

147. Mr Butler's report demonstrated that concerns about unauthorised use of the database for private gain had been raised on 3 September, i.e. before the interview with the Clamant on 4 September. Without evidence of what was said in that subsequent interview, the ET was not in a position to assess whether there had been a protected disclosure.

148. Turning to the Butler report, the references in the "*Introduction*" were to the overall background of concerns, which had led to the interview of 4 September. The observations under the heading "*Consultant Post Proposal*" related to those broad concerns; and in any event related to a different matter, i.e. the alleged exaggeration of a business case for a consultant physiotherapist.

149. Where the Claimant's evidence was relevant to Mr Butler's analysis, he set it out expressly, e.g. in that section concerning the business case for a consultant. Mr Butler's opinions and summaries were informed by a range of information not limited to the interview with the Claimant. Accordingly it was wrong to attribute conclusions to the Claimant's alleged disclosure. Thus it was that the ET focused attention on such evidence as there was to demonstrate what the Claimant had said to him in the interview of 4 September about the relevant issue, namely alleged misuse of the database. This explained the conclusions which the ET had properly reached in paragraphs 65 and 66 of its Judgment. The ET had directed its mind to the correct enquiry, i.e. what did the Claimant say in the interview of 4 September about the relevant issue, and reached an unchallengeable conclusion.

Conclusion on Ground 12: Disclosure 6

150. I do not accept that the ET's conclusion was perverse. The alleged disclosure was made orally to Mr Butler on 4 September 2007: see Schedule. The identified paragraph in the POC (11.3) contains no such reference. The Claimant's witness statement refers to a statement to Mr Butler on 6 September; and in any event goes no further than to state that he reported "*this issue*" to Mr Butler. That appears to be a reference back to the preceding paragraph (52) and the meeting with Ms Green and others on 30 August.

151. In these unhelpful circumstances, the ET gave proper consideration to the only document which might shine a light on what the Claimant said to Mr Butler on 4 September 2007. For the purposes of this disclosure the business case for a consultant's post at Conquest Hospital does not assist. That is a different issue. For the reasons identified by Ms Azib, I do not accept Mr Mitchell's submission that it was perverse for the ET to conclude that Mr Butler's report gave no assistance as to what the Claimant said to him on this topic in the interview of 4 September; nor therefore its conclusion that there was no protected disclosure on any of the suggested bases.

Ground 13: Disclosure 7

152. This concerns the disclosures said to be made by the Claimant to Mr Butler in an email of 6 September 2007 concerning the alleged exaggeration of the business case for an additional post of consultant physiotherapist at Conquest Hospital.

153. As the Judgment records (paragraph 68), this states in particular:

> **Hi John,**
>
> **As I had mentioned in our meeting the other day, there was query from Jane Morris with regard to business case that Robert Jones has put forward for consultant physiotherapist (conquest hospital proposal), with regard to number of patients and number of contacts that our Eastbourne physiotherapist consultant has seen number of patients and number of contacts, this I believe was in order to justify for need to have the same for Hastings (conquest hospital).**

I am forwarding you my reply to Jane Morris query."

154. That reply, dated 25 July 2007, is cited in paragraph 52 of the ET Judgment and provides the number of patient contacts by the consultant at Eastbourne DGH for the year commencing 1 April 2006, as then recorded in Mr Butler's report.

155. The ET continued:

> **"69. The Tribunal considered the contents of Mr Butler's report under the heading "*Consultant Post Proposal*". However, this did not take the Tribunal any further in establishing whether a disclosure was made. The only conclusion reached on this by Mr Butler was that the figures provided by Dr Jones appeared to be factually incorrect as the true figures were less than half of those stated but no reason for this was attributed i.e. fraud, breach of legal obligation, that the health and safety of patients was ultimately affected or deliberate concealment.**
>
> **70. The Tribunal's finding is that on the evidence before it, it cannot conclude that this was a protected disclosure. The email to Mr Butler of the 6 September, 2007 is simply supplying information making no assertions of fraud legal obligation, and safety of patients being ultimately affected or deliberate concealment. The Claimant disclosed the email he had sent to Jane Morris (disclosure four), which the Tribunal has found is not a protected disclosure. It was also not a protected disclosure when he sent it to Mr Butler."**

156. Mr Mitchell submits that this conclusion could not have been reached if the ET had taken account of the passage in Mr Butler's report, not cited in the Judgment, which stated "*Concerns were raised about the business case and proposal for the full time consultants'* [sic] *post at Conquest Hospital, suggesting that the figures supplied by the subject, may have been manipulated to ensure that the post and funding was granted*" (paragraph 4.5).

157. If that reference to manipulation of the figures had been considered and taken into account, the ET could not have reached the conclusion recorded in paragraph 69 of its Judgment. In any event it was not for Mr Butler (or the Claimant) to be attributing fraud etc. The question was whether the supplied information, in the reasonable belief of the Claimant, tended to show this.

158. In response, Ms Azib went first to the POC pleading of this disclosure, which was that the comparative data provided by the Claimant in respect of Eastbourne DGH "*... suggested that Dr Jones was tampering with the data to give the impression that his department was busier than it actually was, in order to secure more staff in order to advance his own "empire building" within the Respondent. On 6 September 2007 I reported this issue to* [Mr Butler] ..." (POC paragraph 11.4).

159. His email of that date, together with the email to Jane Morris, provided no basis for a conclusion that in his reasonable belief it tended to show that Dr Jones had been tampering with or otherwise manipulating data. The email to Jane Morris was purely the provision of information in response to her request. The Claimant then passed the figures on to Mr Butler.

160. Thus the ET's conclusions in paragraphs 69 and 70 were evidently correct and there was no basis to conclude that they were perverse.

Conclusion on Ground 13: Disclosure 7

161. The specified disclosure is an email from the Claimant to Mr Butler dated 6 September 2007. As the ET concluded, the email was simply providing the information which was contained in the attached email to Ms Jane Morris of 25 July 2007. That latter email was the subject of disclosure 4 and was also held not to be a protected disclosure. As the Tribunal found in respect of both disclosure 4 and this disclosure 13, there was nothing in the information contained which tended to show any of the relevant matters.

162. As to the Butler report, and as the ET concluded, this is of no assistance when the question is whether the contents of the email of 6 September constituted a protected disclosure.

163. I therefore reject the contention that the ET's conclusion on this disclosure was perverse.

The Preliminary Objection

164. In the circumstances the Respondent's preliminary objection, that success in the appeal would in whole or part be defeated by the ET's unappealed findings, becomes academic. However I deal with its principal components.

165. Ms Azib's principal submission was that, in the event that the appeal was successful on any of the grounds relating to the disclosures which took place before the Claimant moved to the Operations Department in January 2010 (i.e. the appeals relating to disclosures 1, 2, 5, 6, 7, 9), this can have had no effect on the result of the case. This is because of the ET's unappealed findings on jurisdiction and causation.

166. Her submissions on both these issues focussed on the distinction which the ET had drawn between the periods when the Claimant was working in the Therapies Department and subsequently in the Operations Department. The effect of its finding was that the slate had been wiped clean when the Claimant had transferred to the Operations Department in 2010: paragraphs 28, 33, also 87.

167. This had two effects. As to jurisdiction, that detriments occurring before January 2010 were out of time within the meaning of section 48(3)(a), since they did not form part of a series of similar acts, the last of which occurred within the three-month period before presentation of the claim on 27 August 2015. As to causation, that a disclosure made before January 2010 could have had no effect on detriments which occurred thereafter.

168. As to jurisdiction, Ms Azib acknowledged that the ET's summary of the law (paragraphs 11 to 25) had not included reference to section 48(3) or any other provision concerning time limits. However the issue and that statutory provision had been identified within the List of Issues (number 17). The Claimant's closing submissions under the heading "*Continuing act/extension of time*" had been confined to the issue of time limits for the discrimination claims i.e. section 123 **Equality Act 2010**. However the tests of continuity under section 48(3) and section 123(3) were essentially the same: see also the Claimant's citation of **Hendricks v The Commissioner of Police of the Metropolis** [2003] ICR 530 CA. Furthermore, when dealing with alleged detriments 3 and 5, the ET had in each case concluded that it was not within time as part of a continuing act: see paragraphs 175 and 185.

169. As to causation, Ms Azib also submitted that it would not be right to reopen the issue of causation in any respect, given the ET's adverse findings on causation in respect of those detriments which it had found.

170. For the reasons advanced by Mr Mitchell I do not accept these submissions.

171. As to jurisdiction, I do not accept that paragraph 28 of the Judgment is to be read as any form of determination of the time issue. For the purpose of section 48(3) continuity is relevant in respect of detriments, not disclosures: see e.g. **Canavan v Governing Body of St Edmund Campion Catholic School** UKEAT/0187/13 at paragraphs 24 to 25, citing the Court of Session **Miklaszewicz v Stolt Offshore Ltd** [2002] IRLR 344. Accordingly the reference in the paragraph to the first and second disclosures being "*part of a continuing act*" cannot have determined a jurisdictional issue.

172. As to the findings in paragraphs 175 and 185 which relate to detriments 4 and 5, it is implicit that the Tribunal had the provisions of section 48(3) in mind, because the observations on time limits were in each case related to the relevant "*detriment by any act, or any deliberate failure to act*". However the ET did not go on to consider the potential application of the extension provision under section 48(3)(b). By reference to the List of Issues, if not the Claimant's closing submissions, this was still in play.

173. As to causation, the approach of the Tribunal was first to consider each of the matters alleged to constitute protected disclosure and detriments; and then only to consider the issue of causation if and to the extent that it had so found. Thus there has been no specific consideration of causation in respect of the disclosures which have been the subject of this appeal.

174. As to paragraph 28 of the Judgment, on one reading its conclusion is that there could be no causal link between events before and after the Claimant's move from the Therapies Department in January 2010. However I am persuaded that this is put in doubt by the reference in its penultimate sentence to "*the protected disclosure*", i.e. to the protected disclosure of 3 May 2007, not to any other alleged disclosure. Likewise the following paragraph (29) is referring only to the two disclosures which the ET had found to be protected. I conclude that the ET, consistently with its overall approach on issues of causation, did not make a general finding which would be binding in respect of disclosures which it had not found to be protected.

Conclusion

175. For the reasons given above, this appeal is dismissed.