EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Commissioners for Her Majesty's Revenue and Customs

Heard at: **Cambridge** **On: 5th, 6th and 7th November 2018 (and in chambers on 8th November 2018)**

Before: Employment Judge: Mr. A. Spencer

Representation
Claimant: In person
Respondent: Mr. S. Margo (Counsel)

JUDGMENT

1. The following disclosures on the part of the claimant were protected disclosures within the meaning of section 43A Employment Rights Act 1996:

(a) The claimant's email to Hugh Dorey dated 21 June 2013; and

(b) The claimant's email to Steven Kellett dated 13 January 2014; and

(c) The claimant's complaint to the Civil Service Commission dated 11 March 2016; and

(d) The claimant's complaint to the National Audit Office dated 24 November 2016

2. The following disclosures on the part of the claimant were not protected disclosures within the meaning of section 43A Employment Rights Act 1996:

(a) The claimant's email to Nikki Stinton dated 4 July 2013; and

REASONS

Introduction

1. The claimant is still employed by the respondent.

2. The claimant presented her claim form in this case on 23 July 2017. She brings claims against the respondent that she was subjected to detriments after raising protected disclosures. The claim is brought under section 47B of the Employment Rights Act 1996 (ERA).

3. Following a preliminary hearing for the purposes of case management on 22 September 2017 this hearing was listed to determine a preliminary issue. The preliminary issue is whether the claimant's five alleged disclosures on 21 June 2013, 4 July 2013, 13 January 2014, 11 March 2016 and 24 November 2016 set out in her further particulars of claim, amounted to protected disclosures within the meaning of section 43A (ERA). The respondent asserts that none of the disclosures amounted to protected disclosures and the claimant therefore has no grounds to bring her claims as she does not have the protection afforded by the legislation.

4. The hearing was conducted in private following an order made by Employment Judge Ord pursuant to Rule 50(3)(a) on 30 July 2018. He also ordered by consent that the identity of the Claimant and the identity of the Claimant's witness would not be disclosed to the public in the course of any hearing or in the listing of this case, or in any public document entered into the register or otherwise forming part of the public record. Consequently, I refer to the Claimant as either "the claimant" or "X" throughout this decision and I refer to the Claimant's witness throughout as "Witness A".

5. On the second day of the hearing I determined an application by the claimant to amend her claim. Specifically, following a request from me to clarify the legal obligations that she relied on for the purposes of section 43B(1)(b) the claimant produced a list of the legal obligations upon which she sought to rely. The respondent objected to the application. They referred to the fact that the claimant had provided further and better particulars of her claim on two previous occasions. Further, the respondent had clearly set out their understanding of the legal obligations upon which the claimant sought to rely at an early stage of the proceedings and the claimant had never sought to demur from that understanding. Hence, the respondent had prepared their case on that understanding. After hearing submissions from the claimant and counsel for the respondent I refused the claimant's application for the reasons given orally at the time. I limited the claimant's case to the understanding set out in paragraph 18 of the written opening statement prepared by counsel for the respondent. To avoid confusion, I should point out that I understand that there are two versions of that opening statement and that the other version contains the same wording at paragraph 15.

6. The hearing was conducted over three days after which I confirmed that I would give this reserved decision.

Witnesses

7. I heard evidence from the claimant. The claimant also called a work colleague, Witness A to give evidence.

8. For the respondent, I heard evidence from Guy Hooper a Deputy Director within the respondent who oversees tax assurance and resolution policy.

9. Each witness verified the contents of their written witness statement under oath. I had the benefit of seeing the evidence tested under cross-examination and the opportunity to ask questions of the witnesses.

Documents

10. I took into account the parties respective pleadings, two substantial tribunal bundles, the written witness statements of each witness, a written opening prepared by the respondent's counsel, Mr. Margo together with a glossary, cast list and chronology (also prepared by Mr. Margo). I was also provided with a bundle of case authorities by Mr. Margo.

Findings of fact.

11. The respondent is the UK's tax, payments and customs authority, with responsibility to collect tax revenue.

12. The claimant is employed by the respondent as Assurance Officer. She dealt with environmental taxes. The claimant works at an Officer Grade undertaking an operational role in the Environmental Taxes Team, a part of a department named Customs International Trade and Excise (CITEX). Her role includes casework and making decisions within operational guidelines laid down centrally, or by line management. Employees at Officer Grade are not responsible for setting policy or strategic decision-making.

13. The respondent is a part of the civil service. The civil service follows the Civil Service Code ("the Code"). The Code is significant as it is the "legal obligation" that the claimant relies on for the purposes of section 43B(1)(b) ERA. The code sets out the standards of behavior expected of the claimant and other civil servants. Civil servants (including the claimant) are required by their contracts of employment to abide by the requirements of the Code. A copy of the Code is contained within the tribunal hearing bundle. The claimant directed me to various requirements of the code including the following:

    13.1 the need to comply with the law and uphold the administration of justice;
    13.2 the need to set out the facts and relevant issues truthfully, and correct any errors as soon as possible;
    13.3 not to deceive or knowingly mislead ministers, Parliament or others;
    13.4 to provide information and advice, including advice to ministers, on the basis of the evidence, and accurately represent the options and facts.

14. I was satisfied from the evidence of the claimant, Witness A and Mr. Hooper that the provisions of the Code are significant to those working within the civil service. The claimant was very conscious of the need to comply with the Code in her work. Witness A was also clearly conscious of this. The Code is at the forefront of the minds of those working within the civil service.

15. The main environmental tax that the claimant worked on is the Climate Change Levy (CCL). The CCL is a charge levied by the respondent upon the energy industry. The CCL encourages the generation of "green" (i.e. more environmentally friendly) energy.

16. In late 2010/early 2011 the claimant and Witness A (a Higher Officer) were tasked with developing a project to identify businesses known as Combined Heat and Power Operators (CHP's) who were under declaring CCL.

17. CHP's are companies that use the heat generated by their own businesses to generate power.

18. The claimant and Witness A identified several CHPs that were gaining relief from CCL in circumstances where they were not entitled to that relief. This resulted in underpayment of CCL.

19. The issue involved Levy Exemption Certificates (LECs). LECs are effectively "badges" issued by OFGEM to certify that electricity has been produced in a green way. Such electricity is exempt from the need to pay CCL. Once electricity has been generated and an LEC obtained for that electricity, the electricity concerned could be sold on free of the requirement to pay CCL. LECs can be passed on to the new owner of the electricity so that they too benefit from the CCL exemption.

20. The claimant and Witness A became aware of the existence of a sale and buyback arrangement operated between CHPs and utility companies whereby a CHP sold then bought back electricity at a profit using LECs to maximise that profit by avoiding payment of CCL. The arrangement involved the creation of contracts after the event. For example, in one instance a contract was entered into in June 2010 in respect of the sale of electricity the CHP had generated from January 2009. These contracts were referred to by the claimant as "retrospective contracts".

21. The retrospective contracts scheme left the CHP liable for a potential penalty under regulation 60(1)(hb) of the Climate Change Levy (General) Regulations 2001. The potential penalty was high. It was £250 per megawatt of self-generated electricity that could not be supported by an LEC. The claimant identified that the penalty to one of the companies concerned would exceed £23 million if raised in full. This penalty was wholly disproportionate to the amount of CCL that had been avoided by the arrangement. I have seen various figures in the documents in the hearing bundle. However, it appears to be common ground that the potential penalties were something in the region of fifty times the amount of CCL revenue avoided by the scheme.

22. As with many tax penalties the legislation provides for the CCL penalty to be reduced for mitigation. The claimant identified that paragraph 104 of Schedule 6 to the Finance Act 2000 provides for mitigation of the penalty. The paragraph expressly states what factors must not be taken into consideration by the respondent when considering mitigation of the penalty. However, it does not state what factors should be taken into account. The Claimant could not identify any guidance to assist her. Guidance is available in other more established areas where penalties are raised. Such guidance set out the mitigating factors that will be considered and gives guidelines for the percentage reduction of penalties for each mitigating factor. For example, there is clear guidance about mitigation of VAT penalties.

23. Large businesses such as the majority of the CHPs that were involved are dealt with by a division of the respondent known as the Large Business Directorate (LBD). Each large business has its own client relationship manager (CRM) at a senior grade as the single point of contact for the business. The CRM has an overview of the tax affairs of that business.

24. By late 2011 the claimant had informed one of the CHPs concerned of the potential for a penalty. She had also informed Mitch Noble, the relevant CRM for the CHP.

25. This was to be the first time that a penalty had been raised under the Climate Change Levy Regulations. The claimant discussed with Witness A how to take this forward. Both were aware that they needed to establish the correct process and follow the correct guidance on mitigation to raise a proper and appropriate penalty. However, guidance did not appear to exist.

26. In February 2012, the claimant approached the respondent's environmental policy

team to ask for guidance. The response was that the environmental taxes policy team did not "own" the policy. The claimant was told that it was the central policy team who were responsible for the policy and that she should contact them to seek assistance in determining the correct level of the penalty.

27. On 28 February 2012 the claimant contacted the respondent's central policy team to seek guidance. In her email the claimant stated, "*as you are aware the penalty is harsh - £250 for each failure*" (i.e. for each deficit of an LEC). Each LEC was currently worth £4.85 and so a £250 penalty for each failure to have an LEC worth £4.85 was, in the claimant's words "*harsh*". In addition to asking for guidance the claimant set out some suggestions for appropriate guidelines which she had composed in discussion with Witness A.

28. The respondent's central policy team responded to the claimant by memo dated 17 April 2012 to provide advice about the civil penalty regime under the Climate Change Levy regulations and also to provide suggested guidelines regarding mitigation of the penalties.

29. The claimant responded to the advice by email dated 26 April 2012. She reiterated the magnitude of the penalties concerned. If penalties were raised in full they were likely to be several million pounds. The claimant was concerned that given the large sums involved the CHPs would appeal penalty decisions unless she and her colleagues were able to mitigate the penalties down to a lower level. For example, the claimant stated "*I personally think we should raise penalties that are reasonably proportionate and ones we can defend at tribunal. In the case of regulation 60(1)(hb) the penalties in full are huge and in order to bring them down to* [a] *reasonably proportionate figure they have to be reduced by well over 90%*". The claimant also pointed out that the amount of CCL that had been avoided by the scheme was less than 2% of the amount of the maximum penalty.

30. It is clear from the contemporaneous emails that at this stage the claimant was not advocating the imposition of high penalties. She considered the potential penalties to be harsh and was looking for guidance to enable her and her colleagues to mitigate the penalties to more modest levels. This approach was in stark contrast to the claimant's later approach when she advocated a much tougher line.

31. In January 2013 advice was sought from the respondent's solicitor's office concerning the retrospective contracts entered into by the CHPs concerned. The claimant had some input in preparing the brief that was submitted to the solicitor's office. The Solicitor's Office advised that the scheme to enter into retrospective contracts was not illegal per se. However, they took the view that the scheme would warrant the imposition of a civil penalty under regulation 60(1)(hb). The claimant saw the advice and provided her comments upon it. She appeared to be reasonably happy with the conclusions.

32. The claimant was concerned at the length of time that it was taking for decisions to be made. She was dealing with an individual at a CHP that was potentially facing a penalty. The claimant was anxious for a decision to be made promptly so that the business and the individual knew the outcome. The claimant expressed concerns about the delay in an email she sent to Witness A on 22 January 2013 describing the treatment of the business and individual concerned as "*cruel*". The claimant also expressed concern that it may become too late to impose a civil penalty unless prompt action was taken.

33. The claimant held the view at the time that large businesses were less likely to be pursued by the respondent than smaller businesses and individuals. She considered that there was a degree of bias or favouritism toward larger businesses. There were various reasons for that. Larger businesses produced significant revenue for the respondent. They were also more willing to challenge the

respondent's decisions through the courts or tribunals and had the resources to do so. The claimant perceived that there was a degree of bias in favour of larger businesses particularly from the LBD. When I asked Witness A about the issue it was clear that she held a similar but perhaps less extreme view. She had certainly observed that larger businesses were less likely to be "taken on" by the respondent and that it was difficult to get approval from the CRMs within the LBD to impose large penalties upon such businesses. Mr. Hooper also conceded that such a perception existed at the time. The claimant's perception informed her approach as events developed.

34. The issue of the CCL penalty and the approach to mitigation was a new issue that was the subject of much discussion between the claimant and her colleagues. It was a contentious and tricky issue. In an email dated 13 February 2013 the claimant took issue with the focus of her colleagues. She observed that their focus appeared to be upon the amount of profit the companies concerned had earned because of the retrospective contracts. It is clear that the claimant took the view that the amount of tax loss to the respondent was a more important consideration.

35. The respondent had two contentious issues panels (CIPs) within its governance framework for decisions in resolving tax disputes. The CIPs were authorised to decide HMRCs strategy for handling major contentious issues and to agree an approach for resolving such issues in accordance with the respondent's litigation and settlement strategy (a part of the respondent's policy for resolving tax disputes through civil appeal procedures). The remit of the CIPs is to ensure that cases with the same major contentious issue are handled in a coordinated and consistent manner. The CIPs take referrals from within the respondent's organisation. The CIPs are composed of senior individuals within the respondent's organisation. The CIPs decide the strategy for handling the major contentious issues submitted to the CIPs by those "issue owners". The relevant policy defines a major contentious issue as an issue that involves a point of law or practice which might have a significant and far-reaching impact on HMRC policy, strategy or operations, affect multiple cases and different business areas and may result in major litigation.

36. The CCL civil penalty issue was to be referred to the relevant CIP for guidance as it was a major contentious issue. The CIP referral process involves a paper being produced to brief the CIP about the issue and to make recommendations which the CIP are invited to adopt. The paper represents the combined efforts of many individuals who work within the areas concerned. Comments and input are sought from those individuals and the draft paper is circulated for comment. Thus, the final paper represents the work and views of many individuals. However, one or two senior individuals are responsible for coordinating, signing off and submitting the paper to the CIP Secretariat before the paper is presented to the CIP at its next sitting. In this case I understand that it was Juliette Roche (a CRM within the Large Business Directorate) who was responsible for signing off and submitting the paper to the CIP Secretariat.

37. The claimant was involved in drafting the paper to be submitted to the CIP. The paper gives details of the background, the substantive issue, the points for the CIP to consider and the recommended options open to the CIP. A draft copy of the paper was circulated for comment to various individuals including the claimant. The claimant provided comments by email dated 7 March 2013. The claimant's email suggests that she considered the latest version of the paper to be a vast improvement on the previous version. She expressed some concerns and suggested several amendments. Although the claimant's email suggested that she had several issues with the draft paper the amendments that she suggested were relatively modest.

38. The claimant continued to have input into the discussions. For example, she provided information to Juliet Roche on 15 March 2013 about the extent of tax loss

to the respondent because of the issue. She was also asked by Mitch Noble to provide him with information. The claimant also participated in a conference call on 21 March 2013 to discuss the issue further The claimant was deeply involved in the discussions. This was hardly surprising given that she and Witness A had discovered the retrospective contracts scheme in the first instance and that the issue arose in a field in which they had considerable expertise and experience.

39. On 3 May 2013 Juliet Roche circulated an amended version of the draft paper to be submitted to the CIP. The draft was circulated to several individuals (including the claimant) giving a deadline for responses. The claimant responded by email on 7 May. The draft report set out options for the CIP to consider regarding establishing a policy for mitigation of the penalty. The claimant's comments included an additional option that she wanted to be added.

40. Juliet Roche submitted the final version of the paper to Hugh Dorey, Secretariat to the CIP on 8 May 2013 to be considered at the next meeting of the CIP. Ms. Roche circulated a copy of the final version of the paper to various individuals, including the claimant, the same day. The paper included the claimant's suggestion for the additional option for mitigation of the penalty.

41. After the paper had been submitted, the claimant spoke to Steve Kellet, a Grade 6 Manager within CITEX, to express concerns that the CIP were being misled. It was unclear from the claimant's evidence as to exactly how she considered the CIP were being misled. Mr. Kellett suggested that the claimant raise her concerns through her line management. However, the claimant did not act on her concerns as Mr. Kellett put her mind at rest by suggesting that it was not uncommon for the CIP to reject the recommendations in papers put to them.

42. The CIP convened on 13 May 2013. The CIP did not approve the proposed methods of mitigation. Concerns were expressed by the panel as to whether the respondent had the lawful authority to mitigate the relevant penalties. The CIP suggested that clearer legal advice should be obtained. The CIP confirmed that it was, in principle, supportive of the proposal to mitigate the penalties in the way proposed. However, they did not consider that the legal position concerning the respondent's ability to lawfully mitigate these penalties was sufficiently clear. Ms. Roche confirmed the outcome to various individuals, including the claimant, who received a copy of the CIP's written decision.

43. A second paper would need to be prepared for submission to the CIP to address their concerns.

44. The claimant's concerns increased when she was copied in to an email from Juliet Roche on 24 May 2013 in which she stated that when she had discussed the matter with solicitors they had suggested that the unmitigated penalty looked unlawful. The claimant took the view that those involved (including Ms. Roche) were becoming increasingly concerned with how they could reduce the penalty to a level that was acceptable to them. The claimant took the view that a "harder line" was required. The claimant was taking a more robust approach than others involved in preparing the second paper for the CIP. The claimant's approach was also much stricter than the more liberal approach to mitigation that she had advocated previously.

45. The claimant and Witness A believed that the CIP was not being provided with the full facts upon which to base their decision. This manifested itself in the claimant and Witness A taking a more robust approach. This is clear from the content of an email that the claimant and Witness A sent to Juliet Roche on 3 June 2013. The email contained an express request for the content of their email to be considered by one of the solicitor members of the CIP. The content of the email contained some forthrightly expressed views about the retrospective contracts scheme. She

asserted that the retrospective contracts were not valid contracts, contravened statutory legislation and may amount to tax evasion.

46. The claimant and Witness A considered the activities of the CHPs and the Utility companies involved in the retrospective contracts scheme to have acted fraudulently and illegally and that in the circumstances the respondent should adopt a more robust approach to the imposition of a civil penalty. They acknowledged that it would be appropriate to put in place policies to enable the penalty to be mitigated. However, the claimant's clear view was that the starting point should be the full amount of the penalty as provided for in the legislation and that the respondent should mitigate down from the full penalty taking into consideration each company's individual mitigating factors on a percentage basis.

47. The claimant considered the retrospective contracting arrangement was fraudulent and that the solicitor members of the CIP would recognise this if they were provided with the full facts.

48. The claimant and Witness A formed the impression from various discussions and emails from those within the Policy and Large Business Directorate that those individuals were seeking to downplay the severity of the issue. For example, the claimant's view was informed by views expressed by Steve Robinson who was responsible for signing off the next paper to be submitted to the CIP. The claimant's perception was that he took the view that the penalty offended the EU doctrine of proportionality and ran contrary to the protection of property provisions of the European Convention on Human Rights. The claimant also considered that Mr. Robinson was placing too much emphasis on the actions of the utility company that had promoted the retrospective contracts scheme to the CHPs thereby implying that the CHPs were less blameworthy and less deserving of a penalty. This was plainly at odds with the view taken by the claimant and Witness A. As the claimant put it in her witness statement "*the whole thing to me wreaked [sic] of evasion on the part of the companies and I was at a loss to understand why others within HMRC were not acknowledging such*".

49. By this stage the claimant and Witness A wanted the second paper that was to be submitted to the CIP to highlight their view that the retrospective contracts scheme was fraudulent and constituted tax evasion and to advocate a more robust approach to the imposition of civil penalties.

50. The claimant discussed her concerns with Witness A and agreed that the claimant would contact Hugh Dorey, the secretariat to the CIP, and raise the matter with him. The claimant did so on 19 June 2013. The claimant agreed with Mr. Dorey that she would send him an email setting out her concerns.

The First Alleged Protected Disclosure: 21 June 2013

51. This resulted in the claimant sending an email to Mr. Dorey on 21 June 2013. The claimant asserts that this is her first protected disclosure. The opening paragraph refers to the first paper that had been submitted to CIP and states "*We concluded that the information in our paper is not addressed in theirs. Therefore, we would like the content of this email to be considered by Andrew Scott and Fiona Fraser from the CIP*". It is clear that the claimant considered that the CIP were not getting the full picture and wanted the CIP to be provided with the views of herself and Witness A. The email went on to express the claimant and Witness A's view as "*we have a duty to the taxpayer to not acknowledge these "retrospective contracts*" *and to enforce an appropriate penalty for the following reasons…..*". The email went on to give four specific reasons and to provide information and analysis to support each reason. The four reasons are: –

    51.1 the "retrospective contracts" are not valid contracts; and

51.2 the "retrospective contracts" contravene statutory legislation; and
51.3 the retrospective contracts may amount to tax evasion; and
51.4 there was a tax loss to the exchequer as a result of the contracts.

52. The email went on to set out the view taken by the claimant and Witness A as to how the CIP should approach the imposition of a civil penalty and the approach that should be taken to mitigation. The email does not contain any allegations that others within the respondent's organisation were seeking to conceal the full picture from the CIP. Instead the email seeks to put across the view taken by the claimant and Witness A as to the culpability of the retrospective contracting scheme. There is only one paragraph in which a passing reference is made to the respondent's Policy Department taking a different and more lenient view. However, it is significant to note the context in which the email was sent. The email was sent to Hugh Dorey immediately after the claimant had contacted him directly by telephone to express her concerns that the CIP were not being presented with the full picture. The purpose of the email was to present Mr. Dorey with the full picture.

53. The claimant sent an email to Steve Robinson of the Policy Team on 24 June 2013 on behalf of herself and Witness A. The email was sent in response to an email from Mr. Robinson in which he had expressed the view that the maximum penalty should not be issued. The claimant reiterated her view that the retrospective contracts were invalid and that the companies concerned should have known this. She took the view that this gave the best argument to raise the penalty in full. The claimant also confirmed her understanding was that the CIP were there to make a decision on the issue and that they could only do so if they had all the facts.

The Second Alleged Protected Disclosure: 4 July 2013

54. On 3 July 2013 Nikki Stinton (A Grade 7 on the Policy Team within the Environmental Taxes team) circulated a draft of the second paper to be submitted to the CIP. The recipients were asked for their comments. The claimant responded by email on 4 July 2013. The email was sent on behalf of the claimant and Witness A. It is this email that the claimant asserts was her second protected disclosure. The claimant's email is short and so the full text is set out below: –

"*Nikki,*

Please see technical changes. We would like it made explicit that we do not agree with your recommendations in 5.1 and would prefer to mitigate using traders individual circumstances as already tested.

In reply to Janet Howe's query - we are well aware that a trader would qualify for a higher penalty as they had approached the department and asked if we agreed with these retrospective contracts prior to them signing it. They were clearly advised "no" on 3 separate occasions but they went ahead anyway - knowingly going against HMRC advice. Our method of mitigation caters for these cases; your method of mitigation is one size fits all and as you are aware, in our opinion does not recover the tax loss further down the supply chain.

Kind Regards".

55. The email was accompanied by a draft copy of the proposed second paper to be submitted to the CIP which contained tracked changes suggested by the claimant and Witness A. The suggested changes are modest. The main issue that the claimant disagreed with was the recommendation at the conclusion of the draft paper as to how the CIP should approach mitigation of the penalty. The recommendation at section 5.1 of the draft report was to: –

55.1 mitigate the penalty, where appropriate, to the amount of CCL lost; and

55.2 not to apply a penalty in cases where there is clear evidence of misdirection.

56. In contrast, the claimant and Witness A advocated an approach to mitigation which used trader's individual circumstances on the basis that this was a tried and tested approach that had been used in other areas.

57. The second paper was to be submitted to the CIP on 9 July 2013. The Claimant remained concerned that the CIP was not being presented with all the facts and options for consideration. She attempted to contact various senior members of staff to raise her concerns without success. In the course of this, Maureen Brownless (a Senior Executive Officer in the Environmental Taxes Information Centre) told the claimant not to speak to anyone else regarding the matter. This served to reinforce in the claimant's mind that her concerns were being ignored.

58. The final version of the second paper to the CIP was circulated on 9 July 2013 to various recipients including the claimant. The recommendation at section 5.1 of the submission was unchanged from the previous draft and had not been amended to reflect the claimant's comments in her email dated 4 July 2013.

59. The CIP held their second meeting to discuss the issue on 11 July 2013. Their decision was put in writing as before. The CIP did not adopt the proposal put to them in the second paper. They did not approve the proposed method of mitigation because the panel was not convinced that the proposed mitigation of the penalties was a lawful mitigation of the full penalty. The panel expressed the view that there may be a case for a penalty that was higher than the amount of tax lost, given the nature of the scheme that the businesses had entered into. Before making a final decision, they wanted to know more about the case for a higher penalty and whether mitigation of the penalty to the level proposed would be lawful. The panel wanted to see the full legal advice and asked for a further (i.e. third) paper to be submitted before a final decision was made. It is notable that the CIP were asking to "*know more about the case for a higher penalty*". This was precisely what the claimant and Witness A were addressing in the representations that they had been seeking to place before the CIP.

60. The claimant spoke to Nikki Stinton by telephone on 15 and 16 July 2013. Ms. Stinton informed the Claimant of the CIP's decision. During the second telephone conversation the claimant suggested that she and Witness A prepare further material to be provided to the CIP before they reconsider the matter.

61. Nikki Stinton sent an email to the claimant on 16 July 2013. Ms. Stinton acknowledged that the claimant held strong views on the issue but emphasised the importance of following correct procedures and suggested that the claimant's views had been already been expressed in the previous paper to the CIP albeit that the recommended approach to mitigation was not as per the claimant's suggestion. Ms. Stinton acknowledged that the claimant had mentioned that she would be writing a further paper on the penalties and asked for the paper be cleared through her line management chain before sending it to Ms. Stinton or Steve Robinson. Ms. Stinton stressed that any papers that were submitted to the CIP on the issue must be from the policy team and that the claimant should not send any further papers or emails on the issue to either the CIP Secretariat or individual CIP panel members. The email concluded with the stern instruction: "*I hope this is clear*".

62. An email from the claimant to Witness A dated 16 July 2013 gives a clear insight into the claimant's view at the time. She firmly believed that the retrospective contracts scheme should be seen as tax evasion. She expressed the view that "*they appear to be getting away with it. It does raise the question whether this is the case because they are mainly LBS traders*". She expressed the view that "*I do*

not understand why the CIP cannot be given all the facts and options available. Nikki argues they have but they are only mentioned and dismissed, not discussed in any depth and therefore in my opinion not really given as an option.". It is also clear that the claimant felt threatened as she concluded with the comment "*now I just have to wait for the backlash from Maureen* [Brownless] *and after last week's threats I'm not looking forward to that*."

63. As instructed, the claimant and Witness A did not submit their further paper directly to the CIP. Instead, they submitted it via Christine Clark, a Senior Officer within CITEX Operations. Christine Clark sent the paper to Jason Shelley (A Grade 7 CITEX manager) by email on 18 July 2013 with a request for the paper to be considered for inclusion by Nikki Stinton in their next submission to the CIP. It is clear from the email that Miss Clark thought it odd that Ms. Stinton had stipulated that any further papers from operational staff regarding the issues of penalties on CCL must be sent out via the CITEX management chain. She expressed the view that this was puzzling given the expertise of the claimant and Witness A in the matter. She clearly took the view that the claimant and Witness A had a great deal of knowledge of the subject and that their input would be valuable. In her email she stated, "*the important thing here is that the CIP get answers to their questions and that they are presented with all relevant information so that they can make an informed decision about the treatment of the penalties*". The paper accompanying Ms. Clark's email was the paper that had been prepared by the claimant and Witness A. That paper was substantially the same as claimant's email to Hugh Dorey dated 21 June 2013 (i.e. the claimant's first alleged protected disclosure).

64. On 26 July 2013 the final decision notes from the second CIP meeting were circulated. The panel was conscious of the nature of the scheme the businesses had entered into and wanted to explore further the case for a higher penalty in those circumstances. As I have observed above, this appears to be precisely the point the claimant and Witness A were seeking to bring to the attention of the CIP.

65. The claimant and Witness A approached Keith Knight (a Grade 7 in CITEX's Environmental Taxes Department) before a meeting on 19 September 2013. They confirmed that they did not think that the CIP were being given all the facts. Mr. Knight told the claimant and Witness A to forward their paper to Jason Shelley (another Grade 7 manager within CITEX) and to ask for their paper to be attached the paper that was to be submitted to CIP as an appendix. During the conversation, Witness A referred Mr. Knight to the CIP's brief which was to ensure all the options for resolving the issues are considered and expressed her concern that the CIP was not being made aware of all the options.

66. Witness A and the claimant referred to the discussion with Keith Knight when sending a copy of their paper to Jason Shelley by email on 25 September 2013. Again, they made the point that it was important for the CIP to consider all the options. They also expressed the view that the CIP was not, in the opinion of Witness A and the claimant, being made aware of all options. The email requested that their paper was attached as an appendix to the next submission to the CIP. They also expressed concern that Witness A did not have sight of the draft paper despite being a stakeholder. The claimant and Witness A were being "cut out of the loop". Now that they were advocating a tougher line, the draft of the third paper to be submitted to the CIP was not circulated to them in the same way as the drafts of the first and second papers. However, Witness A had in fact seen the draft of the third paper and she had obtained it from another source.

67. Witness A prepared a slightly amended version of the paper that she and the claimant had produced and emailed it to Jason Shelley on 30 September 2013.

68. The claimant and Witness A were informed by email on 2 October 2013 that the paper to go before the CIP at their next meeting in November had already been

signed off by CITEX and so CITEX would only use the additional paper produced by the claimant and Witness A if it was signed off as the official CITEX view of the issues. Thus, the paper prepared by the claimant and Witness A would need to go through the management chain to Keith Knight for approval before it could be submitted to the CIP. The claimant and Witness A reasonably saw this as an attempt to put further barriers in the way of their paper reaching the CIP.

69. in October 2013 Patrick Clark (a solicitor) provided legal advice and analysis to be included in the third paper to the CIP. His view was that the protection of property provisions under the European Convention on Human Rights was engaged by the CCL penalty provisions. He considered that a mechanical application of the penalty which, in Human Rights Act terms, produced a penalty that would be considered to be disproportionate must be reduced. Mr. Clarke's paper went on to discuss the mitigation powers available to achieve this.

70. On 22 November 2013 the claimant raised a complaint with Steve Kellet. I understand that the complaint included her concerns about the CIP process and also bullying she had experienced. The claimant does not rely on this complaint as a protected disclosure. However, I understand that the concerns expressed in the document (which I was not taken to during the hearing and I could not locate in the hearing bundle) were repeated in the claimant's third alleged protected disclosure.

71. The final version of the third paper to be submitted to the CIP was finalised on 20 November 2013. The paper prepared by the claimant and Witness A was not included as an appendix. The recommendation in the paper was to mitigate the full penalty down to the level of the commercial gain achieved by the CHP together with an additional percentage amount to reflect the behavior of the CHP.

72. The CIP met and considered the matter again in the light of the third paper. The panel unanimously agreed to adopt one of the recommended options for mitigation of the penalty. This was to mitigate down to an amount equivalent to the level of commercial gain, this being the amount of consideration the CHP received for sale of the LECs. The rationale for the decision is set out in the written notification of the panel decision.

73. The claimant was disappointed by the CIP's decision. She did not understand why the behavior of the CHPs concerned, which in her view was fraudulent and amounted to tax evasion, could not be taken into account. She remained firmly of the view that the CIP had not heard all the facts and had been prevented from considering all the options.

74. It was not until 20 December 2013 that the claimant saw the third paper that been submitted to the CIP. She was concerned that the paper did not mention tax evasion or dishonest behavior and expressed almost the reverse view by saying "*we do not consider that there has been any deliberate manipulation or attempt by the CHPs to avoid tax or commit any wrongdoing in the cases".* As someone working at an operational level with direct involvement in the matter the claimant felt that this comment was misleading and did not represent the true facts. There were other aspects of the paper that the claimant considered to be incorrect. However, the claimant's main concern was that her view that there had been dishonest behavior that amounted to tax evasion had not been expressed to the CIP and that the CIP were being presented with a very different view. This was a material omission as the facts that were not being disclosed to the CIP would provide a rationale for the imposition of a high penalty and/or a less liberal approach to mitigation.

75. The claimant noted from an email chain that her manager had received the third paper that to the CIP for a week before the CIP convened but had not shared the draft paper with the claimant or Witness A thereby depriving them of any

opportunity to make comments on the draft report before it was submitted to the CIP.

The Third Alleged Protected Disclosure: 13 January 2014

76. The claimant sent an email to Steven Kellet (A Grade 6 Manager within CITEX) on 13 January 2014 with the subject "Concern and Complaint". The email itself is short and was accompanied by a document setting out the claimant's concerns and complaints in more detail. The covering email included the wording "*I recently had sight of the third paper put to the CIP and it contained nothing of what both* [Witness A] *and I raised".*

77. The text of the accompanying document included the following summary of the claimant's concerns:

"*Point 1) That Policy* [i.e. the Policy Team] *failed to submit all opinions and options to the Contentious Issues Panel which is in breach of what the CIP provide they require on their webpage - that technical specialists can be included and all options are to be considered.*

I believe that by not including our comments was a direct attempt to mislead the CIP of that knowledge which should have been available for the CIP's consideration to make a final fully informed decision.

I also believe that by deliberately not including our comments was a direct breach of the Civil Service Values.

Point 2) That LBS and Policy's dealings with this penalty resulted in an unreasonable lengthy delay which resulted in jeopardising the raising of the penalty in accordance with the legislation and may result in HMRC actions being in breach of the HRA.

Evidence

On Point 1) from the information I have I do not believe the papers submitted to the CIP included all the available options for the CIP to consider and I do not believe the papers gave a complete picture of the mischief. Policy and LBS retained the belief that the penalty was disproportionate and all their action concentrated on this. The evidence is contained within their papers they have submitted.

I strongly believe there was a legal argument that the penalty may have been seen as proportionate and I think the CIP should have had the right to consider this. The evidence for this is contained within the paper both [Witness A] *and I wrote.*

I do not believe the first and second papers submitted in May and July to the CIP informed the CIP of the correct legal tax loss and both failed to mention that mitigation should be performed consistently with the way the department treats all penalties - reduced from the maximum downwards in percentages. The method of mitigation put forward in the first and second paper was in breach of section 104(2)(b) of the Finance Act 2000.

On Point 2) For one company the penalty was brought to the trader's attention in writing in a letter dated 12/01/12. I had a meeting on 11th April 2012 with the trader to discuss the extent of the penalty amounting to over £20million, the reason for penalty and mitigation factors. Therefore, the trader has been aware of this since the beginning of 2012. It is advertised in guidance that penalties must not be unreasonably delayed as it could result in breach of the HRA 1998.

EM1380 – Human Rights Act: Article 6: Delay

One of the rights given by article 6 of the ECHR is that a person is entitled to a fair and public hearing within a reasonable time. For tax matters, this is not restricted to proceedings before an appeal tribunal. It also relates to the whole way in which we conduct and manage a compliance check."

78. The document was accompanied by copies of relevant documents. The document concluded with details of the resolution that the claimant was seeking. This included a request for the paper that she and Witness A had prepared to be put before Andrew Scott (a solicitor and member of the CIP) and "*for the matter to be dealt with satisfactorily*".

79. On 10 March 2014 the claimant chased Steve Kellett for an update regarding her complaints as she had heard nothing from him in the interim. Kelly Adams replied on behalf of Mr. Kellett to confirm that Keith Knight was conducting a fact-finding exercise into the claimant's concerns and was finalizing his report. Once the report was finalized it would be passed to Mr. Kellett's successor, Russell Murphy for him to deal with.

80. Rather unsatisfactorily, it appears that Mr. Knight investigated the matter without ever discussing the complaints with the claimant. He produced a report dated 11 March 2014. He rejected the claimant's complaints. The report was not shared with the claimant at the time.

81. On 6 May 2014 the claimant chased Steve Kellett again expressing her concern that she had still heard nothing from him some four months after raising her complaint. In her email the claimant also referred to a recent conversation she had with a solicitor employed by one of the CHPs to defend the company from the CCL penalty (which had been imposed by this point in line with the guidance issued by the CIP). The solicitor had confirmed to the claimant that the company would not be appealing the decision as they were concerned that the tribunal would increase the penalty on appeal. The claimant took this to support her view that the penalty mitigation regime recommended in the third paper and adopted by the CIP as was too lenient and did not adequately take into account the dishonest behavior behind the retrospective contracts scheme.

82. The claimant had a meeting with Mr. Kellett's successor, Russell Murphy on 20 May 2014 to discuss the findings of Mr. Knight's report. Mr. Murphy had Mr. Knight's report but did not show it to the claimant. The claimant provided Mr. Murphy with a "wish list" that she and Witness A had prepared. This this set out the steps that the claimant wanted the respondent to take. The steps included:

    82.1 the claimant and Witness A meeting with Andrew Scott, a solicitor member of the CIP;
    82.2 an explanation being provided as to how the respondent could justify such a large reduction in the CCL penalty when a much stricter approach was applied with smaller businesses; and
    82.3 an explanation as to why the paper produced by the claimant and Witness A had not been submitted to the CIP bearing in mind that both the claimant and Witness A were specialists in the field and bearing in mind the CIP's brief to consider all relevant matters before reaching a decision.

83. No further action appears to have been taken by the respondent and so in August 2014 the claimant approached a nominated officer to progress her concerns. The claimant met with Linda Ridgers-Waite (from Human Resources) on 27 August 2014 to explain her concerns. After further discussions and communication with the claimant Ms. Ridgers-Waite confirmed that she did not see any evidence of wrongdoing. The claimant's response on 27 October 2014 summed up her view at the time. She said "*I have seen something that I think is not right. I want an opportunity to understand why very relevant factors were not given to the CIP and why very relevant factors were not taken into consideration by the CIP in order to make this decision".*

84. Jim Harra (Director General for Business Tax) was appointed as appropriate senior officer to arrange a further investigation into the claimant's concerns as she did not

accept the decision of Linda Ridgers-Waite. Mr. Harra confirmed this to the claimant by email on 24 November 2014. Val Hennelly (Head of Dispute Resolution) was appointed to investigate the claimant's complaints.

85. The claimant met with Val Hennelly on 17 February 2015. The claimant subsequently provided Ms. Hennelly with her views and supporting evidence.

86. The investigation took several months. It was not until 1 July 2015 that Jim Harra wrote to the claimant to confirm that he had received the report from Val Hennelly and to set out his conclusions. As is all too common with grievances the precise nature of the claimant's grievance had escalated over time. At the outset she had merely expressed concerns that the CIP were not presented with the full picture. However, over time, the allegation had escalated into an allegation that her colleagues had deliberately misled the CIP by failing to include the views of all stakeholders in the papers submitted to the CIP. This was Mr. Harra's understanding of the grievance as set out in his written outcome. This escalation of the grievance had the unfortunate effect of "setting the bar higher" if the grievance was to be upheld as Mr. Harrah would need to be satisfied that there was a deliberate attempt to mislead for him to uphold the claimant's grievance. Mr. Harra concluded that the claimant's concerns were not well founded although he accepted that some matters could have been handled better. With regard to the claimant's key complaint his conclusion was "*the question whether the retrospective application of the scheme was fraudulent was not covered in the CIP papers, although the recollection of CIP members is that the point was not lost on them and was discussed".*

87. The claimant had not been provided with a copy of the reports of Mr. Knight and Ms. Ridgers-Waite. She requested copies. They were provided. The claimant was disappointed with the reports and did not consider that they adequately addressed the issues she had raised.

88. The claimant's request for a meeting with Andrew Scott was granted. The claimant and Witness A met with Mr. Scott, Mr. Clarke (a Senior Lawyer in the Solicitor's Office) and others on 14 October 2015. The purpose of the meeting was to allow the claimant to discuss the matter with the solicitors who had provided the advice which had informed the CIP's decision. Mr. Scott agreed with the claimant's comments that the retrospective contracts were not effective due to a failure of consideration. However, he confirmed that the CIP at been very aware that the arrangements were based on a "false premise" and that they took this into account. The claimant was informed that the CIP had followed a "robust process". However, the claimant was not satisfied that her concerns had been addressed.

The Fourth Alleged Protected Disclosure: 11 March 2016

89. The claimant decided to submit a complaint to the Civil Service Commission (CSC).

90. On 11 March 2016 the claimant submitted her complaint to the CSC by email. The subject heading of her email was "Civil Service Code" and the substance of her complaint was set out in an attachment entitled "Concern re HMRC decision breach of Civil Service Code". The claimant's covering email was short. Details of her concerns and the underlying facts were set out in detail in the attachment. The claimant's approach was markedly more legalistic than her previous approach. The document contained an extensive legal analysis of the relevant statutory provisions and the facts that informed her interpretation of the legal position. However, a less legalistic formulation of her concerns appears on page 7 of the document. The concerns are twofold and are expressed as follows: –

"Concern One

That Policy failed to submit all opinions and options to the contentious issues panel which is in breach of what the CIP provide they require on their webpage - that technical specialists can be included and all options are to be considered.

I believe that by not including our comments was a direct attempt to mislead the CIP of that knowledge which should have been available for the CIP's consideration to make a final fully informed decision.

I also believe that by deliberately not including our comments was a direct breach of the civil service values.

Concern Two

That LBS and Policy's dealings with this penalty resulted in an unreasonable lengthy delay which resulted in jeopardising the raising of the penalty in accordance with the legislation and may result in HMRC's actions being in breach of the HRA"

91. The claimant's document was extremely lengthy (32 pages in length) and was dominated by legal analysis to support the claimant's contention that the CIP and their legal advisers had wrongly analysed the applicable legislation and case law. To that extent it rather missed the point by focusing on the legal analysis rather than the core allegation that the claimant's views were not provided to the CIP. However, the document contains a section on pages 5 to 7 entitled "Case Facts" which sets out the factual background and the chronology of events. There is also a "Background" section which also includes background facts (although once again it strays into detailed legal analysis).

92. By 21 April 2016 the CSC completed its initial assessment of the claimant's complaint and notified the claimant that her complaint was within the CSC's remit. However, the CSC confirmed that their remit was limited to consideration of whether there had been a breach of the Civil Service Code. The wider matter of non-collection of taxes or penalties was outside their remit. However, the CSC observed that the case was not straightforward and as the concerns were of a technical and specialised nature the CSC considered that they would probably not be able to adjudicate without outside assistance. The CSC took the view that they would need to involve the National Audit Office either as advisers to the CSC's investigation, or via a request to investigate the case themselves.

93. Following the claimant's complaint to the CSC the respondent agreed to look at her complaint again, this time with emphasis upon the Civil Service Code. Mr. Harra, reviewed the matter again and wrote to the claimant on 22 September 2016 to confirm his decision. He concluded that the claimant's colleagues in the Environmental Taxes Team did not breach the Civil Service Code when they advised the CIP.

The Fifth Alleged Protected Disclosure: 24 November 2016

94. The claimant still felt strongly that the CIP wrongly applied the law. In view of the CSC's comments that such matters were outside their remit the claimant submitted a complaint to the National Audit Office by email on 24 November 2016. This is the claimant's fifth alleged protected disclosure. The claimant referred to a complaint being under the Public Interest Disclosure Act in the opening paragraph of her email. On this occasion the claimant's complaint was more succinct and did not stray into extensive and detailed legal analysis. Although it dealt with the legal analysis it also set out the underlying facts and a chronology of key events regarding the claimant and Witness A's original concerns and their view that facts they put forward were not put to the CIP.

95. The introductory text of the claimant's email indicates that her concerns were

twofold: –

95.1 the respondent had failed in its statutory duty to collect CCL; and

95.2 the respondent had failed to consider mitigation of the penalty correctly by misapplying, misinterpreting and/or failing to consider the applicable statutory provisions.

96. However, the claimant's email goes on to set out the factual background and a brief chronology of events. The claimant made it clear that during the CIP process, she and Witness A were concerned that certain facts were not being put forward for consideration by the CIP. She set out the matters that she and Witness A tried to raise and asserted that these matters were never included in the submissions to the CIP. Thus, although the main substance of the complaints focused on the legal position, the claimant's underlying complaints that relevant information was withheld from the CIP and that the CIP were misled were also features of her complaint to the NAO.

Applicable Law

97. Part IVA of the Employment Rights Act 1996 (ERA) sets out a regime for protection of whistleblowers in a work context.

98. The legal right at heart of this case is the right given to workers under section 47B(1) ERA. Under that section a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that the worker has made a protected disclosure.

99. The protection afforded by section 47B is only provided to workers if they have made a "protected disclosure". Thus, a worker who has not made a protected disclosure does not have the protection afforded by section 47B.

100. Section 43A ERA defines the term "protected disclosure". For a disclosure to amount to a "protected disclosure" two key requirements must be present:

100.1 the disclosure must be a "qualifying disclosure" as defined in section 43B ERA; and

100.2 the disclosure must also be made in accordance with any of sections 43C to 43H ERA.

101. The definition of a "qualifying disclosure" appears in section 43B ERA. For the purposes of this case a disclosure made by the claimant will amount to a "qualifying disclosure" if it is *"disclosure of information which, in the reasonable belief of* [the claimant] *is made in the public interest and tends to show…. That* [the respondent] *has failed…. to comply with any legal obligation to which* [it] *is subject".*

102. The definition set out above has applied since 25 June 2013. The second to fifth (inclusive) of the claimant's alleged disclosures took place after that change to the law and therefore I must apply the definition set out above to those disclosures. The first of the claimant's alleged disclosures took place before the definition was amended. Consequently, I must apply the "old" definition to the claimant's first alleged disclosure. Under that "old" definition the public interest element of the test was not present was instead subject to a requirement that the disclosure was made in good faith.

103. Section 43B requires certain key elements to be present for there to be a "qualifying disclosure":

103.1 Did the disclosure involve the "disclosure of information?

103.2 Was the disclosure in the public interest? (or was it made in good faith for disclosures made prior to 25 June 2013)

103.3 Did the claimant reasonably believe that the disclosure tended to show (in this case) a breach of a legal obligation?

104. When considering whether there has been a "disclosure" within the meaning of section 43B(1) I must consider whether the claimant disclosed "information". It is not sufficient that the claimant made an "allegation" (see *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38*). However, although there must be a disclosure of information, and not a mere allegation, there is no rigid distinction between the two categories. A statement may "disclose information" even if it is also an allegation. It must have sufficient factual content to "tend to show" one of the matters listed in section 43B(1) (see *Kilraine v LB Wandsworth [2018] IRLR 846 CA* in which Lord Justice Sales said at paragraph 35:

"*for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)*".

105. Following *Babula v Waltham Forest College [2007] EWCA Civ 174* when considering whether the claimant held a "reasonable belief" I must consider both:

105.1 whether she genuinely held the belief in question; and

105.2 if so, assess whether it was reasonable for her to have done so

106. The assessment of a reasonable belief is a subjective exercise. As such, the claimant's belief may be genuine even if, in fact, she was mistaken (*Darnton v University of Surrey [2003] ICR 615 EAT).*

107. However, I must be satisfied that the belief was held at the time of making the disclosure rather than at some later stage (see *Kilraine v LB Wandsworth paragraph 46).*

108. As I have said above it is not sufficient for a worker to merely make a qualifying disclosure in order to gain protection. In addition to making a qualifying disclosure, that disclosure must also be made in accordance with one of sections 43C to 43H ERA.

109. Guidance is provided to Tribunals determining public interest disclosure cases in the case of *Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/450/12*. This advocates a step by step approach which includes separately identifying each alleged disclosure and the relevant legal obligation.

Discussion/Conclusions

110. I will deal with each of the Claimant's alleged protected disclosures in turn. Before I do so I understand that the respondent accepts that the claimant is a "worker" purposes of section 47B. Further, I am not required to determine at this stage whether the claimant's claims have been brought in time. I am required only to consider whether the claimant's disclosures amounted to protected disclosures. Taking each of the five disclosures in turn my conclusions are as follows:

The First Alleged Protected Disclosure: 21 June 2013

111. The disclosure, the date of the disclosure and the content of the disclosure are set out at paragraphs 51 and 52 above.

112. The relevant legal obligation is the obligation of the respondent and its employees to comply with the requirements of the Civil Service Code including those set out in paragraph 13 above.

113. An issue arose during the hearing as to whether:

113.1 The Code could only be breached where a person behaved dishonestly or deliberately breached the Code; or

113.2 Whether the Code had a wider ambit and could be breached in circumstances where, for example, facts were merely mistakenly omitted from a report without any deliberate or dishonest attempt to withhold them.

114. The respondent sought to argue both that the Code could only be breached in the circumstances set out in paragraph 113.1 above or alternatively that the claimant could only advance her case on the narrow basis that it was this stricter legal obligation that was breached. I reject the respondent's submission on both counts. I accept that there are sections of the code which prohibit dishonest or deliberate misconduct. However, the code as drafted is not limited in such a way. It provides a more wide-ranging set of values and behaviors for civil servants. It would be surprising to have a code that prohibited only dishonest or deliberately bad behavior. Such a code would have limited ambit and value. I also reject the respondent's contention that the claimant's case is limited only to dishonest or deliberate breaches of the Code. The respondent has always understood the claimant's case to include allegations that the respondent's employees failed to include relevant facts and law in the papers that were submitted to the CIP. I consider that it matters not whether those breaches were deliberate or innocent when considering whether the claimant's disclosures tend to show that the provisions of the Code have been breached.

115. The claimant's first disclosure includes information which tends to show that, in her view, the CIP were not being provided with all the information and facts. The context must be taken into account. The claimant's email was sent following her conversation with Hugh Dorey on 19 June 2013. The purpose of that conversation was to express the claimant's concerns that the CIP were not being presented with the full facts. The purpose of the claimant's email was to present those facts as the claimant and Witness A saw them. Although the claimant did not go further by alleging that this was a breach of the Code, this does not matter. In the context of the case, the legal obligation was obvious to all parties. The claimant was disclosing information which she believed tended to show that the CIP were not being provided with the full facts. That was a potential breach of the Code. At the time the claimant was not articulating this as a breach of the Code. However, all three witnesses confirmed that the need to comply with the Code was at the forefront of the minds of civil servants. The claimant and Witness A plainly believed that what was happening was wrong even though they did not articulate this as a breach of the Code at the time.

116. I have considered whether the claimant held the necessary reasonable belief that the information in her disclosure tended to show that a breach of the Code had occurred, was occurring or was likely to occur. I accept the respondent's submission that in doing so the focus must be on the claimant's belief at the time the disclosure was made. This is particularly important given that the disclosure was made more than five years before the hearing and the oral evidence presented to me at the hearing will inevitably be coloured by the events in those five years. In that five-year period the claimant's views developed and changed with her allegations becoming more serious over time. However, this is a case where there

is a great deal of contemporaneous documentation to assist me. I place more weight on that contemporaneous documentation than the claimant's oral evidence which I consider was coloured by the hardening of her views in the intervening period.

117. I have considered what the claimant believed at the time. I conclude that the claimant believed at the time that the CIP were not being presented with the full picture and that this was wrong. She also believed that the information in her disclosure tended to show this. She had not yet articulated that this was a breach of the Code. The claimant's first disclosure contained no allegation that there had been a breach of the Code. Indeed, the claimant did not allege any breach of the Code (or as she put it at the time a breach of the "Civil Service Values") until her third alleged protected disclosure on 13 January 2014 which was made after the final decision of the CIP had been made on 11 December 2013. However, by the date of her first disclosure on 21 June 2013 the claimant reasonably believed that her disclosure tended to show that the CIP were not being presented with the full facts. She also reasonably believed that this was in some way wrong and was not the way that civil servants should conduct themselves. I consider that this is sufficient even though the claimant did not specifically articulate her disclosure in terms of breach of a specific legal obligation (i.e. the Code). The claimant's actions were motivated by the importance of civil servants behaving in a way which met the requirements of the Code even though she did not articulate her disclosure in this way at the time. In reaching this conclusion I also take into account the fact that it was not just the claimant who believed at the time that the CIP were not being presented with the full picture and that this was wrong. This was also a view shared by Witness A. This supports the conclusion that the belief was reasonable.

118. The respondent accepts that the claimant's first alleged protected disclosure was a disclosure that was made in good faith.

119. It follows from these conclusions that the first alleged protected disclosure was a "qualifying disclosure" as the claimant reasonably believed at the time she made the disclosure that the information she was disclosing tended to show a breach of a legal obligation. She also acted in good faith.

120. I am satisfied that the qualifying disclosure was a protected disclosure on the basis that the disclosure was made to the respondent as the claimant's employer and therefore complied with the requirements under section 43C ERA. The respondent conceded this in any event.

121. For the reasons set out above, I conclude that the first alleged disclosure made by the claimant was a protected disclosure within the meaning of section 43A ERA.

The Second Alleged Protected Disclosure: 4 July 2013

122. The disclosure, the date of the disclosure and the content of the disclosure are set out at paragraphs 54 and 55 above.

123. Again, the relevant legal obligation is the obligation of the respondent and its employees to comply with the requirements of the Civil Service Code including those set out in paragraph 13 above.

124. The claimant's purpose in sending the email dated 4 July 2013 was to contribute the views of herself and Witness A to the discussion and drafting of the second paper to be submitted to the CIP. It was not to alert anyone to any wrongdoing or to any breach of any legal obligation. I do not find that the claimant believed that by sending this email she was disclosing information which tended to suggest a breach of the Code. She was merely suggesting changes to the draft

paper to incorporate her views and those of Witness A. The email does not provide information which on any reasonable view tended to suggest that the CIP were not being presented with the full facts or that material facts were being withheld from the CIP. It follows that the claimant's email dated 4 July 2013 cannot amount to a qualifying disclosure and that it does not amount to a "protected disclosure" notwithstanding the fact that it was made to the respondent as her employer in accordance with section 43C ERA.

The Third Alleged Protected Disclosure: 13 January 2014

125. The disclosure, the date of the disclosure and the content of the disclosure are set out at paragraphs 76 to 78 above.

126. Again, the relevant legal obligation is the obligation of the respondent and its employees to comply with the requirements of the Civil Service Code including those set out in paragraph 13 above.

127. On this occasion the claimant alleged, for the first time in any of her alleged protected disclosures, that there had been a breach of the Code by the policy team within CITEX. The allegation was, in fact, that there had been a breach of "Civil Service Values". The respondent concedes that this allegation can reasonably be taken to refer to the Civil Service Code. A mere allegation of breach would, in itself, be insufficient to amount to a "qualifying disclosure". However, the allegation is supported by information. That information is essentially the claimant's submission that the papers submitted to the CIP did not include all the available options and did not give the complete picture. I am satisfied that the claimant did disclose information which tended to suggest (if correct) that the Policy Team within CITEX were breaching the provisions of the Code.

128. I accept that the claimant believed that it was in the public interest to disclose such information and that such a belief was reasonable. The respondent accepts that it was in the public interest on the basis that a disclosure of information that tends to show that the respondent has acted unlawfully is, in principle, in the public interest.

129. The respondent also accepts that at the time the disclosure was made the claimant did hold the belief that her disclosure tended to show a breach of the Code. However, the respondent asserts that the claimant's belief was not a reasonable one. I do not agree.

130. It is significant to note that Witness A also shared the claimant's view that information was being withheld from the CIP. It was not just the claimant who held that view. Furthermore, there were significant factual developments in the six-month period between the claimant's second and third alleged protected disclosures that show that by the time of the third alleged protected disclosure the claimant's belief was reasonably held. Prior to the second alleged protected disclosure the claimant already had a perception that there was some bias or favouritism toward larger businesses. In the six-month period between the claimant's second and third alleged protected disclosures many significant events occurred which reasonably served to reinforce that belief including the following:

130.1 Maureen Brownless' instruction to the claimant not to speak to anyone else about the matter (see paragraph 57 above); and

130.2 the claimant's comments and amendments not being added to the draft of the second paper to be put to the CIP (see paragraph 58 above); and

130.3 the CIP making a specific request to know more about the case for imposing a higher penalty (see paragraph 59 above). This was precisely the topic that the claimant and witness a wanted to make submissions to the CIP about.

130.4 Nikki Stinton's somewhat stern instruction that the claimant and Witness A would need to escalate their comments up the managerial line if they were to be included in the next submission to the CIP (see paragraph 61 above). This was a distinct change of tone. Previously the claimant and Witness A had been invited to make comments and suggestions directly without having to first escalate the matter up the managerial line; and

130.5 the claimant and Witness A had a wealth of experience from an operational perspective in what was a technical and specialist area. Any reasonable person would expect that their views on the matter would carry considerable weight and would be communicated to the CIP. However, there was an apparent reluctance to permit this. It is particularly significant that Christine Clark considered it "puzzling" that this was happening (see her email referred to at paragraph 63 above). This is significant evidence as it shows that it was not just the claimant and Witness A who considered the approach to be odd; and

130.6 the claimant and Witness A were not circulated with a draft copy of the third paper to the CIP in the same way they had been included in the drafting of the first two papers (see paragraph 66 above); and

130.7 there was the instruction on 2 October 2013 that the claimant and Witness A must obtain approval via the managerial chain if their additional paper was to be submitted to the CIP with the third paper.

131. I am satisfied that a reasonable person in the position of the claimant and Witness A would also have held the belief that the information in the claimant's third disclosure tended to show a breach of the Code by CITEX.

132. It follows from these conclusions that the third alleged protected disclosure was a "qualifying disclosure" within the meaning of section 43B ERA.

133. The respondent concedes that if the third disclosure was a "qualifying disclosure" it will also amount to a protected disclosure on the basis that the disclosure was made to the respondent as the claimant's employer and was therefore within the ambit of section 43C ERA.

134. It follows from these conclusions that the third disclosure was a protected disclosure and therefore affords the claimant the protection of section 47B ERA.

135. There was some earlier suggestion in this case that the third alleged protected disclosure was also advanced on the basis that the information the claimant had disclosed also tended to show that the CIP itself was acting unlawfully. However, during her evidence, the claimant had an exchange with the respondent's counsel in which she acknowledged that this was not her case (see paragraph 63 of the respondent's counsel's written closing submissions). In any event I accept that it is clear from the wording of the third alleged protected disclosure itself that it makes no reference to the decision of the CIP having been unlawful. The third alleged protected disclosure did not contain information that tended to suggest that the decision of the CIP had been unlawful. Furthermore, I do not accept that the claimant actually believed this at the time or that there would be any reasonable basis for such a belief in any event.

The Fourth Alleged Protected Disclosure: 11 March 2016

136. The disclosure, the date of the disclosure and the content of the disclosure are set out at paragraphs 90 and 91 above.

137. Again, the relevant legal obligation is the obligation to comply with the requirements of the Civil Service Code including those set out in paragraph 13 above.

138. The claimant's focus had widened since the third alleged protected disclosure. It was clear from the claimant's words quoted at paragraph 90 above that the claimant was maintaining the same position in relation to the actions of the CITEX Policy Team in failing to provide the CIP with all relevant information and that this was a breach of the Civil Service Code. However, by this time the CIP had made its final decision and the ambit of the claimant's complaints also focused on the decision made by the CIP. The claimant also sought to argue that the decision of the CIP was also wrong in law and unlawful. This was the purpose of the lengthy and somewhat impenetrable legal analysis set out in the claimant's supporting document.

139. With regard to the disclosure being a disclosure of information that tended to show that there had been a breach of the Code by the CITEX Policy Team, I accept that this disclosure was both a "qualifying disclosure" and a "protected disclosure" for substantially the same reasons as with disclosure three. In brief:

139.1 the claimant disclosed substantially the same core information (albeit supplemented considerably) as she had in relation to disclosure three; and

139.2 the information disclosed tended to suggest that there had been a breach of the code by the CITEX Policy Team; and

139.2 the claimant reasonably believed that such a disclosure was in the public interest; and

139.3 the claimant clearly held the belief that the information she was disclosing tended to show a breach of the Code; and

139.4 her belief was reasonably held for substantially the same reasons set out in paragraph 130 above; and

140. The respondent accepts that if disclosure four is a qualifying disclosure for the purposes of section 43B ERA it will also amount to a protected disclosure on the basis that the claimant complied with section 43C ERA.

141. It follows that disclosure four was also a protected disclosure to the extent that it was a disclosure of information that tended to show that there had been a breach of the code by the CITEX Policy Team.

142. Having found that disclosure four was a protected disclosure on the basis set out above there appears to be little merit in deciding whether it was also a protected disclosure on the basis that the disclosure tended to show that the CIP were also in breach of a legal obligation. However, my conclusions are that it was not a protected disclosure on this basis for the following reasons:

142.1 The claimant believed that the information disclosed tended to suggest that there had been a breach of the Code by the CIP. In fact, the information disclosed sits more comfortably with the suggestion that the CIP wrongly interpreted the law that applied to their decision. That would be the more obvious conclusion to reach from the information. However, the information would also tend to suggest that the CIP breached the Code as the Code

requires civil servants (including the CIP) to "comply with the law"; and

142.2 The claimant reasonably believed that such disclosure was in the public interest; and

142.3 The claimant held the belief that the CIP wrongly interpreted the law when making their decision; and

142.4 However, I do not accept that the claimant's belief was reasonably held. I accept the respondent's submission that under paragraph 104(1) of schedule 6 to the Finance Act 2000 the respondent has a wide discretion to "*reduce the penalty to such amount (including nil) as they think proper".* Paragraph 104 then goes on to provide that certain matters must not be taken into account when exercising that discretion. Those matters are: –

(a) the insufficiency of the funds available to any person for paying any levy due or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of levy;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.

I accept the respondent's submission that there is no statutory provision that requires the respondent to maximise the return on penalties. The statutory provision provides for a penalty and provides the respondent with a discretion to reduce the penalty whilst setting out certain factors that must not be taken into account when reducing the penalty. It is unreasonable to suggest that the CIP took into account one or more of those prohibited factors when reaching its decision. In the circumstances, although the claimant appears to have held the belief that the CIP breached the Code that was not a reasonable belief for the claimant to hold in the circumstances particularly in the as it was a view that contradicted the legal advice given to the CIP by specialist and experienced lawyers.

The Fifth Alleged Protected Disclosure: 24 November 2016

143. The disclosure, the date of the disclosure and the content of the disclosure are set out at paragraphs 94 to 96 above.

144. Again, the relevant legal obligation is the obligation to comply with the requirements of the Civil Service Code including those set out in paragraph 13 above.

145. With regard to the disclosure being a disclosure of information that tended to show that there had been a breach of the Code by the CITEX Policy Team, I accept that this disclosure was both a "qualifying disclosure" for substantially the same reasons as with disclosures three and four.

146. To the extent that the disclosure of information tended to show that there had been a breach of the Code by the CIP I reject the claimant's argument for the same reasons as set out in paragraph 142.4 above.

147. The Claimant's fifth disclosure was not made to the respondent as her employer. Consequently, to amount to a protected disclosure the claimant's qualifying disclosure must meet all the requirements of section 43F ERA (disclosure to a prescribed person). There are three requirements of section 43F all of which must be met. Taking each in turn:

147.1 The respondent accepts that the disclosure was made to the National Audit Office which is a "prescribed person" within the meaning of section 43F(1)(a) as the National Audit Office is listed in the Public Interest Disclosure (Prescribed persons) Order 2014 under the title "Comptroller and Auditor General" ; and

147.2 The respondent accepts that the claimant had the reasonable belief required by section 43F(b)(i); and

147.3 The respondent does not accept that the claimant reasonably believed that the information disclosed, and any allegation contained in it, are substantially true for the purposes of section 43F(b)(ii). In this regard I find that:

147.3.1 With regard to the information and allegation that the CIP had not been presented with the full facts and/or had been misled the claimant reasonably believed that the information and allegation was true; and

147.3.2 With regard to the information and allegation that the CIP had acted unlawfully in breach of the Code The claimant believed that the information and allegation was true. However, that was not a reasonable belief to hold.

148. It follows from this that the fifth alleged protected disclosure was also a protected disclosure.

Application for Redaction of This Judgment Before it is Publicised.

149. The evidence in this case included details of legal advice provided to the respondent about enforcement of tax legislation. Such advice may be sensitive. The respondent indicated that it may wish to make an application for the judgment to be redacted to remove reference to that legal advice. The respondent agreed that it would be sensible to see the content of the judgment first before proceeding with the application. In the circumstances I will proceed as follows: –

149.1 I have instructed the tribunal administration not to publicise this judgement online until the respondent's application is determined; and

149.2 I have made separate case management orders in relation to the potential application so that it can be determined. Those case management orders should accompany this judgment.

Further Case Management

150. There will need to be a further preliminary hearing for the purposes of case management. That hearing will need to consider whether the parties wish to avail themselves of judicial mediation or judicial assessment and to make case management directions for the case to proceed to a final hearing. I will instruct the tribunal administration to list a hearing. The parties indicated to me that they were content to such a hearing to take place by telephone. It will greatly assist the tribunal if the parties could address their minds to whether they wish to request judicial mediation or judicial assessment, to try to agree the issues for determination by the tribunal at a final hearing, to identify the witnesses that they intend to call to give evidence at a final hearing and to consider whether they can agree sensible case management directions to progress case to a final hearing.

Employment Judge : Mr. A. Spencer

Date 23 November 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON
8 January 2019

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FOR THE TRIBUNAL OFFICE