Appeal No. UKEAT/0016/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 February 2019
Judgment handed down on
21 June 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MR DRAY SIMPSON APPELLANT

CANTOR FITZGERALD EUROPE RESPONDENT

JUDGMENT

© Copyright 2019

APPEARANCES

For the Appellant	Mr David Reade (One of her Majesty's Counsel) Instructed by: Clintons 55 Drury Lane Covent Garden London WC2B 5RZ
For the Respondent	Ms Alice Mayhew (Of Counsel) Instructed by: Cantor Fitzgerald Europe 1 Churchill Place Canary Wharf London E14 5EF

© Copyright 2019

SUMMARY

WHISTLEBLOWING

The Claimant alleged that he had been dismissed for having made a series of protected disclosures about trading practices within the Respondent. The Employment Tribunal ("Tribunal") found that none of the 37 disclosures identified were protected and that in any event, it was "utterly fanciful" to contend that the reason or principal reason for his dismissal was that he had made disclosures. The Claimant appealed on the grounds that the Tribunal ought to have aggregated the disclosures rather than consider each one separately; had wrongly adopted the strict dichotomy between allegations on the one hand and information on the other established by the EAT in **Cavendish Munro v Geduld** and which had since been held to be incorrect; misapplied the tests for reasonable belief and the public interest element of s.43B of the Employment Rights Act 1996, failed to consider the Claimant's insider status in assessing reasonable belief and had generally failed to comply with Rule 62 of the ET Rules in that it had not set out the legal principles upon which its decision was based.

Held (dismissing the appeal):

(i) That there was no error of law in not aggregating the disclosures. Whether or not two or more disclosures should be aggregated is a question of fact for the Tribunal and the Tribunal's failure to aggregate could not be said to be perverse, particularly in circumstances where there was no clarity as to which disclosures should be aggregated and when particular disclosures arising from a combination of statements were said to have crystallised.

(ii) The Tribunal had not applied the now discredited strict dichotomy between allegations and information. Instead, it correctly analysed the relevant communication in

© Copyright 2019

each case to determine whether the same amounted to the disclosure of information within the meaning of s.43B.

(iii) There was no error in the Tribunal's approach to the reasonable belief or public interest elements of s.43B. As to reasonable belief, the Tribunal had correctly (and in accordance with the Court of Appeal's decision in **Kilraine** [2018] ICR 1850 which was promulgated after the Judgment) considered whether the disclosures contained sufficient factual content and specificity to be capable of giving rise to a reasonable belief that the information tended to show the relevant breach. To say that a disclosure was "speculative" or based on "assumptions" was another way of stating that, in the circumstances, the factual content was insufficient. As to the public interest, the Tribunal had not applied a general rule that a disclosure about commission payments could never engage the public interest. Instead, the Tribunal had merely stated that it did not do so in the present case where there was nothing to suggest that the complaints about commission payments affected others or involved some other factor that could be said to engage the public interest as opposed to the Claimant's self-interest;

(iv) Finally, whilst it was regrettable that the Tribunal had not set out a summary of the relevant legal principles clearly in its judgment, it was clear from a reading of the judgment that there had been substantial compliance with Rule 62. Tribunals should, however, in all but the most straightforward of cases, endeavour to set out such a summary. Not only would that serve to dispel unnecessary arguments about compliance with Rule 62, it would also guide the Tribunal's application of the relevant legal principles to the findings of fact.

© Copyright 2019

A

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

Introduction

B

1. I refer to the parties as they were below. The Claimant worked for the Respondent as a Managing Director on its Emerging Markets Desk between 23 February 2015 until his dismissal on 31 December 2015. The Claimant contended that the reason for his dismissal was that he had made a series of protected disclosures, initially to his line manager, Mr Charles Cortellesi, and subsequently to the Respondent's Compliance department.

C

2. The East London Employment Tribunal ("the Tribunal"), Employment Judge Prichard presiding, rejected the Claimant's complaint, finding that none of the alleged disclosures amounted to protected disclosures within the meaning of s.43B of the **Employment Rights Act 1996** ("the 1996 Act"), and that, in any event, it was "*utterly fanciful*" to state that the reason or principal reason for the dismissal was that he had made such disclosure. The Claimant appeals against that decision on the basis that the Tribunal's judgment failed to set out any proper analysis of the relevant legal principles and erred in law in various respects.

D

E

F

Factual Background

3. The Emerging Markets Desk has salesmen and traders. The Claimant was hired as a salesman specialising in bonds principally from the CIS countries. Mr Cortellesi was the head of the Emerging Markets business.

G

4. The Claimant made allegations about a number of matters during the course of his employment. These broadly related to: the trading practices of the Respondent, in particular a practice known as "front-running"; a colleague, Steve Gooden, who is alleged to have conducted sales work before obtaining clearance from the Financial Conduct Authority ("FCA") in breach

H

A

of FCA regulations; and the Respondent's alleged practice of permitting trading with clients who had not been through customer due diligence ("CDD") or know your client procedures ("KYC"). The Tribunal described the practice of front-running as follows:

B

> **"19. The tribunal heard a considerable amount of about a practice known as "front-running". Explained simply, a client places an order for $20 million of a certain bond and the trader holds back that order and buys $2 million of the same bond then puts the clients order through. The price will go up because that is what a large order of a certain instrument will do to the price of a bond. The trader has bought a smaller amount in the banks own right. The private knowledge that a larger amount is soon to be acquired makes this analogous to insider dealing. The illustration just given is the simplest paradigm case. There are more subtle variants. The practice is illegal both in the US and the UK, under the respective Securities and Exchange Commission (SEC), and Financial Conduct Authority (FCA) regulatory codes."**

C

5. The Claimant's behaviour was regarded by management and colleagues as amounting to constant complaining and a failure to get on with generating business. Matters came to head in October 2015, when Mr Cortellesi, having previously resisted suggestions that the Claimant be moved due to the difficulties in recruiting to that particular Desk, said that he would refer the matter to Human Resources. Mr Gordon Neilly, then Head of Debt Capital Markets DCM in London, became involved and the Claimant was suspended on 13 November 2015. By 1 December 2015, the decision was made to give the Claimant notice of termination. His employment terminated on 31 December 2015.

D

E

F

6. The Claimant's claim was lodged on 6 April 2016. The Particulars of Claim referred to four protected disclosures, although each of these referred to several communications both written and oral. The matter came on for a hearing before the Tribunal in April 2017. By that stage, the Respondent had compiled a chronology setting out 37 separate alleged public interest disclosures made between 27 April 2015 (just 2 months into the Claimant's employment) and 25 November 2015, after the Claimant had been suspended from work. The Tribunal stated that this list of disclosures had been developed by the legal teams following an original request for

G

H

A

information made by the Respondent. Mr David Reade QC, representing the Claimant (as he did below), complains about the Tribunal's adoption of the Respondent's list of disclosures and contends that this was not the basis on which the Claimant sought to argue his case. This is relevant to one of the grounds of appeal to which I shall return below.

B

The Tribunal's judgment

C

7. The Tribunal's judgment takes its structure largely from the 37 separate alleged disclosures identified by the Respondent from the information provided by the Claimant. There is no separate section setting out the relevant statutory provisions or any analysis of the authorities relating to the application of those provisions. The Tribunal is scathing about the manner in which the Claimant sought to raise matters of alleged concern with the Respondent, concluding, by way of example, that communications from him were *"cryptic in the extreme"*, that his allegations were based on "*just making constructs from overheard one-sided telephone conversations*", that the Claimant was "*speculating in making adverse assumptions of market abuse or front-running*", that the Claimant's criticisms were "*over general, lacking specific details of dates, times, traders, and clients*", that certain complaints were "*a figment of the Claimant's imagination*", that he was "*evasive*" and displayed "*hesitation and equivocation*", and that he had failed to provide information to the Respondent even when it was requested. The Tribunal considered that the Claimant's motivation for raising many of these matters was to do with his commission payments and went as far as accepting that the Respondent was "*probably correct in its contention that the Claimant was merely trying to pass his commission concerns off as protected disclosures in order to leverage his personal position*". Some of the allegations of disclosure - for example, Disclosure number 19 - did not survive cross examination and were withdrawn.

D

E

F

G

H

A

8. The majority of the disclosures were dealt with relatively briefly as the following extract from the Judgment in respect of Disclosure number 6 demonstrates:

B

> **"56. <u>Disclosure number 6</u>, was a Bloomberg chat on 18 June at 2.30pm UK time. The claimant was upbeat saying he had done another decent trade yesterday and had made $70,000 this week so far, and said it felt good when it started to click. Cortellesi: "I have noticed great job and… gaining traction" (a metaphor much used in this business).**
>
> **57. The claimant relies on the following passage: "Also not sure the way we are doing things is most efficient but that's a conversation in person". It is stretching the tribunal's credibility beyond breaking point to suggest that the claimant could have been alluding to a regulatory breach by the word "efficient". He then goes on to say: "Just get a bit frustrated with our traders here". In fact there was only one and it was Thomas Blondin because Steve Gooden had not yet got approval. Then he goes on to say: "but hey nothing is 100% perfect. We're moving in the right direction so the future is bright, bring some shades".**
>
> **58. The claimant seeks to portray to the Tribunal that everything is calm on the surface but beneath it there is this strong undertow of corruption in a way that is non-specific and, to the Tribunal, non-credible…".**

C

D

9. Two alleged disclosures that were dealt with in more detail were Disclosures 20 and 21. Mr Reade's submissions on several grounds focused on the Tribunal's conclusions in respect of these two disclosures, and I shall return to them below.

E

F

10. Having gone through each of the disclosures, the Tribunal set out its overall conclusions as follows:

> **"<u>Public Interest Disclosures</u>**
>
> **163. The tribunal has no hesitation in finding that none of the above alleged protected disclosures are in fact protected disclosures under s 43B of the Employment Rights Act 1996, for the reasons given above. In summary: the claimant's tendency to insinuate and to challenge others, and his hesitation and equivocation when challenged himself, militate against him ever making a disclosure of information (as opposed to allegations or just queries). The tribunal also consider that the origin of the claimant's distrust was a money concern over commission payments. That meant that many of these alleged disclosures could never be in the public interest. Further having heard him giving evidence over a long period at the tribunal, the equivocation suggests that the claimant cannot have held a reasonable belief in what he was alleging. The vestigial evidence the claimant overheard on the account A trade, in which he was not involved, and the lack of a single other trade being**

G

H

A

disclosed to the respondent would suggest a lack of reasonable belief and the claimant bluffing about "other examples".

Conclusions

164. That could be the tribunal's conclusion on the whole public interest disclosure claim, but we need to comment on the main detriment and dismissal complaints and the money claims. Regarding the claimant's dismissal, in the course of the above narrative, woven through the 37 alleged disclosures, it was clear to the tribunal that it had become utterly impossible for the team to work with the claimant. Thomas Blondin said (and it did not seem an empty threat), that if Mr Cortellesi insisted on keeping the claimant, he might be the only one left on the team. The team was exasperated with the claimant and, despite being told repeatedly, the claimant showed no sign of mending his ways. It would be utterly fanciful to state that the "principal reason" for his dismissal (s 103A Employment Rights Act 1996) was that the claimant had made protected disclosures. The team's dissatisfaction was abundantly well investigated by the respondent and is well documented over a long period, a period which was as long as it was only because Mr Cortellesi kept "pushing back" until it was clear that was no longer an option. The claimant's poor attendance was bad in its own right. Mr Neilly was appalled when he saw the records. But he ultimately found it just one aspect of the claimant being a poor team player. It was the lack of trust which proved most corrosive and was ultimately insuperable.

B

C

D

165. So far as account allocation is concerned, work had to be found for Russell Scott when he joined. After a long analysis, the tribunal could find nothing in the respondent's allocation of accounts which could be criticised at all, let alone interpreted as a reprisal for the claimant making protected disclosures. At one stage (see above) Steve Gooden and Thomas Blondin agreed to give in to the claimant's demands for certain accounts, against their better judgment, just to shut him up (the "noise"). The claimant was spending more time complaining about what he did not have than working with the (substantial) accounts he did have. Account allocation as a whistle-blowing detriment is a far-fetched claim.

E

166. The claimant claims that his rightful commissions were underpaid from as early as April 2015. It is a contractual claim, and a claim for unlawful deductions from pay as well as a claim for whistle-blowing detriments. Detailed accounts were produced by the claimant and the respondent to show the amounts due when he was at work. There was in fact little variance. Many variations were due to the US Dollar / GBP exchange rate, deductions of fixed percentage overheads from profits, and calculation dates (the trade date or the date paid). The claimant, as stated throughout the above narrative, was never slow in complaining if he was underpaid to any extent. His main complaint was that he was forced to trust Thomas Blondin to accurately report the trades which determined the amount of sales commissions, as these were not fully visible to the claimant on the system. The respondent would always listen to any query on commissions.

F

G

167. Now the claimant's commission claims as put in these tribunal proceedings amount to a total of £4.6m underpayment based on the claimant's suspicions about trades being systematically under-reported by the traders since April 2015. That was clearly an unwarranted claim. The fact it was so large undermined its own credibility as a claim.

H

A

168. In witness evidence the claimant raised 9 trades on which he stated he "knew" he had been underpaid although he did not quantify the amounts. There was enough detail there for the respondent to respond, as they did in a witness statement from Phillip Wale. He is the new London Head of DCM (Debt Capital Markets). He produced the Bloomberg trade tickets for all the named trades and explained to the tribunal how to read them. It was an exhaustive painstaking exposition to which no effective challenge was made by or on behalf of the claimant. On more than one of these trades, for instance, he stated it was arguable that the claimant had been overpaid. On one (17/06/2015), the tribunal saw a later commission adjustment had been made in the claimant's favour.

B

169. The claimant, who has the burden of proof, here has come nowhere near to proving a single underpayment of commission, either contractually or as a whistle-blowing detriment. The origin of the claim in these tribunal proceedings is fundamentally derived from the claimant's distrust of the traders. Ironically, that is what the claimant was ultimately dismissed for too.

C

170. So the tribunal rejects all the claimant's claims and his claim is dismissed."

D

Legal framework

11. For present purposes, the following provisions of the **Employment Rights Act 1996** ("the 1996 Act") (as inserted by the **Public Interest Disclosure Act 1998**) are relevant:

E

"43A Meaning of "protected disclosure".

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.

43B Disclosures qualifying for protection.

F

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

G

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

H

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

A

12. The words, "in the public interest" were introduced by amendment with effect from June 2013. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731, the Court of Appeal made it clear that the question for the Tribunal was: whether the worker believed, at the time he was making it, that the disclosure was in the public interest; whether, if so, that belief was reasonable; and while the worker must have a genuine and reasonable belief that disclosure is in the public interest that does not have to be his or her predominant motivation in making it: see **Chesterton** at [27] and [30].

B

C

13. As to what amounts to a "disclosure of information", this has been the subject of some controversy since the decision of the EAT in **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 in which it appeared that a strict dichotomy was established between information on the one hand and the making of an allegation on the other. The Court of Appeal in **Kilraine v Wandsworth London Borough Council** [2018] ICR 1850 (upholding the judgment of the EAT) confirmed that there is no such rigid dichotomy (and nor was the EAT seeking to introduce one in **Cavendish**):

D

E

> **"30. I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **32. In my view, Mr Milsom is not correct when he suggests that the EAT in *Cavendish Munro* at [24] was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the EAT was seeking to say was that a statement which merely took the form, "You are not complying with Health and Safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the EAT was**

F

G

H

A

> **seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the EAT's reasoning at [24] is somewhat obscured in the headnote summary of this part of its decision, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".**

B

> **33. I also reject Mr Milsom's submission that *Cavendish Munro* is wrongly decided on this point, in relation to the solicitors' letter set out at [6]. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the EAT in *Cavendish Munro* was right so to hold.**

C

> **34. However, with the benefit of hindsight, I think that it can be said that para. [24] in *Cavendish Munro* was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that *Cavendish Munro* supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in *Cavendish Munro* also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).**

D

E

> **35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). <u>In order 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). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard.”</u> (Emphasis added)**

F

14. The decision of the EAT in **Kilraine** ([2016] IRLR 422) was before the Tribunal in the present case.

G

<u>Grounds of Appeal</u>

15. Permission to proceed to a full hearing was granted by Slade J on the sift in respect of seven grounds of appeal. These are that the Tribunal erred in law in that it had:

H

a. Ground 1 – failed properly to direct itself as to the applicable law;

A

b. Ground 2 – failed to look at the composite picture or to aggregate the separate disclosures identified;

c. Ground 3 – failed properly to direct itself that there is no strict dichotomy between information on the one hand and allegations on the other for the purposes of applying s.43B of the 1996 Act;

B

d. Ground 4 – failed to consider the "insider" context of the disclosure of information;

e. Ground 5 – failed properly to direct itself as to the requirement that there need only be a reasonable belief that the disclosure of information tends to show the person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

C

D

f. Ground 6 – failed properly to direct itself as to the public interest requirement under s.43B of the 1996 Act; and

g. Ground 7 – failed to make clear findings of fact as to the identity of the person making the decision to dismiss and as to the reason or principal reason for that decision.

E

16. I shall deal with each of these grounds in turn.

F

Ground 1 - Failure to direct itself properly as to the applicable law

Submissions

17. Mr Reade submitted that the Tribunal failed to comply with its duty under Rule 62 of the **Employment Tribunal Rules of Procedure 2013** ("the ET Rules") in that it failed to identify the relevant law or to state how that law has been applied to its findings in order to decide the issues. Reliance is placed upon the decision of the EAT in **Greenwood v NWF Retail Ltd** [2011] ICR 896, in which it was held that a judgment needed to demonstrate 'substantial compliance' with the rule.

G

H

A

18. In this case, submits Mr Reade, the Tribunal failed to set out any reference to the relevant statutory provisions or the legal principles. Reference was made to just one authority and the judgment does not demonstrate substantial compliance with Rule 62 of the ET Rules. The absence of substantial compliance is particularly obvious, says Mr Reade, given that the case concerns the particularly vexed area of law concerning protected disclosures.

B

19. Ms Mayhew, who appeared for the Respondent (as she did below), submits that the mere failure to follow the usual practice of setting out a separate section on the relevant law does not give rise to an error of law. The EAT needs to consider whether the Tribunal had in mind the appropriate legal principles and applied them to the facts; it needs, in other words, to consider whether there was substantial compliance with Rule 62 bearing in mind that the rule is a "guide and not a straitjacket". Ms Mayhew submits that on a fair reading of the judgment there is substantial compliance as the parties are readily able to discern why they won or lost. Ms Mayhew places reliance upon the decision of the then president, Mr Justice Morison, in **Chief Constable of the Thames Valley Police v Kellaway** [2000] IRLR 170, in which it was said:

C

D

E

> **"48…Whilst we would not condone a Tribunal decision which does not set out the relevant legal position and does not make findings of fact on all the principal submissions made, this does not amount to an automatic ground of appeal. It has to be shown that omitting to set out the legal principles or key submissions made has led to a consequent error of law or incorrect finding of fact. We are unable to intervene in the majority's findings, which although lengthy, set out the grounds for finding discrimination in sufficient detail to allow both parties to understand the reasoning behind the finding of discrimination."**

F

20. **Kellaway** was not cited to the EAT in **Greenwood**.

G

Ground 1 – Discussion

21. Rule 62 of the ET Rules, so far as relevant, provides:

H

> **"62. Reasons**

A

> **the Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural …**
>
> **…**
>
> **(5) in the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to the findings in order to decide the issues…"**

B

22. The rule is in mandatory terms. Failure to comply with it does give rise to an error of law: see **Greenwood** at [51], [56] and [57]. However, what is required is 'substantial compliance' with the rule, and not slavish compliance with the structure of the rule which would suggest separate sections in the judgment dealing with each of the constituent parts of the rule. As stated in the decision of the Court of Appeal in **Balfour Beatty Power Network Ltd v Wilcox** [2007] IRLR 63 which considered the predecessor rules:

C

D

> **"25… I do not doubt that in future Employment Tribunals would be well advised to recite terms of rule 30(5) and indicate serially how their Determination fulfils its requirements, if only to avoid unmeritorious appeals. <u>But the rule is surely intended to be a guide and not a straitjacket. Provided it can be reasonably spelled out from the determination of the Employment Tribunal what rule 30(5) requires has been provided by the Tribunal, then no error of law had been committed</u>." (Emphasis added)**

E

23. In this case, it is regrettable that the Tribunal did not clearly set out the relevant legal provisions and principles to be applied; had it done so, this ground of appeal might have been avoided. The failure to set out at least a summary of the relevant legal provisions and principles is more likely to invite a challenge to the judgment. Tribunals should, in all but the most straightforward of cases, endeavour to set out such a summary. Not only would such a summary be likely to dispel any argument as to substantial compliance, it is also likely to serve the purpose of guiding the Tribunal's application of those principles to the findings of fact.

F

G

H

24. That said, however, the mere failure to set out a separate section on the legal principles does not, of itself, give rise to an error of law. Whether or not there is an error depends on whether or not there has been substantial compliance. To answer that question, one needs to look closely at the entirety of the judgment. The specific challenge under Ground 1 of the appeal does not descend to the details of the judgment to make good the argument that there has not been substantial compliance. It is under Grounds 2 to 6 that the Claimant sets out instances of a failure to comply with the rule.

25. Before turning to those other grounds, I deal briefly with the parties' respective positions as to significance of the **Kellaway** decision in this context. Ms Mayhew's submission is that, in accordance with **Kellaway** (at [48]), it is not an error of law to fail to set out the relevant legal principles unless that failure can be shown to have led to a consequent error of law or incorrect finding of fact. Mr Reade QC submits that **Kellaway** does not assist the Respondent as the parties in that case were not divided on the law and that the law in relation to protected disclosures is fundamentally more complex than the issue of discrimination being considered there.

26. In my judgment, the test is and remains one of substantial compliance with the rule. The then President stated in **Kellaway** that there is no "*automatic ground of appeal*", where there is a failure to set out the relevant principles or a failure to make findings of fact on all the principal submissions made. The President went on to say that it has to be shown that omitting to set out the principles or key submissions made has led to a consequent error of law or incorrect finding of fact. It might be said that that further requirement is no more than another way of stating that there needs to be substantial compliance with what is now contained in Rule 62(5) of the ET Rules. However, the use of the phrase "*<u>consequent</u> error of law or incorrect finding of fact*", might suggest that the EAT considered that it is not enough that there is a failure to comply with

A

the rule and that an error of law will only arise where that failure gives rise to some consequential error of law. If that is the effect of the decision, then I would disagree with it. As is clear from the decisions of the Court of Appeal in **Balfour Beatty** and the EAT in **Greenwood** (neither of which cited **Kellaway**), a failure to establish substantial compliance with the rule will be enough in itself to amount to an error of law; there is no need to demonstrate that there is also some consequential error of law in some further respect (although clearly there will be cases where the lack of substantial compliance with Rule 62 goes hand in hand with other errors of law).

B

C

<u>Ground 2 – Failure to direct itself to look at the composite picture or to aggregate the separate disclosures</u>

D

Submissions

27. The Claimant's submission here is that the Tribunal should have aggregated the disclosures so as to consider their collective status and effect. Reliance was placed upon the decision in **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540, in which the EAT (Slade J) considered whether an earlier communication ought to be read with a later one in order to ascertain whether there had been a disclosure of information. It was held:

E

> **"22…An earlier communication can be read together with a later one as "embedded" in it, rendering the later communication a protected disclosure even if taken on their own they would not fall with section 43B(1)(d) (Goode, para 37). Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact. …"**

F

G

28. Mr Reade submitted that each of the alleged disclosures made by the Claimant related, broadly, to concerns about trading practices and compliance with FCA rules, and that these disclosures had been made to various members of management within the Respondent and also to the compliance department. He submits that the Tribunal should properly have considered this when looking at the disclosures and should have aggregated and considered their collective status

H

A

and effect. He notes that the Tribunal was specifically invited to do so during the Claimant's closing submissions by reference to **Norbrook**, but failed to do so.

B

29. Ms Mayhew submitted that the Tribunal's approach to the various disclosures was consistent with that suggested by the EAT in **Blackbay Ventures Ltd v Gahir (trading as Chemistree)** [2014] ICR 747 where HHJ Serota QC highlighted the need for each disclosure to be identified by date and content and for each alleged failure or likely failure to comply with a legal obligation to be separately identified: see **Blackbay** at [98]. The Tribunal's analysis of each of the 37 separate disclosures was necessary given the Claimant's unfocused and unparticularised reliance upon four general categories of alleged disclosures, and his apparent contention that his entire 'course of conduct' should be taken into account in determining whether there had been a disclosure, an approach expressly rejected by the Court of Appeal in **Bolton School v Evans** [2007] ICR 641:

C

D

E

> **"12.... The nub of the argument as presented in this court, and more particularly as presented in the oral submissions that we have received this morning, is that the whole course of conduct of the Claimant should be regarded as an act of disclosure, so the hacking was part of the disclosure, and if the Claimant was warned because of the hacking, as the school said that he had been, that was in itself an admission that he had been dismissed for making a protected disclosure. Mr Barnett called this an "entire transaction" approach to disclosure. The argument was supported both by arguments of policy and construction, and by analysis of the facts to bring them within the entire transaction approach.**

F

> **13. As to construction, Mr Barnett, as I understood him, supported the policy-based approach of the Tribunal, but added to it further arguments based on the terms of the legislation. He reminded us of the long title to the Public Interest Disclosure Act 1998 , the source of the present provisions, which says that they are "to protect individuals who make certain disclosures of information in the public interest"; and he pointed to the use in section 43B(1) of the word "any" disclosure. These factors were said to point to the need to give a wide meaning of the concept of qualifying disclosure, in the interests of the employee.**

G

> **14. I am afraid that I was not persuaded by any of that. The legislation uses a common word, "disclosure", and sets out in some detail the circumstances in which that disclosure will or will not be protected. There is no reason to think that Parliament intended to add to that machinery by introducing some special meaning of the word disclosure. Indeed the Tribunal itself, in some detail in the passage that we just looked at, pointed to the controlling structures imposed by the 1998 Act. The question of whether the conduct for which the employee was**

H

A

disciplined was indeed "disclosure" accordingly remains a question for the normal meaning of that word. ..."

B

30. Ms Mayhew also relies on the decision of the EAT in **Barton v Royal Borough of Greenwich** [2015] UKEAT/0041/14 in which HHJ Serota QC held that one cannot convert a disclosure that does not qualify as a protected disclosure by associating it with another disclosure that does qualify: see **Barton** at [80].

C

Ground 2 - Discussion

31. The question of whether or not two or more communications considered together amount to a protected disclosure is a question of fact: see **Norbrook** at [22]. In the present case, the Tribunal found that none of the 37 separate alleged disclosures identified amounted to a protected disclosure. The question is whether the Tribunal erred in failing to consider whether some or all of them taken together might have done so.

D

E

32. In some cases, it will be obvious that aggregation is appropriate. That may be the case where, for example, just two communications are relied upon, the second of which refers back to (or 'embeds' within it) the earlier one containing information within the meaning of s.43B of the 1996 Act. That was the situation faced by the Tribunal in the **Norbrook** case, and the EAT found that the Tribunal had not erred in taking the communications together. In the present case, however, the situation is far more complex in that the Claimant was seeking to rely upon a large number of communications – the Tribunal identified 37 separate alleged communications - said to give rise to three or four separate disclosures. In those circumstances, in the absence of clarity from the Claimant, it would not necessarily be obvious to the Tribunal which particular communications should be grouped together for the purposes of supporting one or more of the four alleged disclosures.

F

G

H

A

33. In his skeleton argument, Mr Reade appeared to be submitting that the Tribunal should have aggregated *all* of the communications relied upon in order to consider their collective status and effect, and relies upon the fact that the Claimant's closing submissions below did invite the Tribunal to consider aggregation. I have been taken to the relevant passages in those closing submissions. Whilst they refer to the **Norbrook** decision and the fact that a protected disclosure may span a number of interactions where the whole is a protected disclosure, there is very little, if anything, in the submissions identifying which of the many communications relied upon are to be taken together in order to found a particular disclosure. As Ms Mayhew puts it, the Claimant did not identify when he claimed that the various disclosures 'crystallised' into a qualifying disclosure. The need to identify the combination of communications relied upon, and the specific protected disclosure to which that combination gives rise, is not academic; it is a basic requirement in such claims. Specificity in relation to the disclosures relied upon is important because without such specificity, it may be very difficult for the Tribunal to answer the further questions which arise in such cases, namely whether or not (in a dismissal case) the reason or principal reason for the dismissal is that the employee made a protected disclosure.

34. In my judgment, the Tribunal did not err in not aggregating the 37 communications in order to consider whether they amounted to a protected disclosure. There was no clear submission that it ought to do so, and, in any case, there is no obvious link between the disparate communications so as to render it perverse for the Tribunal not to have taken all of them together.

35. During oral submissions, Mr Reade did seek to rely upon a more specific grouping of communications based around Disclosures 20 and 21 (and possibly also 23). He points out that the submissions below also specifically relied upon that grouping of communications and submits

A

that the Tribunal ought to have taken at least these together in determining whether there were protected Disclosures. There are several difficulties, as I see it, with those submissions:

a. First, there remains a distinct lack of clarity as to which communications the Claimant expected the Tribunal to consider on a cumulative basis. It is notable in this regard that both the grounds of appeal and the skeleton argument merely seek to suggest that there should have been aggregation in general;

B

C

b. Second, although the Tribunal did not refer expressly to **Norbrook**, it is apparent that it had the question of aggregation in mind. Thus, we see that at [37] of the judgment in relation to Disclosure number 1, the Tribunal refers to a "*composite string of disclosures starting on that date*". Although that is in the context of a specific disclosure, it is indicative of the Tribunal's openness to considering more than a single communication at a time in determining whether there was a disclosure. Furthermore, we see that even in relation to disclosure number 21, which focused on a communication made on 15 September 2015, the Tribunal refers back to earlier communications such as one on 15 August 2015: see [122]. Similarly, in relation to Disclosure 31, the Tribunal took account of communications under Disclosure 30 as the backdrop to the later disclosure. The suggestion therefore that the Tribunal adopted a hermetically sealed approach to each disclosure is not one that can be accepted;

D

E

F

G

c. Third, in respect of Disclosures 20, 21 and 23, the Tribunal came to clear conclusions as to why none of them individually amounted to a protected disclosure. The reasons for doing so included the vagueness of the communication in question, the fact that the Claimant had kept quiet about an allegedly blatant example of front-running for a whole month without telling compliance (thereby suggesting to the Tribunal that the reasonable belief requirement of s.43B of the 1996 Act was not met), and the absence

H

A

of any "*hard information*" suggesting any breach of any legal obligation. It is far from clear in these circumstances how taking these allegations together could improve the Claimant's case that there was a protected disclosure. The Claimant's case might have had more merit had there been a finding that the earlier of these communications did contain some sort of protected disclosure which could be said to have been embedded in or alluded to in subsequent communications. However, that is not what the Tribunal found. Communications that do not, on their own, amount to a protected disclosure, are unlikely to amount to one when combined. It is certainly hard to see how the Tribunal could be said to have acted perversely in failing to conclude otherwise.

B

C

D

36. Ground 2 is therefore dismissed.

<u>Ground 3 - No strict dichotomy between information and allegation</u>

E

Submissions

37. Mr Reade submits that the Tribunal applied a bright-line distinction between "information", on the one hand and "allegations" (or queries) on the other, as apparently identified in the EAT's decision in **Cavendish Munro** without taking account of subsequent authority indicating that the position is more nuanced. He submits that the Tribunal's failure to acknowledge or even allude to this more nuanced approach led to a number of errors. These included an incorrect approach to the level of detail required in providing information; a failure to acknowledge that information as to likely future breaches may be protected; a failure to acknowledge that all that is required on the part of a whistleblower is a reasonable belief that the information disclosed tended to show that there was or is likely to be a breach of a legal obligation, rather than a reasonable belief that there had in fact been such a breach; and that the

F

G

H

Tribunal's unprincipled approach to analysing the disclosures also led it to fail to make determinations of fact in relation to certain pieces of information.

38. Ms Mayhew submitted that the Tribunal did not err in its application of **Cavendish Munro** and that the question of whether something amounts to information or is merely an allegation is one of fact for the Tribunal, with which the EAT should not readily interfere. As to the specific matters relied upon by the Claimant, the Respondent submits that these are all conclusions of fact which the Tribunal was entitled to reach.

Ground 3 – Discussion

39. As the decision of the Court of Appeal in **Kilraine** makes clear, s.43B(1) of the 1996 Act should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. The question in each case, as has now been made clear, is whether a particular statement or disclosure is a "*disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]"*. However, in order for a statement or disclosure to be a qualifying disclosure, 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)*". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case: see **Kilraine** at [31], [35] and [36].

40. Although the Tribunal did not refer to **Kilraine** (which at that stage had been decided by the EAT), it does not appear to me that the Tribunal was drawing a strict distinction between allegations or queries on the one hand, and information on the other. Instead, what it did was to analyse in some detail the communications upon which the Claimant relied in each case in order

A to determine whether the same amounted to a disclosure of information within the meaning of s.43B.

B 41. The first passage criticised by Mr Reade is that at [154] and [155] of the judgment where the Tribunal dealt with Disclosure 32:

C

> **"154. Disclosure number 32 is said to be the Claimant's email of 21 October to Annie Mills. However, it is stated to be an enquiry as opposed to a disclosure of information: "Could you let me know if the following information raises any issues?" The scenario described seems to be the account A trade in which the Claimant was not involved (it was Steve Gooden and Russell Scott). There is again a huge amount of speculation and supposition involved on the Claimant's part. He has constructed a scenario based on overheard conversation, and one-sided telephone calls. That could not support a "reasonable belief" that there was a breach of FCA regulation here.**
>
> **155. Further, it is indicative that, once again, he provided the specifics of the trade very slowly and piecemeal with Ms Mills having to drag information out of him 8 days later on 29 October. The account A trade is in fact the only trade whose details he did eventually disclose – date, bond, trader, sales, and the reference numbers. In some, however, this cannot count as a disclosure. It fails to satisfy s.43B in 2 ways – information (not just a query), and reasonable belief." (Emphasis added)**

D

E 42. Mr Reade submits that the underlined words show that, although this was framed as a query, that was merely the preface to the provision of information, and that in those circumstances the Tribunal was wrong to reject this as the disclosure of information. I do not accept that

F submission. It must be borne in mind that it is not sufficient for there to be disclosure of some information: there must be disclosure of information which, in the reasonable belief of the Claimant tends to show one or more of the matters in s.43B(1). Whether or not something is

G merely a query, or amounts to the provision of information albeit framed as a query, is for the Tribunal to determine. If an employee sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation[1], then the fact that such information is contained within a communication that can be described as

H

[1] The term 'breach of a legal obligation' is used in this judgment as a convenient shorthand for any of the matters referred to in paragraphs (a) to (f) of s.43B(1) of the 1996 Act.

A

a query will not prevent it from amounting to a qualifying disclosure. A straightforward example might be a communication to a manager in the following terms: "On 1 January 2019, I saw employee X manipulating and falsifying data to enhance the employer's year-end results. I consider this to be fraudulent conduct. Do you agree?" The query in that communication does not alter the fact that there is a disclosure of information which, in the reasonable belief of the worker tends to show that a criminal offence is being committed. However, the position might be different if the employee had merely said as follows: "On 1 January 2019 I saw employee X access the year-end results. Could you let me know if that raises any concerns?". In the latter example, the information probably lacks sufficient factual content to amount to the disclosure of information within the meaning of s.43B. Moreover, the communication invites the recipient to form an assessment as to whether any concerns arise, rather than it tending to show, in the sender's reasonable belief, that a criminal offence is being committed. In my judgment, the communication considered by the Tribunal in this case, although not fully set out in the Judgment, would appear to be closer to the latter example than the former. At any rate, it was clearly open to the Tribunal, based on the speculation and lack of detail identified, to conclude that the way in which the Claimant framed this particular communication did not amount to the provision of information within the meaning of s.43B.

B

C

D

E

F

43. The next point made by Mr Reade is that the Tribunal was applying a higher standard in terms of the information required than authorised by statute. Reference is made to the Tribunal's remarks: at [77] where it said "*The Claimant's criticisms were over-general, lacking specific details of dates, times, traders, clients*"; at [138], "*The Claimant gave no specifics at all of his allegations*"; and at [142], "*There was only so long Mr Moore could sit on this, waiting for detail [of front-running having occurred] … This could not conceivably have been a protected disclosure of information. What the Claimant gave Compliance was the antithesis of*

G

H

A

'information'". Mr Reade's submission is that the Tribunal's apparent requirement for exhaustive detail in relation to particular matters amounted to an error of law. I consider this submission to be without merit. As the Court of Appeal in **Kilraine** made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation. The Tribunal in this case clearly concluded that the information disclosed by the Claimant lacked sufficient factual content and specificity and therefore did not satisfy s.43B(1). That was a finding which it was entitled to make and cannot be said to be perverse. It is noteworthy that in respect of one of these matters, the Tribunal concluded that the particular allegation was a "*figment of the Claimant's imagination*", and that under cross examination the Claimant "*rather lost his grip on this particular alleged disclosure*": see [78]. Such findings (which are not challenged) are hardly consistent with the provision of sufficient factual content to amount to the disclosure of information.

B

C

D

E

44. The next contention is that the Tribunal failed to direct itself that information as to potential future breaches can also amount to protected disclosures. The criticism arises out of the Tribunal's remarks in respect of Disclosure 31: "*Again there was no information. Even the Claimant describes the scenarios as hypothetical",* and "*… We have not crossed the line yet" which means he was saying there was no regulatory breach….":* see [153]. The submission is that the Claimant was there describing a 'direction of travel', which, if it continued, would result in a breach of a legal obligation, and that that would be sufficient to amount to a disclosure of information within the meaning of s.43B.

F

G

45. Of course, there can be no doubt that the language of s.43B means that information as to a potential future breach could amount to a qualifying disclosure: "*(b) that a person has failed,*

H

A

is failing or is likely to fail to comply with any legal obligation to which is subject." However, it is one thing to say that a breach is likely to occur some point in the future; it is quite another simply to say that "*we have not crossed the line yet*". The latter statement does not necessarily denote that a future breach is likely. Whether or not it does will depend on the other information provided. Mr Reade's 'direction of travel' point would only get off the ground if there was something more in the communication which tended to show that if the Claimant's colleagues continued to behave in a certain way then a breach was likely. However, that is not what the Tribunal found the Claimant had said. In fact, it is clear from the preceding paragraphs that the Claimant's remarks were directed at past conduct rather than future conduct. Furthermore, The Tribunal went on to conclude (at [153]) that the Claimant had simply failed to provide information to back up his concerns despite being asked to do so.

B

C

D

46. The next contention is, in some respects, a continuation of the argument under Ground 2, which was that the Tribunal ought to have considered all of the disclosures as a whole in determining whether there was a protected disclosure. It is said that by failing to take that approach, the Tribunal failed to make findings in respect of two key matters. The first is that the Tribunal did not reach a clear conclusion in respect of Disclosure number 20. It is clear (from [101]) that the Tribunal regarded Disclosure number 20 as the contents of the Bloomberg chat on 17 August 2015. In respect of that particular disclosure the Tribunal concluded that it was too vague to qualify as a protected disclosure: see [102]. However, the Tribunal goes on to deal with two further communications: one on 18 August involving an email that the Claimant had sent himself; and then a subsequent email sent to Mr Cortellesi on 16 September. The latter email stated as follows:

E

F

G

> **"104…Earlier this week we were working an order for a client to sell Kazak bonds. Thomas goes and hits the screen and bids my client lower which of course he hits. There's a name for that practice."**

H

A

47. It is not in dispute that the "practice" being described there is that of front-running. The Tribunal goes on to say that it is an odd email but that the main thrust of the complaint was about the Claimant not getting paid for the trade. The Tribunal then moves on consider the Claimant's probationary period.

B

48. I have some sympathy with the Claimant's position that the Tribunal does not appear to have reached a clear conclusion in respect of the 16 September email (which was in fact discussing a transaction that had occurred about a month previously). Ms Mayhew submits that the specific email was not one that was relied upon as a separate disclosure and that that explains the absence of any finding in relation to it. That does not seem to me to be an entirely satisfactory explanation for the Tribunal's apparent failure to reach a clear conclusion on it. I note that the email is, unsurprisingly, referred to in the Claimant's claim form in support of one of the four protected disclosures relied upon. It does appear, however, that the Kazakhstan bond trades referred to in that email were revisited at paragraph 120 in relation to Disclosure 21. The Tribunal notes that it was "*extraordinary that the Claimant would keep quiet about this allegedly blatant example of front-running for a whole month without telling compliance, without raising it to Charles Cortellesi with sufficient detail*". The Tribunal relies upon this delay as being indicative of the allegation not being one which the Claimant reasonably believed. It seems to me, therefore, that if one reads the conclusions in relation to Disclosure 20 with those in respect of Disclosure 21, then it can be inferred that the Tribunal rejected the Claimant's contention that the email of 16 September sent to Mr Cortellesi amounted to a disclosure of information within the meaning of s.43B.

C

D

E

F

G

H

49. The final contention under Ground 3 is that the Tribunal failed to analyse whether the extensive notes provided by the Claimant to Mr Neilly after meeting on 12 November 2015

A

amounted to a qualifying disclosure. This is a matter arising in relation to disclosure number 35. As to this the Tribunal held as follows:

> **"160. Disclosure number 35 is said to have been in person on 12 November in a meeting with Mr Neilly, just the two of them. Mr Neilly talked to the claimant seriously and critically about his relations with the team. He mentioned 3 points in descending order of importance – confrontational attitude, time keeping and attendance, and the taking of notes. The last was most important because that specifically undermined trust. He said he would have to address the other team members to see if trust could be rebuilt or not. He was having doubts. The claimant did not hand over the notes he had been making, although they were later given to the respondent. There were more than 30 pages, closely typed, reporting on specific trades and general trends. The tribunal cannot see anything said on that day which could possibly have been a protected disclosure. There is no evidence of it. The tribunal accept Mr Neilly's evidence that he never looked at the claimant's notes at any stage before he decided to dismiss the claimant on 1 December. (The claimant was asked to stay home from 16 November until that point)."**

B

C

D

50. Ms Mayhew submits that there was no need to make specific finding as to whether or not these notes amounted to a qualifying disclosure because: (a) they had not been considered; and (b) the finding on causation rendered it irrelevant.

E

51. There was no appeal against the finding that Mr Neilly did not consider the notes before making his decision. Furthermore, there is no suggestion in this case that Mr Neilly was or might have been aware of the content of the notes and had deliberately sought to avoid looking at them so as to give the impression that he had not been influenced by them. On the contrary, the Tribunal found that there was nothing said on that day which could possibly be a protected disclosure. It was, therefore, highly unlikely that Mr Neilly would have been put on notice that the notes contained something potentially of concern. In these circumstances, whilst it is not satisfactory that no clear conclusion was reached on whether or not the notes amounted to a protected disclosure, the Tribunal's clear conclusions as to Mr Neilly's knowledge of them (or lack thereof) and as to the reason for dismissal - see Ground 7 – mean that the outcome is unaffected.

F

G

H

A

Ground 4 – Failure to take account of insider knowledge

Submissions

52. The submission here is that the Tribunal failed to consider the Claimant's insider status in the trading industry when considering the reasonableness of what he believed the information disclosed tended to show. In particular, it is submitted that on more than one occasion, the Claimant clearly described practices which amounted to front-running and that this would have been understood as such by anyone in the industry even without the provision of specific details; the fact that the recipient of the disclosure, in this case Mr Cortellesi, did not agree that the information tended to show front-running is not sufficient to render unreasonable the Claimant's belief that it did.

B

C

D

53. Ms Mayhew submits that the insider status point cuts both ways in that the Claimant ought to have been properly assessing the information available to him in the light of his experience and expertise before making speculative and unfounded allegations. The Claimant's failure to do so meant that, as the Tribunal found, he did not have a reasonable belief that the information tended to show that which was being alleged.

E

F

Ground 4 – Discussion

54. It is not in dispute that 'insider status' (or to put it more accurately, the specialist knowledge and expertise which a person well-versed in the particular industry or activity would have) may be a relevant consideration when assessing the reasonableness of the belief held. As stated in the decision of the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4:

G

> **"62. … So in our judgment what is reasonable in s43B involves of course an objective standard — that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone**

H

A

> **wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure. To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing."**

B

C

55. Thus, the Claimant's 'insider status' means that respect is to be afforded to his view that there is or is likely to be a breach of some regulatory obligation, but that status also means that the Claimant can be expected to apply his knowledge and expertise in properly considering all the material available to him before making the disclosure. The views of others in the organisation are not irrelevant for the purposes of determining whether the Claimant's belief is reasonable. If the evidence suggests that others with equivalent or greater knowledge and expertise of the industry would not regard the information as tending to show a breach, then that would be relevant in determining whether the Claimant's belief was reasonable. Insider status does not mean that the whistle-blower's subjective view that the information tends to show a breach is sufficient; the test remains an objective one. However, one only gets to the stage of applying the objective test if the employee establishes that the belief was genuinely held. If the employee did not actually believe that the information tends to show a breach then the claim that there was a protected disclosure will not get off the ground.

D

E

F

G

56. In my judgment, the Tribunal in this case did apply the correct, objective test and did not disregard the Claimant's knowledge and expertise. The Claimant's experience and background was considered by the Tribunal (at [6] to [9]), as was his status as an FCA approved professional (at [40]). However, the Tribunal did find in respect of some disclosures that the Claimant's belief

H

A

that certain information tended to show a breach was not reasonably held. These were findings of fact with which the EAT would not readily interfere.

B

57. Mr Reade points to three specific matters in support of his contention that insider status was not properly taken into account:

C

58. The first is in relation to the Claimant's allegation under Disclosure 21, which was described by the Tribunal as follows:

D

> **"114. Later the claimant developed an allegation that strongly resembles front-running which therefore needs to be quoted: "It's about the behaviour I hear. So how does that impact me? How it impacts me is I have stuff like someone comes in a buyer of Ukrainian bond which is super liquid then we're bidding on a screen or to some off screen bookie and its moved against my client, and what happens is…." Cortellesi: "What you're saying is that they are taking the information that you gave them then they're moving their screen against your client". claimant: "Yeah. So what happens is Steve makes a ton of money in Ukraine …. oh yeah he's God now and I am like well fuck man, I fed you guys information I had some orders so it doesn't show up in my numbers because my guys didn't get executed because they are showing preference to other clients so whether they get paid for it or not ….they wanna look like the big guy.**

E

> **115. The tribunal accepted that the claimant did not retract that statement. The transcript is quite ambiguous. In closing submissions we listened to a voice recording of the Bloomberg chat. But Charles Cortellesi disagrees with his entire assumption here stating: "Okay if they're trying to push the market up then why don't you find buyers and help them push the market up?" Mr Cortellesi had previously said in response: "to think about it because you know this is the model I have been operating under for 10 years". So in other words Mr Cortellesi did not consider that the claimant, with this hypothetical illustration, was actually describing front-running. It did not necessarily involve a regulatory breach and unlawful use of insider knowledge of an impending large purchase of Ukrainian bonds. We stress again it was hypothetical. The claimant was not identifying any particular trade here."**

F

G

59. Mr Reade submits that by placing emphasis on Mr Cortellesi's view as to whether what was described was front-running the Tribunal had wrongly failed to afford respect for the Claimant's reasonable belief that it did. However, as stated above, it is not irrelevant to consider the views of Mr Cortellesi, who is also an 'insider', in determining whether the Claimant's belief

H

A

was reasonable. The Tribunal, in this passage, sought to put the information relied upon by the Claimant into context. Having done so, it accepted Mr Cortellesi's view that what the Claimant was describing (in his hypothetical illustration) was not front-running at all. In other words, the information could not reasonably have been believed by the Claimant as being such as to tend to show a breach. The Tribunal then goes on to consider other matters - such as the Claimant "*keeping quiet about this allegedly blatant example of front-running for a whole month without telling compliance, without raising it to Charles Cortellesi with sufficient detail*.": see [120] - in coming to the conclusion that this was not an allegation "*in which the Claimant reasonably believed (or believed at all) and the allegation being untrue*": see [121]. That was a finding of fact which the Tribunal was, in these circumstances, entitled to reach and cannot be said to be perverse or unsupported by evidence.

B

C

D

60. Mr Reade also submitted that it was perverse to conclude that the Claimant was merely providing a hypothetical illustration when it was clear that he was telling Mr Cortellesi what actually happens in his team. It does not seem to me that there is any error of law here. By referring to an "*illustration*" the Tribunal would appear to be accepting that this was a generalised example of the Claimant's concerns. Had that been the only basis for concluding that there was no reasonable belief that the information tended to show a breach, then the Claimant's contention that the Tribunal had erred in law might have had more merit. However, as is clear from the Tribunal's other findings, the foundations of that conclusion were far firmer.

E

F

G

61. The second matter is one that has been referred to already and appears under Disclosure 20. It concerns the email sent by the Claimant on 16 September 2015 about a trade which had occurred about a month previously, and which contains the allegation: "*Thomas goes to screen and bid my client lower which of course he hits. There's a name for that practice*." Although the

H

A

Claimant does not state in terms that this is an allegation of front-running, it is clear from what the Tribunal said in other parts of the judgment that it understood that that was indeed what was being alleged. Mr Reade submits that it was incumbent upon the Tribunal to decide if the Claimant's belief that there was front-running was reasonable but that it failed to do so. However, that would be to ignore the Tribunal's clear conclusion that the Claimant had sat on this "*allegedly blatant example front-running for over a month*" before doing anything about it and which had led the Tribunal to reach the further conclusion that the allegation was not one in which the Claimant held a reasonable belief: see [121]. That conclusion was, once again, one that was open to the Tribunal to reach.

B

C

D

62. Complaint is also made about [122] of the judgment in which the Tribunal states: "*If there was a serious belief that this was blatant front-running it would have been a prime example to put before Mr Moore with more urgency*". The submission is that by referring to a "serious belief", the Tribunal failed to consider the proper test of reasonable belief. I do not consider that the use of the term "serious belief" means that the Tribunal applied the wrong test. The Tribunal was doing no more than assessing whether the belief was genuinely held. That was a matter which the Tribunal was entitled to consider. The Tribunal's conclusion at the end of [121] was that the indication was that the allegation was *"not one in which the Claimant reasonably believed (or believed at all), and the allegation being untrue"*.

E

F

G

63. The final matter relied upon relates to the allegation that Mr Gooden was trading without approval. Mr Reade submits that it would have been apparent to anyone in the industry that the suggestion of Mr Gooden trading without FCA accreditation would be a breach of FCA rules and that the Tribunal ignored the insider knowledge of both the Claimant and those on the receiving end of information he was conveying. The difficulty with this submission is that the Tribunal's clear finding of fact was that this allegation about Mr Gooden was "*never the subject of a*

H

A

disclosure within the workplace. Therefore it cannot conceivably be relied upon as a protected disclosure in these Tribunal proceedings.": see [73]. The Tribunal was perfectly entitled to discount a disclosure that appeared to it to have been made for the first time to the Tribunal. Mr Reade's insider knowledge point does not therefore arise.

B

64. The fundamental difficulty for Mr Reade in respect of many of the points he makes is that the question of whether or not the Claimant's belief was reasonable is one of fact for the Tribunal and so it would be necessary, in order for the appeal to succeed, to show that the Tribunal's conclusions were perverse. In my judgment, there is nothing in the various points made by Mr Reade which gets near to crossing that high hurdle. This ground is therefore dismissed.

C

D

Ground 5 – Misapplication of the reasonable belief test

Submissions

E

65. The short point here, which was not developed to any extent in oral submissions, is that the Tribunal failed to consider the proper statutory test which is whether there was a "*disclosure of information which, in the reasonable belief of the worker making the disclosure… tends to show*" a relevant breach. Instead, submits Mr Reade, the Tribunal appeared to be considering whether the information *in fact* tended to show a breach rather than whether the employee had a reasonable belief that it did.

F

G

66. Ms Mayhew submits that there was no such misapplication, and that in each case the Tribunal properly considered whether the disclosure had a "*sufficient factual content and specificity such that it was capable of tending to show*" the breach: see **Kilraine** at [36].

H

Ground 5 – Discussion

A

67. In **Babula v Waltham Forest College** [2007] ICR 1026, the Court of Appeal considered the reasonable belief provisions of s.43B of the 1996 Act. Wall LJ held:

> **"41. *Darnton's case [2003] ICR 615* seems to me clear authority for the proposition that whilst an employee claiming the protection of section 43(1) of ERA 1996 must have a reasonable belief that the information he is disclosing tends to show one or more of the matters listed in section 43B(1)(a) to (f) , there is no requirement upon him to demonstrate that his belief is factually correct; or, to put the matter slightly differently, his belief may still be reasonable even though it turns out to be wrong. <u>Furthermore, whether or not the employee's belief was reasonably held is a matter for the Tribunal to determine.</u> (Emphasis added)."**

B

C

68. As the underlined words make clear, the relevant question is one for the Tribunal. Further consideration of what is required in order for a belief to be reasonable was set out by Sales LJ (as he then was) in **Kilraine**:

D

> **"36…If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."**

E

69. The Tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.

F

G

70. The question is whether the Tribunal applied that approach in the present case. Having regard to the various examples highlighted by Mr Reade in his skeleton argument, I am satisfied that the Tribunal did apply the statutory test properly:

H

a. Complaint is made of the Tribunal's finding at [66] that "*There is nothing here suggesting any regulatory breach*", the submission being that by focussing on whether

A

there was a regulatory breach, the Tribunal has failed to consider whether the Claimant had a reasonable belief that the information tended to show such breach. I reject that submission. In stating that there was "*nothing*" to suggest any breach, the Tribunal was answering in the negative the question of whether the disclosure had sufficient factual content and specificity so as to be capable of giving to rise to the requisite reasonable belief. That was the correct approach;

B

b. Complaint is then made of the various occasions on which the Tribunal referred to the Claimant's accusations as being "*speculative*" or "*based on assumptions*". However, to describe an accusation or belief in these terms is simply another way of stating that belief was not based on reasonable grounds or lacked sufficient factual content and detail. Once again, the Tribunal was in substance applying the correct test;

C

D

c. Finally, it is contended that the Tribunal erred in relying upon Mr Cortellesi's views to reject the Claimant's case. I have dealt with this contention already under the previous ground. There is no error of law in the Tribunal having regard to the views of others in the organisation in assessing whether the belief was reasonable.

E

Ground 6 – Misapplication of the Public Interest test

F

Submissions

71. It is not in dispute that the relevant test is whether the Claimant genuinely believed that the disclosure was in the public interest and whether that belief was objectively reasonable. Where the Tribunal erred, submits Mr Reade, was in treating motivation rooted in self-interest and money concerns as *necessarily* precluding any finding that the Claimant believed the disclosure to be in the public interest.

G

H

A

72. Ms Mayhew accepts that the test is not one of motivation, but submits that where an individual is motivated by self-interest that may be relevant to the question whether the individual had a genuine belief that the matter was in the public interest.

B

Ground 6 – Discussion

73. The starting point is to consider what the Court of Appeal said about the public interest element of s.43B in **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731:

C

> **"26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B(1) .**
>
> **27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula's* case [2007] ICR 1026 (see para 8 above). The Tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
>
> **28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the " *Wednesbury* approach" (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking—that is indeed often difficult to avoid—but only that that view is not as such determinative.**
>
> **29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the Tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a Tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself**

D

E

F

G

H

A

at the time: all that matters is that his (subjective) belief was (objectively) reasonable [6] .

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation—the phrase " *in* the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

B

31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment Tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the *Reynolds* defence (*Reynolds v Times Newspapers Ltd [2001] 2 AC 127*) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011 , the contexts there are completely different. The relevant context here is the legislative history explained at paras 10–13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the Tribunal at para 147 of its reasons."

C

D

E

74. In determining whether a disclosure was in the public interest, the Tribunal would have to take into account all the circumstances, but the Court of Appeal acknowledged (at [37]) that the following factors (set out at [34]) may be a "useful tool":

F

"(a) the numbers in the group whose interests the disclosure served…;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

G

(c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i e staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far."

H

A

75. The Tribunal does not refer to the **Chesterton** judgment and nor does it attempt to set out the principles which it sought to apply in considering the public interest requirement of s.43B. The question, however, is whether the Tribunal's approach to the public interest element was nevertheless correct in substance.

B

76. Mr Reade points to three specific examples in the Tribunal's judgment as demonstrating that the Tribunal erred in its approach:

C

a. The first is that at [60], the Tribunal found that "*If this disclosure really was about underpaid commission, it could hardly be a qualifying disclosure. It was not in the public interest, but was made for self-interest*". It is relevant to note that the Tribunal went on to find that the Claimant, "*appears to have lost interest in this listed "disclosure" as it was not mentioned in his witness statement*." This disclosure appears, therefore, to have foundered more for evidential reasons than because it failed to satisfy the public interest test. But in any case, a disclosure that is about underpaid commission with no other factors that might indicate a wider public element – such as an allegation that the underpayment of commission affected others or was a deliberate practice designed to conceal unlawful conduct – is unlikely to engage the public interest. There was no error of law in the Tribunal so stating.

D

E

F

b. The second is at [102] where the Tribunal held: "*Once again, too, it primarily involves the claimant's own commissions which are <u>never</u> going to pass the 'public interest' test*". (Emphasis added). The same considerations apply as in the previous example. There is nothing about this allegation (which the Tribunal found to be "*vague*" and unexplained: see [102]) which even begins to suggest any public interest element. By stating that this was *"never going to pass the 'public interest' test*", the Tribunal was not applying a general rule that a disclosure about commission could never engage the

G

H

A

public interest, but was merely stating that in the circumstances of this case – where no other factors are identified - it would not do so;

B

c. The final example is at [163]: "*The Tribunal also consider that the origin of the Claimant's distrust was a money concern over commission payments. That meant that many of these alleged disclosures could never be in the public interest*". Once again, it cannot be said that the Tribunal was applying a general rule to the effect that disclosures about commission can never be in the public interest; it was merely stating that in respect of "*many*" (not all) of the disclosures relied upon in this case they would not do so. This was another way of stating that these allegations, viewed objectively, could not have formed the basis of any reasonable belief at the time they were made that they were in the public interest. The Tribunal in fact accepted as probably correct, the Respondent's contention that the Claimant was "*trying to pass off his commission concerns as protected disclosures in order to leverage his position*": see [153]. That conclusion tends to undermine any suggestion that there was a genuine or reasonable belief that the disclosures were made in the public interest.

C

D

E

77. For these reasons, this ground of appeal is also dismissed.

F

78. My conclusions in respect of Grounds 2 to 6 are such that it has not been shown that the Tribunal erred in law in its approach to this claim, notwithstanding its regrettable failure to set out a clear statement of the relevant legal provisions and authorities. What emerges is that the Tribunal did apply the relevant legal principles to the facts and that there has been substantial compliance with Rule 62 of the ET rules.

G

H

Ground 7 – The Reason for dismissal

A

Submissions

79. The essence of this ground of appeal is that the Tribunal failed to make a clear finding of fact as to who made the decision to dismiss the Claimant. Mr Reade contends that it is no more than implicit from the judgment that Mr Neilly was the decision-maker, and that the Tribunal had failed to consider the Claimant's submission (based on the authorities of **Co-operative Group Limited v Baddeley** [2014] EWCA Civ 658 and **Royal Mail Group Ltd v Jhuti** [2016] ICR 1043, [2016] IRLR 854, EAT) that Mr Neilly had been influenced or manipulated by those with managerial responsibility for the Claimant because of the protected disclosures which had been made.

B

C

D

80. Ms Mayhew submits that the findings as to the decision-maker were clear as were the Tribunal's findings as to the reason for dismissal, which was found to have no connection with the alleged disclosures. As for the alleged manipulation of Mr Neilly, Ms Mayhew points to the finding that neither Mr Cortellesi nor Mr Blondin – who were the Claimant's line managers/colleagues – played any part in the decision to dismiss.

E

Ground 7 – Discussion

F

81. The relevant finding of fact, which is criticised as being unclear, is at paragraph 160 of the judgment:

G

> **"160. Disclosure number 35 is said to have been in person on 12 November in a meeting with Mr Neilly, just the two of them. Mr Neilly talked to the Claimant seriously and critically about his relations with the team. He mentioned 3 points in descending order of importance – confrontational attitude, time keeping and attendance, and the taking of notes. The last was most important because that specifically undermined trust. He said he would have to address the other team members to see if trust could be rebuilt or not. He was having doubts. The Claimant did not hand over the notes he had been making, although they were later given to the Respondent. There were more than 30 pages, closely typed, reporting on specific trades and general trends. The Tribunal cannot see anything said on that day which could possibly have been a protected disclosure. There is no evidence of it. The Tribunal accept Mr Neilly's evidence that he never looked at the Claimant's notes at any stage <u>before he decided to dismiss the Claimant on 1 December</u>. (The Claimant was**

H

A

asked to stay home from 16 November until that point)." (Emphasis added)

82. The underlined words seem to me to be quite clear. They state that *"he [i.e. Mr Neilly] decided to dismiss the Claimant on 1 December".* Mr Reade's criticism that the finding does not

B

state whether Mr Neilly was the only decision-maker is unfounded. It is clear from the context that Mr Neilly was the only decision-maker. Paragraph [160] begins by describing the meeting on 12 November as being in person between "*just the 2 of them*", and the paragraph concludes

C

by stating that "*he decided*" to dismiss the Claimant. Furthermore, it is apparent from the findings at [158] and [159] that Mr Neilly instigated a mediation meeting with the team on 9 November 2015 and that "*Mr Neilly considered that there was a lack of trust on the part of the Claimant*".

D

That the decision was Mr Neilly's alone is further confirmed by the following passage from [164]

> **"… The Claimant's poor attendance was bad in its own right. Mr Neilly was appalled when he saw the records. But he ultimately found it just one aspect of the Claimant being a poor team player. It was the lack of trust which proved most corrosive and was ultimately insuperable." (Emphasis added)**

E

83. For these reasons, and despite Mr Reade's submissions to the contrary, I see nothing remotely equivocal about the Tribunal's finding that Mr Neilly was the sole decision-maker.

F

84. As Mr Neilly was the sole decision-maker, the question of whether or not his mind was manipulated by others does not arise. The decision did not involve one of the situations described by Underhill LJ in the Court of Appeal's decision in **Jhuti** [2018] ICR 982 (which was also

G

promulgated after the Tribunal's judgment below):

> **"59…The correct analysis of a "manipulation" case seems to me require some care. It is best to take it in stages, by reference to the status of the manipulator.**
>
> **60. I take first the case where a colleague with no relevant managerial responsibility for the victim procures his or her dismissal by presenting false evidence by which the decision-taker is innocently (and reasonably) misled. In such a case the dismissal is plainly not unfair within the meaning of the 1996 Act, whether by way of the manipulator's motivation being attributed to the employer for the purpose of section**

H

A

98(1) (or sections 98B-104G), or by his knowledge being used to impugn the reasonableness of the decision to dismiss under section 98(4) . The employee has no doubt suffered an injustice at the hands of the Iago figure and may have other remedies (as the Claimant may in the present case – see below); but *the employer* has not acted unfairly.

B

61. I take next the position where the manipulator is the victim's line manager but does not himself have responsibility for the dismissal. If the matter were free from authority I could see the force of the argument for attributing the manipulator's motivation to the employer, because it has delegated authority to him or her to manage the employee in question. However, that is precisely the argument that appealed to Sedley LJ in *Orr* and which the majority rejected, for cogent reasons: see paras. 49-50 above. It is accordingly not open to us to accept it.

C

62. Neither of those situations is covered by what I said in *Baddeley* , which referred specifically to the situation where the manipulator is "a manager with some responsibility for the investigation", albeit *ex hypothesi* not the actual decision-taker. That phrase was chosen, I think, to refer generally to the possible role of Mr Berne, and it was imprecise because no findings had been made about what that role was. But it does in fact have a possible application in cases where someone other than the ultimate decision-taker has a formal role in the decision-making process. For example, in the more elaborate forms of disciplinary procedure manager A is sometimes given responsibility for investigating allegations of misconduct which are then presented to manager B as the factual basis (albeit, typically, challengeable at a hearing) for a disciplinary decision. This is a refinement of a kind which did not fall for consideration in *Orr* ; and there would in my view be in such a case a strong case for attributing to the employer both the motivation and the knowledge of A even if they are not shared by B. I do not see anything in that view inconsistent with the *ratio* in *Orr* : in such a case the conduct of the investigation is part of the deputed "functions under section 98 ". But although in the present case Mr Widmer supplied documents to the HR department which it in turn passed to Ms Vickers, and responded to her query about the TMI complaint, that does not make him an investigator.

D

E

F

63. There was, finally, some discussion before us of the case where someone at or near the top of the management hierarchy – say, to take the most extreme case, the CEO – procures a worker's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-taker. Such a case falls outside Moore-Bick LJ's formulation quoted at para. 47 (4) above, because the CEO, despite his or her seniority, would not have formal responsibility for making the dismissal decision [5] . But the facts in *Orr* did not raise this issue, and it rather sticks in the throat that even in a case of this particular kind the manipulator's motivation should not be attributed to the employer for the purpose of section of 98(1) . There may well be an argument for distinguishing the case of a manager in such a senior position from those considered in the preceding paragraphs; but the issue does not arise on the facts before us and I prefer not to express a definitive view."

G

H

85. In my judgment, none of the situations where it might be appropriate to attribute the motivation and knowledge of a manipulator to the employer applies in this case. The alleged manipulators are said to be Mr Cortellesi and/or Mr Blondin. Based on the Tribunal's findings,

A

neither of them played any part in the disciplinary decision, and nor did they play any role in any formal investigation of the allegations against the Claimant in this case. This is not a situation, for example, where either Mr Cortellesi or Mr Blondin prepared or assisted in the preparation of a formal report which formed the basis for Mr Neilly's decision. (It is perhaps also relevant to note that far from pressing for the Claimant's termination, Mr Cortellesi was for a long time "*pushing back*" against any such suggestion because of the difficulties in recruiting to that desk, and was ultimately reluctant to involve HR at all: see [150]. That undermines the suggestion that Mr Cortellesi was an arch manipulator who was determined to see the back of the Claimant and was prepared to influence Mr Neilly to achieve that outcome).

B

C

D

86. In any case, it is clear from the Court of Appeal's analysis in **Jhuti** of its earlier decision in **Orr v Milton Jeynes Council** [2011] 4 All ER 1256 that where a manipulator is a Claimant's line manager or colleague and where that person does not (as in the present case) have responsibility for the dismissal, the motivation of that line manager or colleague cannot be attributed to the employer. Instead, the focus must be on the factors operating on the mind of the relevant decision-maker, which, in this case was unequivocally Mr Neilly: see **Jhuti** at [57] and [61].

E

F

87. Mr Neilly's decision appears to have been based on genuine concerns as to the Claimant's relationship with his team. Ms Mayhew took me through numerous passages in the Tribunal's judgment identifying the Respondent's mounting irritation with the Claimant's behaviour. At [151], the Tribunal, having considered a discussion between Mr Cortellesi and Mr Blondin states as follows:

G

H

> **"151. We were urged to read this transcript in some detail by the respondent's counsel. It conveys a reliable authentic view of the intensity of, and the focus of, the team's unhappiness with the claimant, as at 9 October at a time before decisive steps were made. Even then Mr Cortellesi was, as he put it, "pushing back".**

A

88. There were clear findings that each of the Claimant's colleagues had become fed up with his constant complaining, poor attitude and timekeeping. As to the records of the latter, when Mr Neilly considered them, he was "*horrified*" ([150]) and "*appalled*" ([164]). The Tribunal's ultimate conclusion, namely that it was "*utterly fanciful to state that the "principal reason" for his dismissal … was that he had made protected disclosures*.": see [164], appears to me to be one that was fully supported by the evidence and one that it was entitled to reach.

B

C

89. Even if, contrary to the Tribunal's conclusions, there had been any protected disclosures, it is clear that the reason for dismissal was properly separable from such disclosures. The issue of timekeeping, for example, which was considered serious in itself, could not conceivably have any overlap with his disclosures.

D

90. As there is no error of law in relation to the reason for dismissal, this ground of appeal also fails.

E

Conclusion

91. For all of these reasons, this appeal fails and is dismissed.

F

G

H