Appeal No. UKEAT/0044/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 29 October 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR N WILLIAMS APPELLANT

MICHELLE BROWN AM

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER HOWELLS (of Counsel) Instructed by: Kingsley Solicitors 20 Nicholas Street Chester CH1 2NX
For the Respondent	MR BENJAMIN JONES (of Counsel) Instructed by: Geldards LLP Dumfries House Dumfries Place Cardiff Glamorgan CF10 3ZF

SUMMARY

VICTIMISATION DISCRIMINATION – Protected Disclosure

The Claimant was employed by the Respondent, a Member of the Welsh Assembly. He was suspended and later dismissed by her on the given ground of conduct. He claimed that the suspension amounted to detrimental treatment on the grounds that he had made a protected disclosure, and that he was dismissed for the reason or principal reason that he had done so.

The claimed disclosure was contained in a letter. It referred to the fact the Respondent's brother had not been recommended for permanent appointment to a position in her office, following interview by a panel on which the Claimant had sat. It stated that her brother did not make the grade despite her having tried to manipulate the recruitment process. The Claimant's case, among other things, was that this was a disclosure containing information which he reasonably believed tended to show that she had committed a criminal offence, in particular under the **Fraud Act 2006**, section 4.

The Tribunal found that the claimed disclosure did not contain sufficient specific factual information to be reasonably capable of being regarded as tending to show that a criminal offence had been committed. It was therefore not a qualifying or protected disclosure and the claims were dismissed.

The Claimant's appeal against that decision failed. The Tribunal had correctly applied the guidance in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850**,** as further recently elucidated in **Simpson v Cantor Fitzgerald Europe** UKEAT/0016/18/DA. It had properly found that the disclosure did not meet the threshold test of containing sufficient specific information so as to tend to show that there had been a criminal offence. The Tribunal was

entitled to take a view that the assertion that the Respondent had tried to manipulate the process did not necessarily or obviously connote criminality, in particular by way of some dishonest conduct. In any event the threshold test was properly viewed as not passed, because the disclosure did not state what, specifically, the Respondent was said to have done, in fact, that amounted, in the Claimant's view, to an attempt to manipulate the process. Without some such additional factual content, the information that the Respondent held public office, that the candidate was her brother, that there were special rules about the recruitment of family members, and that the brother would gain financially by being, or remaining, employed, was not sufficient to tend to show that a criminal offence had been committed.

HIS HONOUR JUDGE AUERBACH

1. This is another appeal about the concept of a protected disclosure. The Claimant in the Employment Tribunal ("ET") was employed by the Respondent, who is a member of the Welsh Assembly, as a Senior Advisor. His employment began in May 2016.

2. In December 2016 allegations were raised about the Claimant's conduct and he was suspended. In May 2017 he was dismissed for the given reason of conduct. The Claimant presented a claim that he had been subjected to detriment on the grounds of having made a protected disclosure, the detriment being his suspension, and unfairly dismissed for the reason or principal reason that he had a made a protected disclosure.

3. The claim was defended and came to a Full Merits Hearing before Employment Judge Ward, Mr R Mead and Ms C Williams over three days in September 2018. The Claimant was presented by Mr Howells of counsel, the Respondent by Mr Jenkins, a solicitor.

4. The Claimant relied on one claimed protected disclosure, said to be contained in a single sentence within a letter that he wrote to the Respondent on 11 December 2016. In its Reserved Judgment and Reasons, the Tribunal found that this was not a protected disclosure and dismissed the claims. The Claimant appeals against that Decision. There was also a cross-appeal to which I can return later.

5. At the Hearing before me today the Claimant has been represented once again by Mr Howells. The Respondent has been represented by Mr Jones of counsel. Both prepared written skeletons and made oral submissions this morning and I was referred to various authorities.

6. Section 43A of the **Employment Rights Act 1996** ("the ERA") provides that a protected disclosure "is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of Sections 43C to 43H." A disclosure is made in accordance with Section 43C if, among other things, it is made to the employer.

7. In this case there was never any dispute that the Claimant was an employee, and therefore also a worker, of the Respondent, nor that his claimed disclosure was in a letter to her, and therefore that, if it was a qualifying disclosure, it was also protected. The dispute was about whether it was a qualifying disclosure and whether, if so, the suspension was in the requisite sense on the ground of it (contrary to Section 47B) and/or the dismissal was for the reason or principal reason that he made it (and therefore unfair pursuant to Section 103A).

8. Section 43B(1) provides as follows:

> **"43B Disclosures qualifying for protection.**
>
> **(1). In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—**
>
> > **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> >
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> >
> > **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> >
> > **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
> >
> > **(e) that the environment has been, is being or is likely to be damaged, or**
> >
> > **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**

The remaining provisions of Section 43B are not relevant in this case.

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9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does

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hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

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10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader

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unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn,

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setting out in turn out its reasoning and conclusions in relation to those which are in dispute.

11. I turn to the ET's Reasons in this case. After identifying that the claimed protected disclosure was contained in a letter of 11 December 2016, and the legal complaints brought by

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reference to it, the Tribunal turned to the law. It directed itself, correctly, that the Claimant bore the burden of showing on the balance of probabilities that the claimed disclosure amounted to a protected disclosure.

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12. It cited correctly the opening words of Section 43B(1) of the **ERA** and the text of sub-paragraph (a), which was the particular subparagraph relied upon in this case. It then said the

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following:

> **"4. It is only if the disclosure is protected that a Tribunal will then go on to consider causation in relation to detriment and dismissal.**

5. The question as what amounts to a protected disclosure under section 43B has been helpfully discussed in Cavendish Munro professional Risks management Ltd v Geduld [2010] ICR 325 and Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436."

13. The Tribunal found that the Claimant was employed by the Respondent as a Senior Advisor on 11 May 2016 following her election as an Assembly Member. The Tribunal then made further findings of fact before turning to its conclusion. It is most convenient to set out these remaining sections of these short Reasons in full.

"The relevant facts

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8. Staff employed in this situation are employed for an initial six month probation period before a competitive recruitment exercise is undertaken. Template job descriptions are provided by the Assembly and before recruitment is undertaken, every assembly member is able to change the templates to suit their personal requirements.

9. The assembly member then undertakes the selection process, except in cases involving family members. In these cases the Assembly selects and interviews, with only the appointment decision reserved to the assembly member themselves.

10. The respondent had been advised of the recruitment procedure required after the first six months and sought advice on the content of the job descriptions from the Assembly during November 2018. The claimant was aware of emails between the respondent and the Assembly discussing the post held by the respondents brother (Richard) during this time due to the access that he had to the respondents emails in undertaking his day to day duties.

11. The claimant's own post had to go through this recruitment procedure and he was interviewed for the position on 11 November 2016. He was successfully re appointed by the Respondent who at this point had not raised any concerns about the claimants performance or conduct.

12. The post held by the claimant's [*sic*] brother also had to go through this recruitment exercise. On the 2 December the claimant formed part of the interview panel and recommended to the respondent the appointment of another candidate, not the claimant's [*sic*] brother.

13. On 5 December the respondent asked for the claimants access to her emails to be withdrawn.

14. On 11 December the claimant wrote to the respondent detailing his concerns about the breakdown of their employment relationship. The letter contains the following statement, which the claimant relies upon as a protected disclosure;

> ***"Richard just did not make the grade despite you trying your best to manipulate the (recruitment) process beforehand so that he could be employed."***

Conclusions

15. The Tribunal evaluated the above sentence and addressed the legal issues in turn to decide whether it was a protected disclosure.

Does the disclosure contain information?

16. The Tribunal was cautious to not over rely on the principles established in *Cavendish* and the sometimes artificial distinction between an allegation and information. It was clear that the exercise for the Tribunal is to consider whether the sentence conveys facts.

17. The Tribunal considered the sentence and found that it contained three elements. Firstly that her brother did not make the grade, this is a statement of fact. Secondly the allegation of a

manipulation and thirdly the fact that the aim was to secure employment. The Tribunal concluded that overall the particular sentence relied upon disclosed information.

Was the disclosure made in the public interest?

18. The letter was a statement of the claimants personal position where the employment relationships had broken down. That said the sentence relied upon as the disclosure is a statement of fact about the employment of the Assembly member's brother. This in the tribunal's view was in the public interest given the position an assembly member holds.

Was the disclosure made with a reasonable belief of the claimant?

19. The tribunal considers that the claimant made the statement with reasonable belief because he had seen emails from the respondent to the assembly HR advisor Ms Franklin during November about changes to the job description which her brother would apply for.

Did the information tend to show that a criminal offence has, is or is likely to be committed?

20. The *Kilrane* case confirms that in order for a disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) of S43B.

21. The Tribunal finds that the sentence in the claimants letter does not meet this standard. The word manipulate is used, no reference is made to obtaining a pecuniary advantage or any sufficient specific information that tends to show that a criminal offence has, is or is likely to be committed in the whole of the sentence. As in *Kilrane* where one of the disclosures used the word inappropriate, the Tribunal finds that the word manipulate may cover a multitude of sins, it is too vague, the term denotes something underhand not a criminal act.

22. The disclosure is therefore devoid of factual content sufficient enough to be capable of tending to show one of the matters listed in subsection (1) of S43B. It is on this basis that the Tribunal must conclude that the claimants letter of 11 December 2016 did not constitute a protected disclosure."

14. The substantive grounds of appeal appear at paragraphs 12 and 13 of the Notice of Appeal as follows:

"12. The Tribunal considered separately the issue of the Appellant's reasonable belief [19] and whether the disclosure tended to show a failure to comply with the legal obligation [20-22]. That was the wrong approach.

13. As a result of applying the incorrect test the Tribunal:

13.1. Failed to consider whether the Appellant reasonably believed that the disclosure tended to show a failure to comply with a legal obligation to which the employer was subject.

13.2. Failed to consider the legal obligation that the Appellant believed had been breached (namely s 4(1) Fraud Act 2006), which was necessary precursor to the analysis of the question of the Appellant's reasonable belief.

13.3. Failed to consider the context against which the pleaded protected disclosure had been made. Instead the Tribunal conducted a vacuous analysis of whether the word "manipulate" tends to show that criminal offence had been committed.

15. I turn to the arguments on the appeal. I can summarise the principal arguments as follows. In Mr Howells' skeleton he developed paragraph 12 of the Notice of Appeal, arguing that the

A Tribunal had taken a wrong approach in paragraph 19 of its Reasons, by considering whether the Claimant reasonably believed the information to be true. That might be relevant if the remedy stage was reached and the question of whether he had acted in good faith then arose. See Sections 49(6A) and 123(6A) of the **ERA**. But it was not a relevant consideration at the liability stage.

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16. However, in oral submissions Mr Howells said that he did not maintain that any error or wrong turn in paragraph 19 showed, as such, that the Tribunal's reasoning in paragraphs 20 to 22 was defective, or led it into error in those later paragraphs. Rather, his case was that the Tribunal had in any event erred in paragraphs 20 to 22, for the reasons set out in paragraph 13 of the grounds of appeal, as a freestanding ground. He also accepted that, if the Tribunal had *not* erred in paragraphs 20 to 22, then its conclusion in those paragraphs was fatal to the Claimant's case that there was a protected disclosure. He therefore focussed his oral submissions on paragraph 13 of the grounds of appeal.

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17. Mr Howells argued that the Tribunal had, in paragraph 21 of its Decision, erred in focusing purely on the word "manipulate" in isolation. That was an unnecessarily restrictive approach. The Tribunal's misunderstanding of **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 had perhaps led it astray. In that case, the focus had properly been on a single word – "inappropriate" – because the worker in that case had merely asserted inappropriate conduct, without providing any factual information or context.

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18. However, the Claimant in the present case, he argued, had provided information, which did have the relevant minimum factual content, so as to be capable of tending to show that an offence had been committed by the Respondent. In that regard, he said, the Tribunal had failed to take into account its own finding, at paragraph 17 of its Reasons, that the letter of 11 December

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2016 did not just refer to the Respondent having tried to manipulate the process, but also conveyed further relevant information, being that her brother did not make the grade for the role in question, and that the reason for the alleged manipulation by her was in order to secure her brother's continued employment. Further relevant context was that the Respondent was an employer holding public office, and that the Assembly had specific recruitment procedures in cases involving family members. See paragraph 9 of the Reasons. The Tribunal's failure to analyse all of this information was, said Mr Howells, a startling omission.

19. The Tribunal's error was compounded, he submitted, by its focus on the absence, in the disclosure, of a reference to obtaining a pecuniary advantage. This suggested that the Tribunal considered that the disclosure needed to spell out the particular criminal offence relied upon, or all the elements of it. However, the authorities establish that the disclosure does not need to spell out the source of the wrong relied upon in strict legal language, nor to spell it out at all in a case where it will, from the context, be obvious that a breach of some legal obligation, or here, a criminal offence, would be involved. See: **Bolton School v Evans** EAT [2006] IRLR 500 at paragraphs 39 to 41, upheld by the Court of Appeal [2006] IRLR 500; and **Blackbay Ventures Limited v Gahir** [2014] ICR 747, in particular at paragraph 98.5 in the first sentence.

20. Further, said Mr Howells, the principal offence relied upon by the Claimant in his claim to the Tribunal was that of abuse of position under Section 4 **Fraud Act 2006**, and the obtaining by the perpetrator of a pecuniary advantage was not a necessary element of that offence. Had the Defendant dishonestly abused her position of financial responsibility in an attempt to secure employment for her brother, the offence would have been made out.

21. Mr Howells developed these arguments in his written skeleton argument in this way:

> **"31. In contrast to *Kilraine* the Claimant had provided information that went well beyond the minimum factual content. He did not merely assert that there had been manipulation, he described how R had manipulated recruitment procedures to her brother's advantage, but R's brother did not make the grade for that role and that her brother was employed in the role and received an income that he would not have benefited from but for R's manipulation.**
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> **32. Further, it was apparent the information disclosed tended to show a relevant failure. He did not need to spell it out. Context is important. R held the public office of high responsibility. Her role was governed by recruitment procedures that prevented her from recruiting family members to her office. C's complaint was that R had manipulated these processes so that her brother could benefit from employment and therefore an income that he would not otherwise have received."**

22. In oral submissions, Mr Howells said that all of the factual ingredients of the Section 4 offence were addressed by the disclosure and/or the context: the occupation of a position in which the Respondent had a duty to safeguard the financial interests of another person, by virtue of her holding public office; the intention to make a gain for someone else, by virtue of her purpose being to secure her brother's employment; and the dishonest abuse of her position, by virtue of the fact that there were specific protocols regarding recruitment of family members, together with the assertion that she had manipulated that process. For all these reasons, concluded Mr Howells, the Tribunal ought to have found that the Claimant had disclosed information that he reasonably believed tended to show that a criminal offence had been committed.

23. Mr Jones argued that, strictly, Mr Howells' concession that it was no longer maintained that an error in paragraph 19 led the Tribunal into error in paragraphs 20 – 22, or showed that it must have erred in those later paragraphs, meant that paragraph 13 of the grounds of appeal fell away. That was because paragraph 13 postulated that it was *as a result* of applying the incorrect test in paragraph 19 of its Reasons, as asserted in paragraph 12 of the grounds of appeal, that the Tribunal had fallen into error, as asserted in the remainder of paragraph 13 of the grounds. However, he sensibly, in any event, addressed the three particular strands of paragraph 13 of the grounds of appeal in their own right.

24. As to the first strand, he argued that the Tribunal had correctly cited **Kilraine v London Borough of Wandsworth** [2018] ICR 1850, as well as **Cavendish Munro Professional Risks Management Ltd v Geduld** UKEAT/0195/09. He relied in particular on the following passage in the judgment of Sales LJ as he then was, Kitchin LJ, as he then was, concurring, in **Kilraine**:

> **"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"). 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.**
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> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* at [8], this has both a subjective and an objective element. 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."**

25. He also referred to the succinct point which Choudhury P recently drew out of that passage in **Kilraine,** in **Simpson v Cantor Fitzgerald Europe** UKEAT/0016/18, 21 June 2019 at paragraph 43, where he said:

> **"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)."**

26. Further, even if a worker believes that the disclosure is of information which tends to show that a criminal offence has been committed, that belief must be reasonably held. However, it cannot be reasonably held, if the disclosure does not have sufficient factual content and specificity to be capable of reasonably supporting such a belief. Choudhury P in **Simpson** put it this way at paragraph 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."**

27. It follows, submitted Mr Jones, that if the Tribunal properly concludes that there is no content in the purported disclosure that would be sufficient reasonably to support the holding of the requisite belief, then the claim that it was a qualifying disclosure falls at the "information" hurdle, *and* at the hurdle of the requirement that the complainant have had a reasonable belief that it had the requisite tendency. Therefore, it does not matter whether the worker bringing the claim actually held that belief. See also **Goode v Marks & Spencer Plc** UKEAT/0442/09.

28. In this case, continued Mr Jones, the Tribunal found that the information contained in the sentence relied upon was not sufficient to be capable of tending to show that a criminal offence had been committed. That was a permissible finding, reached after having heard the evidence and following a proper self-direction as to the law. Strictly, he suggested, as it now seemed to be accepted that the Tribunal had correctly stated the law in paragraphs 20 to 22, the challenge would have to be one of perversity; but this finding was not perverse. The Tribunal was entitled to take a view that the assertion that the Respondent had tried to manipulate the process did not contain sufficient information. That was, first, because an allegation of manipulation was not in and of itself necessarily or obviously an allegation of criminal conduct. Further, and in any event, no sufficient *factual* information was given in the disclosure, as to what *factually* the Respondent was said to have done, that was said to amount to an attempt to manipulate.

29. Further, said Mr Jones, the second sub-strand in paragraph 13 of the grounds of appeal, to the effect that the Tribunal had not properly engaged with the elements of the **Fraud Act** offence, had no substance. That was because the Tribunal had properly found that the content of the information disclosed was too vague to connote *any* criminal wrongdoing, whether under that

provision or otherwise. Nor did Mr Jones agree with the suggestion that, if the Tribunal had specifically considered Section 4 of the **2006 Act,** then it ought to have concluded that the information provided was capable of tending to show that that offence had been committed.

30. As to the third strand, he submitted that the Tribunal had set out the relevant context adequately, and had not failed to set its findings in that context. The Judgment, said Mr Jones, should not be read in a pernickety or hypercritical way; see **London Borough of Brent v Fuller** [2011] ICR 806 at paragraph 30. Enough had been said to properly determine the single point about the content of the disclosure that was, as the Tribunal found, fatal to the claim that it amounted to a qualifying disclosure. This was a fairly short decision and the Tribunal did not need, in paragraphs 20 to 22, expressly to cross-refer to its earlier factual findings.

31. My conclusions are as follows. This Tribunal's Decision was not in all respects as well-constructed and clearly reasoned as it might have been. Paragraph 19 was not well-constructed. The question it posed was whether the Claimant had a reasonable belief and the answer it gave was that he did. However, the Tribunal does not say explicitly in that same paragraph what the thing was that he reasonably believed. The Tribunal *does* say that the reason why he had a reasonable belief was because he had seen the emails from the Respondent to the HR Advisor about changes to the job description. That appears to draw on paragraph 10. It might therefore be taken to be saying that the Claimant both believed that the Respondent had engaged in communications with the HR team about changes to the job description for her brother's post, and reasonably believed that, because he had seen the emails discussing that.

32. However, Mr Howells accepted, rightly, that paragraph 19 did not of itself show that the Tribunal had asked itself the wrong legal question in paragraphs 20 to 22. Nor did it otherwise support the conclusion that the Tribunal ought to have found that there *was* a protected disclosure.

33. Notwithstanding Mr Jones' argument that the challenge, in paragraph 13 of the grounds of appeal, to paragraphs 20 to 22 of the Tribunal's Reasons, was framed as consequential on paragraph 12 of the grounds, I have considered paragraph 13 as a freestanding ground of appeal, as the point was fully prepared and argued before me today. It is clear that the Tribunal did, in paragraphs 20 – 22, focus, discretely, on the content of the disclosure itself. It also asked itself a correct question, as such, as to whether the disclosure was of information that was objectively capable of having been viewed as tending to show the commission of a criminal offence. That it did so appears from the sub-heading of paragraphs 20 to 22; and from the language used in paragraph 20, referring to a tendency to show that a criminal offence has been committed; and from the language in paragraph 22, referring to showing one of the matters in Section 43B(1).

34. Further, the Tribunal correctly articulated – plainly drawing directly on the language in the guidance from **Kilraine** – the test of whether the claimed disclosure had sufficient factual content and specificity such as to be capable of tending to show one of the matters listed in Section 43B(1)(a) – (f), in this case under (a): a criminal offence. It then set out a reasoned finding that it did not meet that test. Further, that finding was one that it was entitled to reach on the basis of the facts, including the contextual facts, found. My reasons for so concluding are as follows.

35. As to the law, the passages in **Kilraine** and **Simpson** to which Mr Jones drew attention are indeed in point, as is the point he made by reference to the **Goode** case. The subjective question of whether the complainant believed that the information tended to show, in a case such

as this, that a criminal offence had been committed, and the objective question of whether it could be reasonably viewed as tending to show that, are distinct and different questions. However, if the Tribunal properly concludes that the factual content of the claimed disclosure *cannot reasonably be construed* as tending to show a criminal offence, then that conclusion will, by itself, be fatal to the proposition that there was a qualifying disclosure relying on Section 43B(1)(a). That will be so, regardless of what the complainant subjectively believed, and regardless of whether all the other elements are shown.

36. In this particular Decision, the initial citation of the **Cavendish Munro** and **Kilraine** cases in paragraph 5 contains no discussion of the particular points emerging from those authorities. However, albeit in a very compressed way, paragraph 16 suggests that the Tribunal had on board the danger of relying upon what it called the sometimes-artificial distinction between allegation and information. Had it said nothing else, I might nevertheless have been concerned that this part of the reasoning was rather too compressed; but, importantly, in paragraph 20 the Tribunal correctly homed in on the more precise test, directly extracted from **Kilraine**, of whether the claimed disclosure had sufficient factual content and specificity, such as was capable of tending to show one of the listed matters.

37. I also consider that, in paragraph 21 of the Reasons, the Tribunal properly focused on the assertion, within the sentence relied upon as containing the disclosure, that the Respondent had tried her best to manipulate the recruitment process. The fact that the Respondent was an Assembly Member, which is a public office, the fact that there were particular rules about the handling of the recruitment of family members, the fact that in this process it was her brother who was seeking to be, or remain, employed by her, and the fact that at independent interview he did not make the grade to be kept on, could not by themselves be reasonably viewed as tending

to point to the commission of an offence. It was not suggested, for example, that there was any rule banning Assembly Members from employing their close family members outright.

38. Further, the Tribunal found that the requirement for an independent interview process was, as such, adhered to in this case, and that Assembly Members were permitted, as such, to bespoke the job description. Therefore, while these factual matters may all have helped to provide some essential ingredients of the **Fraud Act** offence, in relation to the holding of a position of financial responsibility, and the potential for gain to be made by another, the remaining essential feature was some *factual conduct* by the Respondent that amounted to a dishonest abuse of her position in an effort to secure her brother the post.

39. The Tribunal therefore rightly focused on whether the assertion that the Respondent's brother had not been appointed, "despite you trying your best to manipulate the recruitment process beforehand" had sufficient content and specificity, in context, to be capable of amounting to information tending to show the commission of a criminal offence.

40. Mr Howells submitted that the Tribunal should have found that it did, because an assertion that someone in the Respondent's position had tried to manipulate the recruitment process is inherently, he said, an assertion she has dishonestly attempted to abuse it in a way that it would be obvious would amount to criminal conduct, particularly given the context of public office.

41. Mr Jones, however, submitted that the Tribunal's conclusion that "the word 'manipulate' may cover a multitude of sins, it is too vague, the term denotes something underhand not a criminal act" was one that it was entitled to reach. It was entitled to conclude that an assertion that there had been an attempted manipulation of the process was not necessarily an allegation of

criminal dishonesty. It was also entitled to conclude, in any event, that there was no sufficient factual basis advanced in the disclosure to support such an allegation, such that it failed to pass what I might call the **Kilraine** threshold test.

42. I agree with Mr Jones. This was a conclusion that the Tribunal was entitled on the facts found, and in context, to reach. "Manipulate" is plainly a pejorative term and the allegation was obviously that the Respondent had acted in a way that was in *some* sense wrong. The Tribunal clearly thought so: it considered that the word could cover a multitude of sins and denoted something underhand. However, it was entitled to take a view that it did not necessarily or obviously connote specifically that something *criminal* had occurred.

43. Nor do I think that the Tribunal's observation that no reference was made in the letter to pecuniary advantage shows that it erred in that regard. In the Particulars of Claim, at paragraph 32, reference was made to offences under Sections 2, 3 and 4 of the **2006 Act**; and the contention was advanced that the Respondent "by making the efforts that she did to employ him sought financial advantage for her brother." As Mr Howells correctly pointed out, the language of obtaining a pecuniary advantage was found in **Theft Act** offences which the **Fraud Act** replaced, but the intention to make a gain for oneself or another is still one element of one way in which the Section 4 **Fraud Act** offence can be committed, as well as featuring in the Section 2 and 3 offences.

44. Given the allegation in the Particulars of Claim, that the Respondent was wrongly seeking financial advantage for her brother, I do not think that the Tribunal's use of the old statutory language shows that it applied too high a test. It simply used an out of date shorthand to refer to the general nub of the pleaded case as to the nature of the offence involved. In any event, the

Tribunal also stated more broadly that there was not any specific information that tended to show a criminal offence had been, was or was likely to be, committed. It concluded that the reference to manipulation connotes something underhand but "not a criminal act."

45. In respect of the **Bolton** and **Blackbay** guidance, the Tribunal took the most generous (to the Claimant) approach that it could have, by considering whether the disclosure contained information that tended to show that a criminal act *of any sort* had been committed. The essential hallmark of criminal behaviour in this area is surely dishonesty. I do not think that the Tribunal was bound to conclude that the allegation of manipulation obviously connoted dishonest conduct, as opposed to some improper attempt to interfere, short of dishonesty. Had the Claimant's case been founded on Section 43B(1)(b) – failure to comply with any legal obligation to which a person is subject – he might have made more ground on this aspect. However, this was not how the case was put, whether before the ET or as part of the grounds of appeal.

46. In any event, even if, contrary to my view, the Tribunal should have considered that an allegation of trying to manipulate the selection process amounted, in this context, to an allegation of criminal behaviour, it was certainly still entitled to conclude that there was insufficient *factual* content such as tended to show that some criminal offence had been committed.

47. Crucially, what the sentence in the 11 December 2016 letter relied upon lacks, is any more particular or specific factual assertion about the actual factual conduct alleged, that is said to have amounted to an attempt at manipulation. It is noteworthy in this regard that, by contrast, in paragraph 30 of the Particulars of Claim, the Claimant did set out four specific things that he said that he believed she had done or tried to do; a) tried to fix the job description by downgrading the essential qualifications, so her brother would be suitable for the position; b) misrepresented his

qualifications in an email; c) tried to fix the interview panel by attempting to ensure that someone sympathetic to her wish to appoint her brother sat on the panel and; d) requested that an IT test not be completed, as she knew he would not be able to pass it.

48. However, the 11 December 2016 letter did not itself refer to *any* of those four particular or specific things, or any other specific factual conduct that he might have been thinking of when he referred to an attempt at manipulation. I also disagree with Mr Howells' submission that the Tribunal erred by neglecting its findings that the letter contained information that the Respondent's brother had failed to make the grade and had not kept or retained his employment and/or by neglecting the context of the Respondent holding public office. The Tribunal was plainly aware of these basic factual features, but they did not by themselves reasonably point to anything tending to show the commission of an offence.

49. Nor did Mr Howells' submission that the Tribunal had taken insufficient account of its finding in paragraph 9 advance his case. That paragraph simply contained a finding of fact that, where a family member is involved, a different interview and selection process applies. That process, involving an interview panel on which the Assembly Member does not sit, was, as such, followed in the case of the Respondent's brother. Neither in paragraph 9 nor anywhere else, did the Tribunal find that the Respondent had not followed the recruitment procedure.

50. For all these reasons, the Tribunal properly focused on whether the sentence relied upon as amounting to the protected disclosure contained sufficient information as might reasonably be said to tend to show that a criminal offence had been committed. I do not think that anything in that sentence read as a whole, nor in the wider context, reflected in its findings of fact as a whole, ought to have led the Tribunal to the conclusion that it did.

51. I was told that at the Hearing below, the Tribunal heard evidence and submissions, as to why the Claimant had pulled his punches in this letter, and not been more forthcoming in it about the factual allegations he had in mind. However, whatever the reason may have been, why he wrote this letter, and in particular this sentence, in the way that he did, it is a fact that the Claimant did not spell out there, any of the specific things which, in his Particulars of Claim, he claimed he believed the Respondent had done. Nor did he set out any other specific factual matter that he might have said led him to form the view that she had tried to manipulate the process.

52. The Tribunal's Reasons do not address all of the elements of the definition of a qualifying disclosure. I note, for example that although, at paragraph 18, the Tribunal made a finding that the Claimant's disclosure was in the public interest, from which one might infer that it would also have considered it reasonable for the Claimant to have held such a view, it did not actually make a finding as to whether he subjectively did hold that view.

53. However, as I have said, *all* of the necessary elements have to be present for a qualifying disclosure to be made out. In this case, whatever the shortcomings of other parts of its Reasons, the Tribunal properly found that the disclosure relied upon did not contain sufficient specific factual information to be objectively of capable of tending to show that a criminal offence had been committed. In my judgement, nothing in its wider findings of fact as to the context should have led it to that conclusion. Therefore, the Tribunal properly came to the conclusion that this was not a qualifying disclosure, and hence it was not a protected disclosure.

54. The cross-appeal asserted that the Tribunal had, in any event, erred by not going on to consider whether the claimed disclosure formed a ground for the detrimental treatment, by way of the Claimant being suspended, and/or was the reason or principal reason why he was

dismissed. However, without formally withdrawing it, Mr Jones did not spend any time today seeking to make good the cross-appeal.

55. That was a sensible and pragmatic decision. As the Claimant did not have qualifying service, the Tribunal's conclusion that he had not made a protected disclosure was fatal, not only to his detriment claim, but also to his unfair dismissal claim. The Tribunal might have chosen to go on to consider those further issues, out of an abundance of caution or in the alternative, but it was not obliged to do so. It was not an error to fail to do so.

56. I conclude that the Tribunal properly dismissed the Claimant's complaints; and both the appeal and the cross-appeal fail.