Appeal No. UKEATS/0021/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 30th April 2019

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MR PETER KIRBY — APPELLANT

GLASGOW CALEDONIAN UNIVERSITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

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APPEARANCES

For the Appellant	Mr Nigel Grundy (One of Her Majesty's Counsel
For the Respondent	Mr Brian Campbell Brodies LLP 110 Queen Street Glasgow G1 3BX

SUMMARY

In this case the Claimant alleged that a fellow employee had acted unlawfully. The Claimant asserted he had suffered detriment because he had disclosed this to his employer. It was accepted that some but not all of the disclosures he made qualified for protection under s. 43B of the Employment Rights Act 1996. The Claimant submitted that in deciding whether a disclosure qualified for protection under the Act the ET had misinterpreted s. 43B and had required him to establish more than a reasonable belief in the unlawful conduct of the fellow employee. He further argued that the ET had erred in holding that the protected disclosures had not caused the Claimant any detriment. In particular he submitted that the ET had erred in proceeding on the basis that the protected disclosures had to be the sole or substantial cause of the detriment; he further submitted that the Tribunal had erred in placing the burden of proof on the Claimant in this connection. In connection with his claim of constructive unfair dismissal the Claimant alleged that the Claimant's colleagues had through their hostile conduct to the Claimant repudiated the contract of employment and that in resigning he had accepted the repudiation. The Claimant submitted that in these circumstances he had been constructively dismissed. Held (1) that the ET had correctly interpreted and applied s. 43B of the 1996 Act and that there was no basis for the submission that the ET had applied the wrong test in determining whether the Claimant believed that a fellow employee had breached a legal obligation; (2) that the in determining whether the protected disclosures had caused detriment the ET had utilised the wrong test but in the circumstances of the case it was evident that even if the correct test had been applied, the result would have been the same; (3) that the ET had not placed the burden of proof on the Claimant; and (4) that even if it was accepted that the Claimant's colleagues had not treated the Claimant properly, it was equally clear that he had not treated them properly, and that it was impossible to say who initiated the deterioration in relationships or who was primarily to blame and that in this circumstance it was not possible to say that the Respondent had repudiated the contract or that the Claimant was entitled to resign

in response; and accordingly the ET had been correct to conclude that there was no constructive unfair dismissal.

Topic Numbers

Subjects – Unfair Dismissal – 3; Contract of Employment – 9; Whistleblowing, Protected Disclosures – 32A

THE HONOURABLE LORD SUMMERS

Introduction

1. The Appellant is Peter Kirby, formerly Professor of Social History at Glasgow Caledonian University. I shall refer to him as the Claimant. On 16 September 2015 he presented a claim to the Employment Tribunal (hereafter "the Tribunal") alleging that that he had suffered various detriments at the hands of Glasgow Caledonian University, the Respondent. He claimed that he suffered these detriments because he had made disclosures to the Respondent about the conduct of a colleague. He also claimed disability discrimination. After commencing proceedings, he resigned his employment and added a claim of constructive unfair dismissal. By judgement (hereafter "the Judgement") dated 15 March 2018 and entered on the Register on 21 March 2018, the Tribunal rejected his claims.

2. The Claimant appealed the Tribunal's decision on protected disclosure and unfair dismissal. He did not appeal the rejection of his claim of disability discrimination. A Preliminary Hearing was held on 30 April 2019 at which I excluded some of the grounds of appeal. The grounds that survived are narrated in an order of 8 May 2019 and are dealt with in my decision below.

Statutory Provisions

3. The following sections of the Employment Rights Act 1996 are referred to in the Judgement:

> **"43A. 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. (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:**

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

47B. (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

48. (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B

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

98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Terminology

4. S. 43B(1)(b) of the 1996 Act provides protection to a worker where the disclosure shows "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject." In the Judgement rather than repeat the complete wording of s.43B I shall refer to this ground as an unlawful act or unlawful behaviour. I refer to the Employment Rights Act 1996 as "the 1996 Act". The Glasgow School of Business and Society, the department of the Respondent in which the Claimant worked, is designated "the GSBS". The Centre for the Social History of Health and Healthcare is referred to as "the Centre", The Respondent had a policy document on financial matters called, "Financial Misconduct: A Guide to Prevention, Reporting and Investigating". It is referred to in the Judgement as "the Policy".

Background

5. The Tribunal's Judgement is dominated by factual findings. This was a consequence of the defence adopted by the Respondent. Whereas the Claimant invited the Tribunal to draw an inference that the detriments he claimed to have suffered were the result of his protected disclosures, the Respondent endeavoured to demonstrate that they were symptomatic of a broader and pre-existing breakdown in the relationship between the Claimant and his work

colleagues. The Respondent led a great deal of evidence about the background to the dispute designed to show that the toxic relationship between the Claimant and other staff members was nothing to do with his disclosures to the Respondent. Some of this factual evidence is important and is summarised in detail below. The Tribunal's reasoning requires to be assessed and understood in light of its Findings in Fact. Inevitably some of these Findings in Fact were not of significance for the determination of the legal issues argued before me. I have not found it necessary therefore to summarise all the evidence. Although an appeal to the EAT does not usually require a detailed discussion of the facts, this is a case where the legal issues cannot be addressed without a comprehensive understanding of their factual context.

6. A large number of grounds of appeal were stated by the Claimant. The Notice of Appeal is a lengthy document. In particular the Claimant sought to challenge the Tribunal's assessment of detriment. Over 40 were claimed at the Tribunal. Most of these were challenged in the Notice of Appeal. Some were excluded at the Preliminary Hearing. Subject to a submission about the scope of the Order of 8 May 2019 which I shall relate in due course, Mr. Grundy QC narrowed his submissions down on appeal so that a smaller number of detriments were the subject of express challenge. A similar difficulty appeared in connection with the Notice of Appeal relative to constructive dismissal. Not all of the grounds are mentioned in the Skeleton Argument. Not all were spoken to by Mr. Grundy QC. Out of an abundance of caution I have sought to address those grounds of appeal even though it is not clear to me whether they were maintained by the Claimant.

The Legal Issues

7. The purpose of s. 43 the 1996 Act is to provide workers with a remedy if they suffer detriment as a result of making a disclosure to their employer about a matter falling within a number of categories specified in the statute. The Claimant asserted that he had made what the statute describes as protected disclosures under s. 43B(1) of the 1996 Act. He alleged that one

of his colleagues, Dr Janet Greenlees, had applied to him for conference funding and had made false representations in the application. His position was that the false representations were a breach of Dr Greenlees' legal obligations and were covered by s. 43B(1)(b) of the 1996 Act. The Claimant asserted that he disclosed this unlawful act to the Respondent and was as a result subjected to detrimental treatment.

8. The Respondent accepted that three of the disclosures disclosed a belief on the part of the Claimant that Dr Greenlees had acted unlawfully. It submitted that the remainder did not disclose such a belief. The Tribunal accepted this submission. It held that the only disclosures that contained an allegation of unlawful acts were the disclosures made on 27-29 January 2015 to Ms Lyndsey Brown, an employee of the Respondent. These disclosures are described as Disclosures 9-11. On appeal the Claimant submitted that the Tribunal had misinterpreted s. 43B(1) and that if the words of the section had been given their natural meaning, the Tribunal would have taken a different view of Disclosures 2, 5, 6 and 7.

9. Whether there was a causal connection between the protected disclosures and the alleged detriments was a prominent issue in this appeal. The Claimant submitted that in seeking to determine whether there was a causal link between the disclosures and detriment the Tribunal had applied the wrong legal test. He submitted that the Tribunal had laboured under the misapprehension that the Claimant had to show that the protected disclosure was the sole or primary cause of the detriment. He submitted it was enough to show that the protected disclosure had contributed in some material way to the detriment. He also submitted that in this connection the Tribunal had placed the burden of proof on the Claimant when in fact the 1996 Act placed the burden on the employer. The Respondent submitted that even if the Tribunal had applied the wrong test and erred in placed the burden on the Claimant, the Claimant was still not entitled to succeed. It submitted that the detriments the Claimant experienced were due to his own behaviour and not the protected disclosures.

10. As I have indicated a great deal of evidence was led about the relationship the Claimant had with his colleagues. The Claimant sought to show that his colleagues had mistreated him. The Respondent sought to show that he had mistreated them. In order to make their respective points, evidence was led that the Claimant had bullied certain colleagues. That was met by evidence that his colleagues had undermined him. His colleagues were irritated that he called himself the "History Lead" even though his time in that role had ended. They resented his requests for information so he could compile Units of Assessment for the Research Excellence Framework. The nadir of the parties' relationship was reached when his colleagues at the Centre co-operated in an informal "vote of no confidence" conducted by means of a Doodle Poll. Its avowed purpose was to remove him as Director of the Centre. It was an unedifying episode. That said he too was behaving in way calculated to upset and disturb. He made Subject Access Requests against his colleagues designed to work out what they were saying about him.

11. The Tribunal accepted that the Respondent's submission that this rancour was the true cause of the treatment meted out to the Claimant. This conclusion had two consequences. It meant that he failed on causation. The Claimant was not in a position to demonstrate that the detriments were suffered because of his protected disclosures. It meant that he failed in his case of unfair constructive dismissal. The Claimant was unable to show that it was the Respondent's behaviour that had broken the obligation of trust and confidence. The Claimant challenged the reasoning of the Tribunal in connection with causation, burden of proof and the obligation of trust and confidence.

The First Ground of Appeal

12. In May/June 2014, Dr Janet Greenlees applied to the Claimant for funding for a conference entitled "Caring for the Poor in Twentieth Century Britain". (paragraph 130). She was a fellow employee of the Respondent and a member of the Centre. In the Judgement the event is described as both a "conference" and "workshop". The QNIS (Queen's Nursing

Institute, Scotland) had offered partial funding. Dr Greenlees considered that further funding was needed to cover the catering costs. She applied to the Claimant for a grant from the Wellcome Trust. The Claimant as Director of the Centre was *ex officio* the Principal Investigator for Wellcome Trust grants. He was responsible for processing and monitoring applications for funding from the Wellcome Trust (paragraph 15). The Claimant agreed to provide funding to a limit of £1 200.

13. After the conference Dr Greenlees sought payment of £ 1047.91 (paragraph 136). The form was sent to the Claimant on 1 December 2014. The Claimant was suspicious of the size of the claim. He knew that the conference had been smaller than expected and was surprised that the catering costs had come to £ 1 047.91. Dr Greenlees asked him make payment to an existing account, identified as R4331. R4331 was the account used for another project that he knew had come to an end. He suspected that Dr Greenlees was seeking to make up a shortfall on account R4331. The Claimant considered that account R4331 should have been closed after the event to which it related had come to an end.

14. The Claimant and Dr Greenlees met on 3 December 2014. The Claimant covertly recorded the meeting. He stated that he did so because "he needed to be sure they were working within the respondent's procedures". Dr Greenlees confirmed that account R4331 had been used for a separate event and that it too had received funds from the Wellcome Trust and the QNIS. Dr Greenlees explained why she had not opened a new account for the conference. The Claimant was not satisfied with her explanation and his suspicion that an irregularity had occurred increased (paragraph 139). After the meeting he emailed Dr Greenlees and asked for the "overall costs of the accommodation and travel for the conference". Dr Greenlees provided more information. She sent receipts and invoices (paragraph 142). Although it was within the Claimant's remit to check such matters, Dr Greenlees was not happy with the Claimant's queries and took the view that the Claimant was hounding her. The Claimant meanwhile had

come to the conclusion that QNIS did provide funding for teas and lunches. He thought that in this situation there should have been no need to apply to the Wellcome Trust. He contacted Dr Greenlees to say that he would withdraw funding unless it could be shown that the workshop costs were in excess of the £2 000 the QNIS had provided.

15. The Claimant met Mr Stuart Mitchell on 5 December 2014 to voice his concerns (paragraph 143). At the Tribunal it was submitted that this was a protected disclosure. It is designated Disclosure 2. Mr Mitchell was the Business Finance Partner for GSBS (paragraph 143). In their submissions the parties described him as a Finance Officer. The Claimant disclosed that he had "concluded Dr Greenlees was trying to overcharge his fund by £700/800". He indicated that he was only willing to provide £305 in respect of conference costs.

16. Dr Greenlees produced a spreadsheet of the conference expenses which indicated that they had been overstated (paragraph 146). It would appear however that she still considered that a payment from the Wellcome Trust was due. On 12 December 2014 the Claimant reiterated his willingness to provide the funds if Dr Greenlees could show that the costs had exceeded the £2000 provided by QNIS (paragraph 149).

17. On 17 December 2014 the Claimant referred the matter to the Dean of the GSBS Professor Lennon. The Claimant supplied email correspondence and tables that he considered showed that Dr Greenlees had attempted to overcharge account R4146. This was Disclosure 5.

18. The Respondent investigated. Ms Russell and Mr McConville concluded that the requests for information made by the Claimant had been reasonable (paragraph 161) and that Dr Greenlees had failed to provide adequate vouching for her application. They considered that the cost of the conference was £ 2 908, in part because Dr Greenlees had omitted to include transcription costs. They concluded that the spreadsheet Dr Greenlees had given to the Claimant was erroneous because it included costs from an earlier workshop. Mr McConville

and Ms Russell accepted that the Claimant should have been given a clear account of the costs (paragraph 166). They further concluded that the manner of the Claimant's interactions with Dr Greenlees had contributed to the problem. I take from this that they thought that the Claimant had contributed to the dispute by failing to make his requests in a reasonable and measured fashion. They were satisfied that the QNIS grant did not cover the catering costs of the conference and therefore that Dr Greenlees was entitled to apply to the Wellcome Trust for additional funding. They concluded that it was legitimate to use account R4146 for the conference. They concluded that Dr Greenlee's conduct was inept rather than dishonest. This was communicated to the Claimant at a meeting on 23 January 2015.

19. The Claimant did not consider that Ms Russell and Mr McConville had grasped the position. In his view it was clear that Dr Greenlees had altered the original spreadsheet so as to conceal the fact that she had claimed costs that were not connected to the conference. In his view she had misled them about the costs incurred in convening the conference. He then sought and obtained a copy of the Policy. As indicated above it was a guide designed to prevent financial misconduct and assist in the task of investigating and preventing financial misconduct (paragraph 168). The Policy specified a variety of types of misconduct and their legal designations. These ranged from fraud to breaches of accounting standards.

20. The Claimant then emailed Ms Brown, the Respondent's Financial Controller (paragraph 170) on 27-29 January 2015. These emails constituted Disclosures 9-11. Ms Brown. Mr McConville and Ms Russell met on 3 February 2015. They agreed that the QNIS grant did not cover the catering cost and that the balance could be paid from R4146. They considered that the cost of the catering was £305.46. They decided that the catering costs should be split. £115.46 would come from R4146 and that the GSBS, should pay the balance of £190. They agreed that the transcription costs should not be charged to the conference. Ms Brown did not consider that Dr Greenlees' application and the representations that accompanied it, constituted financial

misconduct (paragraph 175). She reported to Mr Gerry Milne, the Chief Financial Officer. He agreed that Dr Greenlees' actions did not involve financial misconduct (paragraph 183). Ms Brown did however consider that Dr Greenlees' application exhibited a lack of understanding of financial procedures. She thought this was symptomatic of a more general problem among the staff and considered that clearer guidance should be given to staff.

21. Thereafter the Claimant agreed to pay the balance of £115.46 but made this conditional on Dr Greenlees apologising to him. The resulting dispute led to the Claimant intimating that he intended to raise a grievance against the History Group and Dr Greenlees (paragraph 182).

The Interpretation of s. 43B (1) of the 1996 Act

22. As I have indicated the Tribunal accepted that Disclosures 9-11 were protected disclosures under the 1996 Act. On appeal the Claimant submitted that the Tribunal should have found that Disclosures 2, 5, 6 and 7 were also protected disclosures. He submitted that the Tribunal had misinterpreted s. 43B (1) of the 1996 Act and that had the Tribunal approached the question of interpretation correctly it would have been satisfied that Disclosures 2, 5, 6 and 7 were covered by the Act. S. 43B(1) provides –

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

23. The Claimant directed my attention to paragraph 378 of the Judgement. There the Tribunal was considering Disclosure 2. It decided that because at the time of the disclosure the Claimant "had not yet concluded" that Dr Greenlees had acted unlawfully there could be no protected disclosure. The Claimant submitted that these words showed that the Tribunal thought that s. 43B(1) required a disclosure to be in "conclusive terms" and that it had applied a "conclusive test". In the Claimant's Skeleton Argument (p 4) it was described as the

"conclusive belief" test. Mr Grundy QC submitted that s. 43B did not require a worker to have concluded that an unlawful act had taken place. He submitted that a disclosure qualified under s 43B(1) if the worker had a "reasonable belief" that an unlawful act had occurred. He submitted that this was a less exacting standard than that applied by the Tribunal. He submitted that the words "tends to show" in s. 43B(1) supported the proposition that a worker need not have reached a definite conclusion provided he or she had a reasonable belief that an unlawful act had occurred.

24. It was argued that in interpreting s 43B(1) in this way the Tribunal had been influenced by the decision of the E.A.T. in **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] ICR 325. There the E.A.T. decided that the "information" referred to in s. 43B (1) meant factual information and that allegations did not qualify under s 43B(1) as information. Mr Grundy QC submitted that the Tribunal had been influenced by **Cavendish** and had understood it to mean that a worker did not have protection if he or she disclosed beliefs or opinions that were short of certainties. It had interpreted facts as consisting of matters about which the worker was certain or nearly certain. He submitted that this was why the Tribunal used the word "concluded'. Conclusions were certainties or firm convictions. Mr. Grundy QC described this as the "conclusive terms" test.

25. Mr Grundy QC argued that in taking this course the Tribunal had "backed the wrong horse". He submitted that **Kilraine v Wandsworth LBC** ([2018] ICR 1850 and [2018] IRLR 846) did not require a disclosure to be factual in character. Although the Tribunal had been referred to **Kilraine** it had chosen to follow **Cavendish.** At the time of the hearing **Kilraine** was a decision of the E.A.T. and of equal authority to **Cavendish**. After the hearing **Kilraine** progressed to the Court of Appeal and the decision of the Court of Appeal came to be the authoritative pronouncement on the interpretation of s. 43B. It was submitted that **Kilraine** took a more relaxed view of the meaning of "information" and showed that provided the disclosure

represented the beliefs of the worker it did not matter if the disclosure was not a concluded belief.

Disclosure 2

26. I consider that before analysing these submissions, it would be helpful to examine the Tribunal's factual findings and its reasons for making them. Disclosure 2 is dealt with as follows :

> **"The Claimant arranged to meet Mr Stuart Mitchell, Business Finance Partner for GSBS, on 5 December. At the meeting the claimant told Mr Mitchell of the situation and showed him the various emails and receipts. The Claimant thought Dr Greenlees was overcharging his research account and that he did not want to end up subsidising another project. The Claimant confirmed he would be willing to pay £305 which was the cost of the inner."** (paragraph 143)
>
> **"The Claimant calculated the total cost of the workshop was £2,200 (in fact it was £2,115), and Dr Greenlees had already been given £2,000 by QNIS. Dr Greenlees was seeking £1047 from the claimant. The claimant, on this basis, concluded Dr Greenlees was trying to overcharge his fund by £700/800. This, if true, would be a breach of the respondent's expenses policy" (**paragraph 144**).**
>
> **"We concluded the Claimant did disclose information to Mr Mitchell, however he did not do so in the reasonable belief that a breach of a legal obligation had occurred. We reached that conclusion because the claimant did not at any time make such a suggestion, and he did not at that stage have all of the necessary information to reach that belief. The claimant also told Mr Mitchell that *"It may be more, rather than the sin of commission, it's a sin of omission, a muddle really"*. This explanation supports the fact the claimant had not yet concluded Dr Greenlees had breached a legal obligation" (**paragraph 378**).**

27. The Tribunal noted that the Claimant described Dr Greenlees' failure to submit an accurate application for funding as a "sin of omission" and "a muddle really". The expression a "sin of omission" certainly indicates that the Claimant believed Dr Greenlees had done something wrong. No doubt the Tribunal was correct in declining to interpret this expression in an exact theological sense as a breach of divine law. I consider the Tribunal understood the expression to mean that the Claimant thought that Dr Greenlees had made an error by omitting certain information from the form but in describing it as a "sin" rather than an unlawful act he could not be said to have disclosed a belief that Dr Greenlees had acted unlawfully. The Claimant further stated that the application was "a muddle really". I consider that the Tribunal was entitled to regard this description as falling well short of a disclosure of unlawful behaviour. I consider the Tribunal was correct to reject the possibility that the Claimant's

language was a circumlocution for unlawful conduct. The Claimant made no reference to the law. In this state of affairs, the Tribunal's interpretation of the words "reasonable belief" and "tends to show" in s 43B of the 1996 Act are beside the point. In the Tribunal's view the Claimant did not address the question of unlawful behaviour far less express a view (tentative or otherwise) on the lawfulness of the application.

28. The Shorter Oxford English Dictionary (3rd edition) supplies a number of definitions for "conclude". The definition apposite to this context defines the verb as follows, "Arrive at as a judgement or opinion by reasoning; infer, deduce". Mr Grundy QC's phraseology substituted the word "concluded" for "conclusive". The Shorter Oxford English Dictionary defines "conclusive" as "ending all argument; decisive, convincing". The verb "concluded" is therefore not an analogue of the adjective "conclusive". The Tribunal simply said the Claimant had "not yet concluded" that Dr Greenlees had acted unlawfully. In my opinion all that the Tribunal was saying was that the Claimant had not arrived at a judgement on Dr Greenlees conduct. In other words he had not yet by process of reasoning, inference or deduction made the judgement that Dr Greenlees was acting unlawfully.

29. This interpretation is consistent with the way the Tribunal used the word "concluded". In the same paragraph the Tribunal uses the words "concluded" and "conclusion" to describe its views of the evidence. A Tribunal's findings are based on the balance of probability. If the word "concluded" meant "conclusive" the Tribunal would have been applying something similar to the criminal standard of proof. In any event there are clear indications that the Tribunal was applying the test correctly. When referring to the fact that the Claimant did not yet know the total costs of the conference the Tribunal indicated that the Claimant "did not at that stage have all of the necessary information to reach that belief". The Tribunal here uses the word "belief". This indicates that the Tribunal was using "concluded" as a synonym for

"believe", the concept used by the statute. I do not consider that that the word "concluded" is freighted with the meaning ascribed to it by the Claimant.

30. There is nothing to indicate that the Tribunal misread s. 43B (1). Paragraph 378 quotes the statutory wording accurately Likewise in connection with Disclosure 5 the Tribunal stated that the Claimant:

> **"did not fully understand the position and therefore was not yet in a position to *reasonably believe* there had been a breach of a legal obligation" (**paragraph 388**) [**my italics**].**

31. The Tribunal concluded that the:

> **"information disclosed did not *tend to show* a breach of a legal obligation" (**paragraph 389**) [**my italics**].**

32. The words "had not yet concluded" point forward. In light of the Tribunal's findings at paragraph 255 it is clear that the Tribunal accepted the Claimant did come to believe Dr Greenlees had acted unlawfully. The Tribunal does not express a view on when that belief coalesced in the Claimant's mind. I accept that the Claimant may have been suspicious that Dr Greenlees had acted unlawfully when he made Disclosure 2. But suspicion is not enough. Even if the Claimant privately believed she had acted unlawfully but was reluctant to say so, his claim would fail. The Claimant was obliged by the terms of the statute to articulate his belief to the Respondent.

33. In any event the error of law could make no difference to the outcome. The Tribunal found that "he did not at that stage have all of the necessary information to reach that belief". The "necessary information" is a reference to the transcription and data storage costs of the conference. The Claimant only became aware of these cost elements at a later stage. The Tribunal found that without this information the Claimant could not have formed a "reasonable belief" that Dr Greenlees had acted unlawfully under s. 43B(1). The Tribunal's assessment of what information the Claimant required to have before he could reasonably believe that Dr Greenlees had acted unlawfully is a finding of fact. No challenge is mounted to this aspect of

the Tribunal's views about reasonableness. I accept that it may be possible to decide that something is unlawful before all the facts are known. The Claimant however does not appeal on the ground that the Tribunal erred in this respect. The issue of the reasonableness of the Claimant's belief was a matter for the Tribunal to assess.

34. The Claimant's submission that the Tribunal had adopted a "conclusive terms" test because of **Cavendish** is entirely speculative. There is no indication that the Tribunal used the word "concluded" because of how it understood **Cavendish**. Out of deference to Mr Grundy QC's detailed submissions I propose to say a few words about the argument.

35. The issue that absorbed **Cavendish** was not the meaning of a worker's reasonable belief but whether the content of the worker's disclosure had sufficient substance to merit protection. It emphasised that mere allegations were not protected and that there must be a minimum factual component in the disclosure to merit protection. Thus the EAT stated (paragraph 24) -

> …the ordinary meaning of giving "information" is conveying facts…. ([2010] ICR at p 332E-F)

The E.A.T. went on to explain that a distinction should be drawn between communicating factual information and making allegations e.g. of unlawful conduct. It held that bare allegations were not disclosures under s. 43B.

36. It would appear that **Cavendish** came to be regarded as authority for the proposition that there was a sharp dichotomy between facts and allegations. In both the EAT and the Court of Appeal the unreality of such a distinction was noted ([2016 IRLR 422, para 30; [2018] ICR 1860 para 30). **Kilraine** does not overrule **Cavendish** (p 1860, see para 32 and 33). **Kilraine** rather explains that the distinction drawn in **Cavendish** while sound should not be pressed too hard. Disclosures may vary enormously in content and character. Plainly there is a continuum between fanciful allegations and factual disclosures and plainly a disclosure may entail both

factual information and allegations. The Court of Appeal in **Kilraine** explain that judgement is required to discern whether or not the disclosure merits protection (p. 1861 para 36).

37. This issue did not arise in the present case. The Claimant's disclosures were not fanciful. They were carefully explained and cross referenced to emails and spreadsheets. The issue for the Tribunal was whether the Claimant's disclosures revealed a belief that Dr Greenlees had breached a legal obligation under s. 43B(1)(b) and whether on the information available to him any such belief could be reasonably held.

38. There is no hint that the Tribunal saw **Cavendish** and **Kilraine** as rival authorities. The Tribunal saw them as complimentary authorities:

> **"The E.A.T. in the case of *Kilraine v London Borough of Wandsworth* [2016] IRLR 422 cautioned Tribunals to take care in the application of the principle arising out of the *Cavendish* case. It was stated that Tribunals should not focus only on asking whether an alleged protected disclosure was information or an allegation when reality and experience suggested that, very often "information" and "allegation" were intertwined. The question to be asked was simply whether there was a disclosure of information."** (paragraph 366)

39. I consider the Tribunal was correct in treating the cases as consistent with each other. Nor do I think the analysis by the E.A.T. in **Kilraine** was invalidated by the subsequent decision of the Court of Appeal. The Court of Appeal upheld the decision of Underhill, J in the E.A.T.. It considered that **Cavendish** had been misunderstood. I do not consider that the Tribunal "backed the wrong horse", as Mr Grundy QC put it.

40. In my opinion the Tribunal was not focussed on the question of whether the Claimant had disclosed facts or made an allegation. The Tribunal was focussed on whether the Claimant had expressed a belief that Dr Greenlees had acted unlawfully and whether if he had done so he had reasonable basis for doing so. That being so I am unable to accept that the Tribunal had any reason to construct a "conclusive terms" test. I am equally unable to understand why such a test could have been inspired by **Cavendish**.

Disclosure 5

41. This disclosure is dealt with in the Judgement as follows:

> **"The claimant also sent an email to Professor Lennon on 17 December which included all of the email correspondence and the tables of financial information which, he stated, "*tended to show Dr Greenlees was attempting to overcharge the R4146 research account in excess of* £930."** (paragraph 152)

> **"The fifth disclosure was alleged to have been made by the claimant to Professor Lennon on 17 December 2014. The claimant sent Professor Lennon an email on 17 December 2014 (page 936a) stating he had a duty to ensure that expenditure claimed from grant R4146 fell within normal procedure, and that Dr Greenlees had already received £2000 from QNIS for the workshop which cost £2115. He confirmed he had asked Dr Greenlees to account for the £930 overcharge but that she had not yet done this. He confirmed he had told Dr Greenlees the Centre would pay any reasonable costs incurred by the workshop, in excess of the £2000 received from QNIS and up to a maximum of £1,200, however he needed to see the expenditure before signing the transfer form. He concluded by stating there was a need to avoid any hint of double counting, before going on to complain about a change in the tone of Dr Greenlees emails."** (paragraph 385)

> > **"We next considered whether the claimant provided information to Professor Lennon inasmuch as he sent the email chain of correspondence (13 pages) and tables of financial information to him.**

> **"However, Section 43B makes clear there must be a disclosure of information, and the *Cavendish* case confirmed there must be something more than an allegation or perception. The disclosure of information must, in the reasonable belief of the worker making it, tend to show a breach of a legal obligation. The claimant did not, in the email, state he believed the claimant had acted in breach of the University's financial procedures, or that there was wrongdoing on her part. The thrust of the claimant's email was a complaint about not having received full accounting from Dr Greenlees for the amount he had been asked to release and being unable to release funds in those circumstances. We acknowledged there was a suggestion of an overcharge, but that was balanced by the fact the claimant had agreed to release funds of up to £1,200."** (paragraph 387)

> **"The claimant did not at this stage have all of the relevant information (the alleged disclosures up to and including this stage were made before the transcription and data storage costs were put to the claimant as part of the sum claimed by Dr Greenlees. Accordingly, the only issue between the two related to Dr Greenlees asking for what she thought the claimant had agreed to pay - that is, catering costs - but which the claimant thought was more than he had agreed - that is, catering costs not covered by the £2,000 from QNIS - causing him to ask if there were any further expenses of which he was unaware). He did not fully understand the position and therefore was not yet in a position to reasonably believe there had been a breach of a legal obligation."** (paragraph 388)

42. The Claimant sought to argue that the Tribunal had applied a "conclusive test" in connection with Disclosure 5. There is no support for this in the Tribunal's reasoning. At paragraph 387 the Tribunal states the test correctly:

> **"The disclosure of information must, in the reasonable belief of the worker making it, tend to show a breach of a legal obligation."**

43. The Claimant submitted that the Tribunal's reasoning at paragraph 387 was defective. He submitted that the Tribunal should have followed **Kilraine** and not **Cavendish**. As I have indicated I consider this submission misunderstands **Kilraine** and **Cavendish**. **Kilraine** is consistent with **Cavendish**. It is true that the Tribunal refers to **Cavendish** at paragraph 387 and does not mention **Kilraine**. But nothing turns on that.

44. The Tribunal refers to the meaning of "information" in paragraph 387. The meaning of "information" was a central issue in both **Cavendish** and **Kilraine**. The Tribunal acknowledges that an allegation or perception is not information. But it does not go on to say that the Claimant's disclosure was an allegation or perception. By the same token it does not go on to say that his disclosure was "information" as that word is explained by **Cavendish** and **Kilraine**. The point is left hanging. If the Tribunal had held that the Claimant had not disclosed "information" this would have been a difficult conclusion to defend. The Claimant supplied emails and a spreadsheet in support of his disclosures. He explained why Dr Greenlees' application for funding was defective. The Respondent's investigation demonstrated that some of his complaints were correct. Dr Greenlees had omitted costs that should have been included and had included costs that should have been omitted. Likewise his complaint that the application had proceeded on a false premise viz. that the QNIS could not pay catering costs could not be said to be lacking in substance or objective content. The Respondent ultimately accepted that there were defects in Dr Greenlees' application and these were symptomatic of a broader failure by staff to follow appropriate standards when applying for grant funding. Mr McConville and Professor Hilton stated in evidence that they thought that Dr Greenlees should have been disciplined (paragraphs 254 and 285). This of course is simply an expression of opinion. It was for the Respondent to decide whether to instigate disciplinary measures and it decided not to do so. But their evidence does indicate that his complaint had substance. The remainder of paragraph 387 is devoted to the Tribunal's conclusion that the disclosure did not

merit protection because the Claimant failed to say that he considered Dr Greenlee's conduct to be unlawful. The Tribunal also refused to accept the disclosure was protected because it was not the product of a reasonable belief. The Tribunal did not think that the Claimant's belief could be characterised as reasonable until such time as the transcription and data storage costs were known. In other words the Tribunal thought that his belief could not be reasonable until it had a sufficient basis. No doubt another view might have been taken on that issue. The Tribunal might have decided he knew enough about the application to form a reasonable view that was reasonable. It might have thought that it was reasonable because his disclosure had a factual foundation or was based on objective considerations. But it did not. Thus while the disclosures could not be characterised as "allegations or perceptions" of the sort identified in **Cavendish** the Tribunal was entitled to hold that until he had a fuller picture of what the costs were the Claimant's belief was not reasonable. No Ground of Appeal seeks to challenge the Tribunal's judgement of reasonableness. Had there been an attempt to do so such a challenge would have faced formidable obstacles.

45. The Tribunal accepted that Disclosures 9-11 qualified as disclosures under s. 43B(1)(b) because they referred to the Policy and to financial misconduct. The transcription and data storage costs had now been identified. Hence the Claimant's belief that Dr Greenlees had acted unlawfully was not premature and in in the Tribunal's view had a reasonable basis.

46. The Tribunal's conclusions were expressed as follows:

> **"The thrust of the claimant's email was a complaint about not having received a full accounting from Dr Greenlees for the amount he had been asked to release… we acknowledged that there was a suggestion of an overcharge but that was balanced by the fact that the claimant had agreed to release funds…"**

> **"We concluded the disclosure made to Professor Lennon on 17 December 2014 was not a protected disclosure because the claimant did not disclose information to Professor Lennon, and the information disclosed did not tend to show a breach of a legal obligation."** (paragraph 389)

47. I accept that the Tribunal was entitled to conclude that "the information disclosed did not tend to show a breach of legal obligation". This ground of appeal must fail.

Disclosure 6

48. The Tribunal rejected the Claimant's submission that an email sent on 13 January 2015 was a disclosure within the meaning of s. 43B(1). The Claimant submits that the Tribunal applied a "conclusive test". It is clear however that this is not the case. The word "concluded" or "conclusive" or "conclusion" do not appear in the Tribunals' reasoning. The Tribunal's terminology may be seen as follows:-

> **"Furthermore, the information provided did not tend to show a breach of a legal obligation and did not suggest the claimant had reached that view yet"**(paragraph 393).

49. The words "tend to show" and "suggest" contradict the Claimant's submission that the Tribunal sought a disclosure in "conclusive terms".

50. The Claimant's submission is in any event beside the point. The Tribunal decided as follows –

> **"We did not consider the claimant's email to Ms Russell to be a protected disclosure because it did not provide information, but rather confirmed his increasing frustration at a situation whereby he was being asked to approve the transfer of a sum of money without being provided sufficient vouching. The email to Ms Russell does no more than reiterate the claimant's understanding of what the requested funds were to be used for and his surprise/concern that transcription costs had been introduced into the equation…"** (paragraph 393).
>
> **The Claimant clearly took a very dim view of the spreadsheet being altered, and new expenses being added. The claimant did not, as at 13 January, know whether those costs were sufficiently well connected to the workshop to validly fall within the scope of the agreement. The Claimant could not, therefore, disclose information to Ms Russell about a likely breach of a legal obligation** (paragraph 394).

51. The Tribunal held, in effect, that section 43B(1) was not engaged. The email was an explanation of the Claimant's position not a disclosure of information. As with Disclosures 2 and 6 the Tribunal held that it also failed to qualify as a disclosure because the Claimant lacked sufficient information to allow him to reasonably believe that there was a breach of legal obligation and in any event the email contained no indication that the Claimant believed that Dr Greenlees was in breach of a legal obligation.

52. The Claimant argues that the finding of fact at paragraph 163 does not support the conclusion at paragraph 393. The relevant part reads as follows:

> **"The claimant … set out his view that the spreadsheet forwarded by Ms Russell was an altered version of the original spreadsheet and the additional costs had not been incurred for the explanation given."** (paragraph 163).

53. The Tribunal's essential conclusions are undisturbed by these criticisms of the Judgement. There could be no protected disclosure unless the Claimant reasonably believed that a breach of legal obligation had occurred and disclosed this belief to the Respondent.

Disclosure 7

54. At paragraphs 398 and 399 Tribunal accepted that the disclosure made to Mr McConville and Ms Russell contained some of the ingredients a relevant disclosure. In this case the Tribunal accepted that the Claimant was not a statement of his position. The Tribunal accepted that the Claimant had assembled sufficient information to make his belief that Dr Greenlees had overcharged a reasonable one. The Tribunal held however that the Claimant did not make his disclosure in the belief that Dr Greenlees had breached a legal obligation under s. 43B(1). In this connection I refer back to my comments above on the interpretation of paragraph 400 the Judgement.

55. The only point taken by the Claimant in connection with Disclosure 7 is that the Tribunal applied the "conclusive" test. This submission however is erroneous. The Tribunal is not at this stage addressing the question of "reasonable belief" and whether it must be in "conclusive terms". The Tribunal held that the Claimant only disclosed his belief that Dr Greenlees had breached or potentially breached a legal obligation after he invoked the Policy. Until that point was reached s. 43B(1) was not engaged.

Disclosures 9-11.

56. These disclosures were made to the Respondent's Financial Controller, Ms Lyndsey Brown, on 27-29 January 2015. The Tribunal records that the Claimant's meeting with Ms

Brown came about because he was dissatisfied with the meeting he had with Mr McConville and Ms Russell on 23 January 2015. The Tribunal found that after the meeting the Claimant carried out some research and identified the Respondent's Policy "Financial Misconduct: a guide to prevention, reporting and investigating" The Policy stated:

> **"Financial misconduct should be taken to cover fraud, corruption, theft, dishonesty or deceit by an employee, whether at the expense of the University, other employees, students or any other body or organisation, as well as actions or inactions which fall below the standards of probity expected in public life."** (paragraph 168)

57. The Tribunal returned to the significance of the meeting on 23 January 2015 in its reasoning. It began by paraphrasing the issue posed by the wording of s. 43B(1)(b) of the Employment Rights Act 1996:

> **"We next considered whether, in the reasonable belief of the claimant, the information disclosed tended to show that a person had failed to comply with a legal obligation. We concluded the claimant did not reasonably believe, at the meeting on 23 January, that the information disclosed tended to show a person had failed to comply with a legal obligation. We reached that conclusion because the claimant's clear position was that it was only as a consequence of the discussions at that meeting, that he became convinced the matter needed to be dealt with under the University's Financial Misconduct policy. We inferred from this that at the time of the meeting the claimant did not hold, and had not held, that view."** (paragraph 400)

58. The first two sentences of paragraph 400 paraphrase 43B(1) of the 1996 Act. The remainder of the paragraph has to be read in light of the Tribunal's finding at paragraph 255. There the Tribunal makes it clear that the Claimant was convinced that the Claimant was guilty of financial misconduct before he met Ms. Brown. The Tribunal, no doubt wisely, does not offer an opinion on when or why the Claimant became convinced. The Tribunal did however address whether he disclosed his belief. The Tribunal concluded that it was only after the meeting with Ms Brown that he made a disclosure under s. 43B of the 1996 Act and complained that Dr Greenlees had breached the Policy. This change in the content of the disclosure was crucial to the Tribunal's conclusion. A disclosure could only come within the scope of s 43B(1)(b) if it expressed a belief that there had been a breach of a legal obligation. Thus while the Claimant may have believed that Dr Greenlees had been guilty of financial

misconduct, until such time as he communicated that belief to the Respondent there could be no protected disclosure. It would not appear that he specified what type of legal obligation had been broken. This does not matter. I accept that the Tribunal was correct to treat the reference to a Policy that dealt with financial misconduct as bringing the disclosures within the ambit of s. 43B(1)(b). It will not usually be necessary for a worker to articulate with precision the nature of the legal obligation or the precise manner of the breach, provided it is clear that the worker considers that unlawful activity has occurred. It will be a matter of judgement in each case whether the disclosure is sufficiently focussed to bring it within the scope of s. 43B(1)(b). The Tribunal found as follows:

> **"The ninth disclosure was alleged to have been made by the claimant to Ms Brown, Financial Controller, on 27 January 2015, when he reported, in terms of the University Financial Misconduct Policy, the problems he had had with Dr Greenlees. The tenth disclosure was alleged to have been made by the claimant to Ms Brown on 28 January 2015 when they met and the claimant provided her with information. The eleventh disclosure was alleged to have been made by the claimant to Ms Brown on 29 January 2015 when the claimant provided information and attachments to Ms Brown."** (paragraph 404)

> **"We have dealt with these alleged disclosures together because they are clearly linked and show a developing disclosure of information and documentation. We were satisfied that between 27 - 29 January 2015, and at the latest, by 29 January 2015, the claimant made a disclosure of information to Ms Brown which, in his reasonable belief, tended to show a person had breached a legal obligation (that is, the obligation to deal with financial matters in accordance with the University's policies and procedures). This was a protected disclosure."** (paragraph 405)

Conclusion.

59. Even if I was satisfied that the Tribunal had interpreted s43B(1)(b) to mean that the Claimant had to make a disclosure in "concluded terms" and if I was further satisfied that this was an error of law, such an error could not have changed the outcome. The Tribunal concluded that disclosures 2, 5, 6 and 7 did not disclose a belief that Dr Greenlees had breached a legal obligation. The Tribunal held that the terms of the disclosures could not be said to disclose such a belief, whatever the Claimant thought privately. This assessment of the meaning of the words used by the Claimant is a factual finding. It does not require the application of the law. In the absence of any challenge to the Tribunal's Findings in Fact in this connection the Claimant's submission that the Tribunal applied a "conclusive terms" test cannot succeed.

Concession

60. I should add that the Claimant also argued that the Respondent had conceded that the disclosures referred to above were protected disclosures. There is no reference to this argument in the Grounds of Appeal. Nor was there any reference to this issue at the Preliminary Hearing on 30 April 2019 where the grounds of appeal were considered. In this situation the Claimant is not entitled to argue the point. It is clear that there was no such concession. There is no reference to concessions in the Judgement and it formed no part of the Respondent's argument; see Core Bundle pp. 399-423. The only disclosures which the Respondent accepted were 'protected' in terms of section 43A of the Employment Rights Act 1996 were those referred to as items 18 to 20 in the Scott schedule p.283, disclosures 9-11. I refuse this ground of appeal.

The Second Ground of Appeal - Detriment

61. The Tribunal accepted that detriments 11, 30, 35 and 41 satisfied the requirements of the legislation. The Claimant's Grounds of Appeal contended that the Tribunal had erred in in rejecting detriments 1, 2, 3, 5, 12, 14, 16, 17, 18, 20, 21, 22, 23, 25, 26, 29, 37.

62. I considered these detriments at the Preliminary Hearing. I permitted Detriments 1, 3, 5, 14, 16, 17 and 18 to be argued. At the appeal however Mr. Grundy QC sought to challenge detriments outside the scope of the Order. He submitted that I had not intended to exclude the detriments from detriment 18 onwards and that despite the terms of the Order I had "waved them through". I permitted Mr. Grundy QC to make submissions on the hypothesis that he was correct. In the event his submissions were more ambitious than he had suggested. He also argued that I should also allow the appeal in connection with detriments 2 and 3. These were not among the detriments after detriment 18 that I had in some way "waved through".

63. I have reviewed the Order and the Note I wrote to accompany it. It permits Detriments 1, 3, 5, 14, 16, 17 and 18 to be argued. The Order does not permit detriments 20, 21, 22, 23, 25, 26, 29 and 37 to go forward to appeal. No detriment was "waved through" as Mr. Grundy QC

suggested. Nor does the Order allow detriment 2 and 3 to be argued. It may assist if I explain why at the Preliminary Hearing detriment 1 was allowed and detriments 2 and 3 refused. I allowed Detriment 1 to be argued because I considered that there was material that supported the proposition that the Tribunal's factual assessment was perverse. Detriment 1 was challenged on the specific basis that Dr Greenlees had conceded that what she said in the relevant email was untrue. I accepted that this provided a basis for the appeal. Detriments 2 and 3 were rejected because the Tribunal's assessment was based on broader considerations of a factual nature (see paragraphs 433 and 434). I did not consider that it was reasonably arguable that the Tribunal's assessment of detriments 2 and 3 was perverse or lacked a factual foundation. Although the Tribunal's reasoning in connection with detriment 2 was tied to some extent to detriment 1 it also rested on other bases. Detriment 3 likewise rested on the Tribunal's conclusion that as a matter of fact the Claimant had not suffered a detriment but held an unjustified sense of grievance. I permitted Detriments 3, 5, 14, 16, 17 and 18 to be argued because it was submitted that they had been conceded by the Respondent (see the Skeleton Argument, paragraph 23). I assumed that the Claimant was in a position to refer me to material that supported the proposition.

64. At the appeal Mr. Grundy QC advanced submissions on detriments 1, 2, 3, 5, 16, 25 and 35. The submissions on detriments 2 and 3 lay outside the scope of the Order. Mr. Grundy QC also addressed me on detriments 5 and 16. My Order permitted him to do so on the basis that these detriments were alleged to have been conceded. Given my Order and the Note that accompanied it he was not at liberty to advance an appeal on any other basis. Out of an abundance of caution I have reviewed the Tribunal's reasoning in connection with detriments 5 and 16 and remain of the view that the submissions advanced represent an attempt to relitigate the Tribunal's conclusion that detriments 5 and 16 were in reality unjustified grievances rather than detriments for the purposes of the s. 43B of the 1996 Act. Detriment 35 is not mentioned

in the Notice of Appeal and should not have been advanced. In submission Mr. Grundy QC emphasised that it was the Claimant's perception of matters that was critical (**Shamoon v Chief Constable of the RUC** [2003] 2 All ER 26; [2003] ICR 337; [2003] IRLR 285) and that very little was required to establish detriment (**MOD v Jeremiah** [1980] ICR 13). I accept that this is so. **Shamoon** however does not mean that because the Claimant considered the conduct to be detriment that it must therefore be a detriment. The Tribunal is entitled to decide that in truth the alleged detriment is no more than an unjustified sense of grievance. Except as noted below I remain satisfied that the Tribunal was entitled to find that the Claimant's grievances were unjustified and that it is not open to the Claimant to re-argue his case in connection with the detriments discussed above, with the exception of detriment 25.

Detriments.

65. Detriment 1 is dealt with at paragraph 1(1)(i) and (ii) in the Grounds of Appeal. The Tribunal heard evidence that Dr Greenlees had emailed Professor Mills and complained that the Claimant had refused her funding (see paragraphs 254 and 265). Dr Greenlees was asked about her emails in evidence and accepted the Claimant had not refused funding. What he had done was refuse funding until such time as his queries about the sums sought had been clarified to his satisfaction. Her evidence is recorded as follows –

66. Dr Greenlees acknowledged that reference, in her emails to Professor Mills, to the claimant refusing to pay what had been agreed was untrue. The Claimant was not "refusing" but seeking clarification and vouching for the sum claimed.

67. Despite Dr Greenlees' acceptance that what she said was "untrue" the Tribunal decided that what she said was true. It put matters as follows:

> **"We considered that Dr Greenlees' use of the term "refusing", used generally and in layman's terms, correctly described what she believed was happening: that is, that the claimant was not paying the money, but instead he was questioning the matter."** (paragraph 430)

68. This is a surprising conclusion given that Dr Greenlees accepted that what she said was untrue. No doubt there are cases where a witness who accepts that she has not told the truth may nevertheless be believed. But they will be rare. The Tribunal suggests that she spoke as a "layman". But Dr Greenlees did not say that she was speaking as a "layman". Dr Greenlees accepted what she said was untrue because it omitted important information and gave a misleading impression.

69. Although the Tribunal had the great advantage of hearing the witness and although its conclusions on matters such as the interpretation of emails are to be accorded considerable respect, this finding does not appear to me to be one that was open to the Tribunal. I agree with the Claimant that the Tribunal's conclusion is perverse.

Detriment 25

70. This detriment was excluded at the Preliminary Hearing. The disposal at the Preliminary Hearing proceeded on the basis that the Tribunal was entitled to conclude that the conduct of the Doodle Poll on 9 March 2015 was not a detriment. The Tribunal had reached this conclusion because it was satisfied that a senior member of staff had on behalf of the Respondent sought to stop the Doodle Poll, even though she was unsuccessful. At the appeal for the reasons I have explained I permitted Mr. Grundy QC to make submissions about detriments that were outside the scope of the Order of 8 May 2019 until such time as I had an opportunity to consider the Order and Note. In light of the submissions made on appeal I have come to the view that this ground should have been allowed at the Preliminary Hearing. I consider that that the Tribunal overlooked the possibility that even if a senior member of staff had attempted to stop the Doodle Poll, the Respondent remained responsible for the employees who did participate in the Doodle Poll. I discuss the Doodle Poll in greater detail hereunder when considering the issue of unfair dismissal. All I require to say at this stage is that a coordinated attempt by fellow employees to remove the Claimant from his role as Director of

the Centre without the knowledge or approval of the Respondent's management could in my opinion be said to be a detriment. This was not a possibility discussed by the Tribunal. I do not consider that I require to remit the issue back to the Tribunal. I consider that I am in as good a position as the Tribunal to assess this submission. No authorities were cited in support of the proposition that the actions of the Claimant's fellow employees could be laid at the feet of the Respondent. The Respondent accepted that the actions of the Respondent's employees who participated in the Doodle Poll were the responsibility of the Respondent. I am willing to accept that this concession was properly made.

The Third Ground of Appeal - Causation

71. The Claimant submitted that when assessing whether the detriments were "on the ground of a protected disclosure" the Tribunal misinterpreted s. 47B of the 1996 Act. The Claimant directed me to the following passage in the Judgement:

> **"We referred to the case of *Aspinall v MSI Mech Forge Ltd EAT 891/01* where the EAT held that the words "*on the ground that'* in Section 47B Employment Rights Act mean that an employee must be able to prove a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject him to the detriment. The EAT adopted the same approach as that applied by the *House of Lords in Chief Constable of West Yorkshire Police v Khan [2001]* ICR 1065 where it was held that (the proper approach in determining a victimisation complaint) was not to ask whether "*but for*" the protected act having taken place the treatment would have occurred, but rather to ask what, consciously or unconsciously, was the employer's reason or motive for the less favourable treatment. Where the Tribunal finds a motive for the less favourable treatment, and is satisfied that this is not consciously or unconsciously related to the protected act, the less favourable treatment cannot be said to be "*by reason*" of the protected act. Accordingly there is no victimisation." (**paragraph 483**)**
>
> **"The EAT in Aspinall borrowed the words used in the Khan case where it was stated that "*for there to be detriment under Section 47B, on the ground that the worker has made a protected disclosure, the protected disclosure has to be causative in the sense of being the real reason, the core reason, the causa causans, the motive for the treatment complained of.*" (**paragraph 484**).**

72. In **Aspinall** "the ground" was understood to refer to "the real reason, the core reason, the *causa causans*, the motive for the treatment complained of". The Claimant pointed out that the Court of Appeal in **NHS Manchester v Fecitt** [2012] IRLR 64; [2012] ICR 372 interpreted the words "the ground" rather differently. Elias, LJ held at paragraph 45:

> **"In my judgment … section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."**

73. Thus where a Claimant can show that he or she has suffered a detriment and the protected disclosure has had a material influence on the circumstances that brought the detriment about s. 47B will be satisfied. This is plainly a less demanding test than the sole or primary cause test in **Aspinall**. That being so I consider that the test articulated in **Aspinall** has been overruled**.** Although Elias, LJ's test uses the word "influence" rather than "cause" it is till legitimate in my judgement to talk of causation in connection with s. 47B. The position now is that the protected disclosure need not be the cause of the detriment. It will be sufficient if it is a cause, provided it has materially contributed to the infliction of detriment. Causation remains the overarching concept that links actions to their consequences Although it may be awkward to speak of a lesser or co-operating cause as "the ground" of the detriment, it is clear that the Court of Appeal considered a material influence to be the equivalent of "the ground" in s. 47B (1); (see Harvey on Industrial Relations and Employment Law Division L 3(2)(e), para. 272 for a discussion of causation more generally).

74. It is not entirely clear why the Tribunal did not adopt the test articulated in **Fecitt**. The parties referred to **Fecitt** in submissions. The Tribunal refers to the Court of Appeal's interpretation of s. 47B at paragraph 300 of the Judgement. Clearly **Fecitt** and not **Aspinall** was binding on the Tribunal. The Tribunal should have applied the "material influence" test. I consider that the Tribunal's failure to do so was an error of law.

75. It does not follow however that I should allow the appeal and remit the matter back to be reheard. I require to consider whether the failure to apply the test in **Fecitt** had any bearing on the outcome.

76. The Tribunal stated that it found three detriments established. This is incorrect. The Tribunal found that four detriments were established (paragraph 482). The Tribunal omitted to discuss detriment 35. With that in mind I now discuss the detriments.

Detriment 1.

77. I held above that it should have qualified as a detriment. I draw attention however to the fact that the emails covered by Detriments 1, 2 and 3 were sent on 4 and 5 December 2014. No protected disclosures were made until 27-29 January 2015. Even if the inaccuracy in Dr Greenlees' email was a detriment it was not a consequence of Disclosures 9-11.

78. Section 47B of the 1996 Act provides:

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

79. The words "done on the ground" mean that the detriment must have been a consequence of the protected disclosure. One must follow from the other in sequence of time.

Detriment 11

80. The eleventh detriment occurred on 17 February 2015. It involved the removal of a module taught by the Claimant from a degree course offered by the Respondent. The Tribunal accepted that the reason for its removal from the Social Sciences degree course was because:

> **"there was not scope to put forward both of the claimant's modules"** (paragraph 496).

81. The Tribunal therefore found that the reason for the removal of the module was based on educational and operational considerations. The Tribunal asked itself whether her decision was "motivated, consciously or subconsciously, by the fact of the Claimant's disclosure to Ms Brown on the 27-29 January 2015". These words indicate that the Tribunal misdirected itself. The Tribunal should not have been seeking to establish the motivation behind the removal of the module from the course but whether the removal was materially influenced by the disclosures to Ms Brown. It is clear however that had the test in **Fecitt** been applied the Tribunal would have reached the same conclusion. The Tribunal found that the reason for the removal of the Claimant's module had no connection with what he disclosed to Ms Brown on 27 January 2015. The Tribunal stated:

"We were entirely satisfied the decision had nothing whatsoever to do with the Claimant's disclosure to Ms Brown" (paragraph 496 line 20**).**

Detriment 30

82. The thirtieth detriment was on 9 April 2015. The Tribunal deal with it at paragraph 498. It involved Professors Hilton and Johnston emailing the members of the History Group to arrange a meeting about the future of history research without consulting the Claimant. The Tribunal accepted that contacting the members of the history group without including, or consulting, the Claimant was a detriment. The Tribunal also stated, "we were entirely satisfied the pragmatic approach was not influenced consciously or subconsciously by the fact that the Claimant made a disclosure to Ms Brown in January 2015" (paragraph 498 line 6). The phrase "influenced consciously or subconsciously" appears to combine elements of the test in **Aspinall** with the test in **Fecitt**. The Tribunal does not direct itself to **Fecitt** nor does it apply the "material influence" test. Nevertheless I consider that it is clear that even if the correct test had been used the result would have been the same. The Tribunal concluded that the decision to exclude the Claimant was because of the fact that the staff did not have a good relationship with the Claimant. That problem predated Disclosures 9-11 (paragraph 498 line 4). The effect of the finding is that the Tribunal did not think that Disclosures 9-11 had any influence on the decision to meet without the Claimant (paragraph 498 line 7). In these circumstances it is clear that even if the correct test had been applied it would have made no difference to the outcome.

Detriment 35

83. The Tribunal omitted to address the thirty fifth detriment. The detriment took the form of a snub. The Claimant had asked the History Subject Group not to discuss his continuing role as History Research Lead in his absence. The Group ignored his request and proceeded to do so. The Tribunal concluded that this failure to include the Claimant in their discussions was a detriment. Although the Tribunal did not deal with this detriment, I do not consider that the omission affected the decision.

84. 84.The Judgement contains a discussion of the detriments in their entirety. In paragraphs 501 and 502 the Tribunal explains that it did not accept that any of the disclosures resulted in a detriment. The Tribunal give a number of reasons for this conclusion. The Tribunal's first reason was that it accepted the explanations provided by the Respondent's witnesses of the detriments. The Tribunal did not consider that Disclosures 9-11 led to any retaliation by the staff. Although the use of the word "retaliation" indicates that the Tribunal had in mind the **Aspinall** test, the Tribunal's other findings indicate that even if the correct test had been applied it would have made no difference. The Tribunal found that the working relationship between the staff and the Claimant had broken down before any of the protected disclosures. The Tribunal found that that the staff were not particularly aware of the Claimant's dispute over expenses with Dr Greenlees. It is evident that in the Tribunal did not think that the protected disclosures had a material influence on the decision to exclude the Claimant from the meeting of the History Subject Group. It follows that to the extent that any detriments were suffered by the Claimant they were not the result of his disclosures of 27-29 January 2015.

Detriment 41

85. It consisted of an article posted on the Centre's website on 7 July 2015. The article referred to the Centre's staff but did not refer to the Claimant. The Tribunal considered that his omission from the article was a detriment. The Tribunal rejected the submission that this detriment was connected to disclosures 9-11 because "there was no evidence... regarding the author of the article or its purpose". The Tribunal stated that "we were entirely satisfied that there was no causal link between the article and the disclosure made in January". The Tribunal considered there was insufficient evidence to make a connection between the article and Disclosures 9-11. While the identity of the author may not matter much if the article was accepted and posted by the Centre, the absence of any evidence about the purpose of the article is a more serious omission. Having regard to the fact that the Tribunal considered itself entirely

satisfied that there was no causal link with the protected disclosures I am not persuaded that the failure to use the **Fecitt** test could have affected the Tribunal's conclusion.

Detriment 25

86. As I have indicated above, detriment 25 took on a new complexion at the appeal hearing. The Tribunal's judgement focussed exclusively on the response of the Respondent's management to the Doodle Poll. It concluded that Professor Hilton had done her best to stop the Poll and that the Poll was not therefore a detriment. The Tribunal did not however ask whether the participation of the Claimant's fellow employees could constitute a detriment. It would not appear that the Claimant submitted that their conduct could be a detriment at the Tribunal. It is no surprise therefore that the Tribunal did not deal with the question of whether the Claimant's fellow employees had caused detriment. I consider in light of the fuller submissions made at the appeal this detriment should have been treated as reasonably arguable. It is now apparent that the Tribunal did not look at the question of whether the participation of the Claimant's colleagues might constitute a detriment irrespective of whether Professor Hilton had taken steps to stop the Poll.

87. That said I do not consider the conduct of the Doodle Poll is causally connected to Disclosures 9-11. The author of the Poll and its participants make it clear that it was held a because of the Claimant's refusal to resign as Director of the Centre and because he had begun to make Subject Access Requests. The background detail is explained in more detail in the discussion of the implied term of trust and confidence. In my judgement it is clear that "the fact of the vote of no confidence" (Grounds of Appeal 2(10(ii)) had no connection to the protected disclosures. The Claimant's employees did not participate in the Doodle Poll because of the protected disclosures. The Tribunal did not find that there was any link between the disclosures at the meeting with Ms Brown and the conduct of the Poll. I consider that this is not a factual issue that requires remit to the Tribunal.

Conclusion

88. I am unable to say that the Tribunal's errors of law had any bearing on the outcome. Detriment 1 occurred before the protected disclosures. The Tribunal decided that Detriment 11 was a decision taken for educational and operational reasons. Detriments 30 and 35 were decisions that arose from the staff's antipathy to the Claimant not a decision by Professors Hilton and Johnston to exclude the Claimant because of the Claimant's allegation that Dr Greenlees had acted unlawfully. The Tribunal found that staff were only "superficially aware" of the dispute and "unconcerned by it" (paragraph 502). It is one thing to be aware of a dispute and another to be aware that it involved allegations of unlawful acts. The Tribunal found that the decision to exclude "was not influenced… by the fact of the Claimant having made a disclosure to Ms Brown in January 2015". It found that it was "influenced by the fact that the Claimant's relationship with the members of the history group had broken down and he no longer commanded their respect" (paragraph 498). There is no evidence in the Judgement that the organisers of the meetings excluded him because he had disclosed to Ms Brown a belief that Dr Greenlees had breached a legal obligation. Detriment 41 failed because the Tribunal was not satisfied that it had anything to do with the protected disclosures. Had Detriment 25 been presented to the Tribunal in the way it was presented to me would have been rejected for the same reason.

89. In these circumstances I hold that the error of law demonstrated by the Claimant did not have any bearing on the Tribunal's conclusions.

The Fourth Ground of Appeal - Burden of Proof

90. The Claimant referred to s. 48(1A) of the Employment Rights Act 1996. It provides:

> **"48(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.**
>
> **(2) On a complaint under subsection …. (1A) …. it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

91. The Claimant submitted that the Tribunal had failed to apply s. 48(1A)(2). I was referred to paragraph 483 where the Tribunal states "an employee must be able to prove a causal nexus". I accept that this is not an accurate statement of the law. The worker does not need to show that the detriment was the result of a protected disclosure. The Claimant referred me to two other passages which he said showed that the Tribunal had failed to apply s. 48(1A)(2). At paragraph 494 the Tribunal states:

> **"We asked ourselves what did the Claimant rely upon to demonstrate that the protected disclosure caused the detriments complained of".**

92. I do not consider that this supports the point the Claimant wishes to make. The fact that the Tribunal asked itself what proof the Claimant had adduced to demonstrate that there was a causal connection between the protected disclosures and the detriments does not give any indication of where it thought the burden of proof lay. The Claimant also relied on paragraph 501. There the Tribunal state:

> **"We should state that if we erred in our decision regarding whether disclosures were protected and whether alleged detriments were detriments, and if all the alleged disclosures were protected, and all of the detriments found to be so, our conclusion would still have been the same - that is, we would still have decided to dismiss the complaint because we would not have been satisfied there was a causal link between the disclosure and the alleged detriment. "**

93. The words "we would not have been satisfied" do not imply that the Tribunal thought that the Claimant had the burden of proof. They rather express the responsibility of the Tribunal to decide on the evidence whether it was satisfied that the protected disclosures were causally connected to the detriments.

94. I do accept however that the Tribunal assumed that the Claimant bore the burden of proof. But I am not persuaded that error could have altered the outcome. In **Hewage v Grampian Health Board** (2013 SC (UKSC) 54 at p. 65; [2012] ICR 1054; [2012] IRLR 870) Lord Hope stated :

> **"It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other." (**paragraph 32**)**

95. In this case there was an abundance of evidence about the relationship between the protected disclosures and the detriments. Once that evidence was out, the Tribunal had to decide what to do with it. At no point in the Judgement does the Tribunal indicate that it felt unable to decide a matter because of a lack of evidence. There is no indication that the Tribunal decided an issue against the Claimant because he had failed to discharge the burden of proof. Thus for example in dealing with Disclosure 41 the Tribunal noted that it had no evidence about who authored the offending article or what it its purpose was. The Tribunal was not bound in that circumstance to find that the Respondent had failed to discharge the burden of proof and that the Claimant had suffered a detriment because of the Protected Disclosures. It had a wealth of other evidence that indicated that the cause of the Claimant's detriments were not the protected disclosures. It was entitled to infer that the same was the case in connection with Detriment 41. Although the Tribunal does not supply any reasoning it is obvious having regard to the Judgement as a whole that it felt able to decide the matter in the absence of any evidence of the identity of the article's author or its purpose.

96. It was submitted that the Tribunal had failed to consider matters from the Claimant's perspective. But this is not so. The Tribunal referred to the need to consider matters from the Claimant's perspective.

> We were referred to the case of ***Shamoon v Chief Constable or the Royal Ulster Constabulary*** (supra) where it was held that:
>
> > **" a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. The basic test to determine whether there has been a detriment must be applied *by considering the matter from the point of view of the complainant.* If the complainant's opinion that the treatment was to his detriment is reasonable, that ought to be sufficient. An unjustified sense of grievance is, however, not enough" (**paragraph 426 my italics**)**

97. The Tribunal considered that the explanation for the detriments lay in circumstances unconnected to the protected disclosures of 27-19 January 2015. It held :

> **"…there was an abundance of evidence regarding the very difficult relationship between the claimant and his colleagues prior to any disclosure being made. The relationship had**

> **broken down prior to any disclosure being made. We attached significant weight to this fact…"**

98. The Tribunal did not consider that Dr Greenlees' dispute with the Claimant caused the breakdown of relationship between the Claimant and the academic staff (paragraph 494). It stated :

> **"We considered the explanation for the treatment of the claimant lay in the fact the relationship had broken down and the claimant would not participate in mediation unless and until Dr Greenlees apologised. The longer that situation continued, the more difficult the group of staff became: they did not want to co-operate with the claimant; did not want him to lead research; did not want him to speak for the department; did not want him to continue as Director of the Centre and did not want him to continue as Principal Investigator for the R4146 grant."**

99. In that circumstance looking at matters from the Claimant's point of view could not affect matters. If the Tribunal was unable to conclude that the protected disclosures were connected in any way to the detriments, the Claimant's belief that they were could not be regarded as "reasonable". The Tribunal would be bound to consider this an unjustified sense of grievance. I do not consider that there is any indication that the Tribunal fell foul of the admonition in **on.**

Concession

100. The Claimant intimated in oral submission that he did not pursue the argument set out in paragraph 23 of his Skeleton Argument to the effect that the Respondent conceded that the Claimant suffered detriments following from protected disclosures.

Other Matters

101. As I have indicated I have encountered a degree of difficulty at times in reconciling the oral submissions made on behalf of the Claimant with the Notice of Appeal. It would appear to me that some of the points taken in the Notice of Appeal were not followed up in oral submission.

102. The Claimant refers in the Notice of Appeal at paragraph 2(1)(iii) to paragraph 430 in the Judgement and submits that it is contradicted by paragraph 254. I do not consider that this is so. Paragraph 254 is an account by Dr Greenlees of why she sought payment and of the

justifications she provided in support of her application. Professor Hilton and Mr McConville do not appear to have been impressed with her explanation and stated that they thought that in hindsight disciplinary measures should have been taken. In paragraph 493 the Tribunal took the view that the evidence of Professor Hilton and Mr McConville indicated that disciplinary action "could" have been taken. It would appear Dr Greenlees was resistant to advice about how funding applications should be presented.

103. It is self-evident that the lawfulness of the Respondent's decision not to discipline Dr Greenlees was not an issue for the Tribunal and is not one for me. The evidence may suggest that Dr Greenlees' application was perceived as defective by these two witnesses. But the task of assessing the evidence and deciding whether it supported the Claimant was for the Tribunal. I am unable to see how their opinion on Dr Greenlees' conduct could affect the Tribunal's assessment of whether the Claimant's disclosure satisfied s. 43B(1).

104. The same point may be made about the alleged contradiction between paragraphs 265 and 431 (Notice of Appeal 2(1)(iv)).

Ground of Appeal 4

The Obligation of Mutual Trust and Confidence

105. . The Notice of Appeal criticises the way in which the Tribunal went about the task of finding facts (Notice of Appeal 4.1 and 4.2). The broad criticisms at 4.1 and 4.2 are particularised at 4.2(i)-(vii). The Claimant submits that there are various matters that should have been found to be breaches of the obligation of trust and confidence.

106. **Ground 4.2(i).** Mr Grundy QC did not speak to this point. I assume this was because he did not insist upon it. Out of an abundance of caution however I propose to address it. This ground returns to the untruth discussed in Detriment 1(paragraph 265). The Claimant submits that the untruth was a breach of the obligation of trust and confidence. The Tribunal lists the

issues covered by this submission at paragraph 570. There is no indication in the Judgement that the Claimant submitted to the Tribunal that this matter could constitute a breach of the obligation of trust and confidence. Where a matter is not raised with a Tribunal it can scarcely be faulted for not addressing it. I do not consider that I can entertain this ground.

107. **Ground 4(ii)** Mr Grundy QC did not speak to this point either. I make the same observations as I did in connection with 4.2(i). In such a circumstance it is not possible to consider the submission. I would only observe that I doubt whether the submission is open to the Claimant in principle. It is sometimes said that one way of testing whether a contractual right exists is to ask whether right could be enforced by an action of specific implement. If the Claimant's submission is correct the implied term would give an employee the right to compel an employer to begin disciplinary proceedings against another employee. The corollary of such a right is as the Claimant asserts, the existence of a right to claim breach of contract. Such an argument could only be addressed in a case where the point was before the court. I am sceptical however of the proposition that the implied term creates a nexus over an employer's administrative decisions and in particular its decisions in relation to another employee under a separate contract of employment. The Respondent was au fait with Dr Greenlees' conduct and decided not to begin disciplinary action. I do not consider the implied term of trust and confidence intrudes into their decision making in that connection. The views of Mr McConville and Professor Hilton are wholly extraneous to the propriety of the Respondent's decision not to discipline.

108. **Ground 4.2 (v).** The Notice of Appeal has not been numbered accurately and jumps from 4.2(ii) to 4.2(v). Mr Grundy QC did not make any submissions about this issue. In connection with 4(v) the points adverted to above again apply. In any event, the factual conclusions of the Tribunal are not open to challenge except in narrowly defined circumstances. No complaint of perversity is made. Nothing was put before me to show that the Tribunal had no basis for its

conclusions. No issue of law arises and there is no indication of how the Tribunal's factual findings could disturb its conclusion that Ms Brown's conduct had nothing to do with the Respondent's obligation of trust and confidence.

109. **Ground 4(vi)** raises a more substantial issue. In this connection it may be helpful to set out the background in s little detail.

110. On 24 February 2015 two members of the Centre, Professor James Mills of Strathclyde University and Professor Mike Mannion of the Respondent, discussed what they perceived to be the breakdown of trust between the Claimant and his colleagues at the Centre (paragraph 116). Professor Mannion met the Claimant on 4 March 2015 to discuss the Claimant's position at the Centre. As I understand it he was asked to stand down as Director and refused. This was followed by an email from Professor Mills on Friday 6 March 2015. The email was in robust terms. He stated:

> **"it is clear to me that you are now director of health historians there in nothing but name. The reasons for your actions are none of my business but they point to a breakdown of trust between you and your colleagues" (**paragraph 120**).**

111. He stated:

> **"I am sure you agree that we are no longer able to claim that you are able to provide effective leadership to the health historians there and as such you have relinquished the Director's role and must now relinquish the title".**

112. He advised that if the Claimant did not step down as Director he would circulate a Doodle Poll to his colleagues at the Centre asking whether they had confidence in the Claimant or not. He indicated that this could be avoided. He stated:

> **"an email from you to colleagues by noon on Monday advising them that you have stepped down with immediate effect will do the trick… if there is no progress along these lines by noon on Monday then we will have to proceed with the vote of no confidence."**

113. The Claimant did not resign by the deadline of noon on Monday 9 March 2015. Professor Mills then emailed the Doodle Poll to the Claimant's colleagues at the Centre. The Claimant contacted Mr McConville and Professor Toni Hilton, the Dean of the GSBS, to complain about Professor Mill's actions. Professor Hilton tried to contact Professor Mills on Monday 9 March.

She had no success. She met him the following day to express her concern. Professor Mills accepted that the use of the Doodle Poll was inappropriate. But he declined to withdraw it. It was accepted before me that all the Claimant's colleagues at the Centre received the Doodle Poll. They all, with the exception of one colleague who declined to take part, voted against the Claimant.

114. Thereafter Professor Hilton met the Claimant. The Claimant said he would step down as Director of the Centre. Professor Hilton contacted the Dean of Strathclyde University to explain what Professor Mills had done and its effects. Professor Hilton again asked Professor Mills to take down the Doodle Poll. Unsurprisingly, its purpose having been achieved, Professor Mills agreed to do so.

115. The Claimant submits that "the happening of the vote of confidence itself amounted to a breach of the implied term of trust and confidence". This argument was not one that had been presented to the Tribunal. Mr Campbell, solicitor, for the Respondent accepted that participating in a strategy designed to procure the Claimant's resignation as director could be regarded as capable of rupturing the relationship of trust and confidence and accepted that the actions of the staff were the responsibility of the Respondent. Mr Campbell submitted however that I should not consider the actions of the Claimant's fellow employees in the circumstances of this case. He submitted that the Claimant had presented his case on a narrow basis. The only member of staff mentioned in the Scott Schedule was Dr Kehoe (see paragraph 36 of the Scott Schedule). She had participated in the Poll and voted against the Claimant. There was no indication in the Schedule that the Claimant relied on the actions of other employees of the Respondent. The difficulty for the Respondent however is that the evidence showed that all the Claimant's fellow employees in the Centre, with one exception, took part in the Poll (see the circulation list on Professor Mills' email of 9 March 2015; electronic bundle at p. 484 and p. 368 in the paper copy). In that situation it would appear that the evidence necessary to support

the Claimant's submission came out. I was advised by Mr Grundy QC that the Claimant had submitted that the participants in the Poll included a combination of employees of the Respondent and employees of Strathclyde University (see paragraph 283). It would appear there were 17 participants. Since it is accepted that these employees did participate in the Poll and since the point is focussed in the Notice of Appeal, I consider that the Claimant is entitled to submit that their actions were a breach of the obligation of trust and confidence. Nor does it appear that there is any need to remit the issue back to the Tribunal fir further findings in fact.

116. In contractual relations whether a party is entitled to rescind depends on whether there has been a repudiatory breach. A repudiatory breach has to be judged in the context in which it occurred. Here the Claimant and his colleagues were in a state of mutual antipathy. I do not consider that I should consider the Doodle Poll in isolation from the Claimant's conduct at the time. Whether their conduct was repudiatory and gave rise to the right to rescind has to be considered in light of the fact that he had fallen out very badly with his fellow employees and his colleagues at the Centre. An act that would be plainly repudiatory in one context may not be so regarded in another. I have come to the view that by participating in the vote of no confidence the Claimant's fellow employees did something that was so extreme that even taking into account the context that it could constitute a repudiatory breach. I consider that it was so serious that it could be said to be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (**Malik v BCCI** [1997 IRLR 462; [1997] 3 All ER 1; Harvey on Industrial Relations and Employment Law Div. AII 4D para. 178**)**. Mr Campbell on behalf of the Respondent did not ask me to sever the conduct of the Respondent's staff from the Respondent itself. He submitted that I should treat their participation in the Poll as the act of the Respondent. Thus their participation in the Poll was to be attributed to the Respondent.

117. While I acknowledge that the staff had become aware that the Claimant had initiated Subject Access Requests under the Data Protection Act 2018 and this distressed the staff, it should be recalled that this was a lawful request. As I understand it, he did not continue with this Request. I was referred by Mr Grundy QC to Professor Mill's discussion of the attitude of the members of the Centre in his email of 9 March 2015. The email states that the members of the Centre had sought to persuade him to step down. It also states that "colleagues were keen to push for a vote of no confidence that would make public their loss of faith in his leadership". While appreciating that the staff may have felt pushed to the limit of their endurance, any steps that were capable of affecting the Claimant's work duties and status in the Centre should have been fair and lawful. The staff and Professor Mills appear to have taken matters into their own hands. No steps were taken to consult those responsible for managing the Respondent. The Respondent's HR department was not involved. The Claimant was unwell after this episode. While I am not in a position to comment on why he was unwell, caution must be exercised in the handling of employees in stressful situations. No matter how high feelings may be running employees should be treated with dignity and with appropriate concern for their wellbeing. It would not appear to me that any account was taken of his welfare. The email from Professor Mills does not suggest a consciousness of the gravity of what they were about to do. If the membership of the Centre wished to remove the Claimant as Director this should have been done with the co-operation of those responsible for the Claimant's management. If a no confidence vote was necessary or desirable, advice should have been taken so as to ensure that the vote was conducted under the supervision of the university. It should have followed a fair procedure. The Doodle Poll was not fair and does not reflect creditably on those who organised or participated in it.

118. It is true that Professor Hilton on behalf of the Respondent attempted to stop the Poll. By the time she took action the Poll had been circulated and she was not able to persuade Professor

Mills to take down the Poll. I do not consider that her action elides the Respondent's responsibility for what happened.

119. I do not consider however that the Respondent's breach of the obligation of trust and confidence means that the claim of constructive unfair dismissal must succeed. The Doodle Poll took place in March 2015. The Claimant did not resign until shortly before the Hearing in 2017. The reasons he gave for his resignation do not make any reference to the Doodle Poll. His resignation letter claims that the Respondent had not conducted his Subject Access Requests properly. It claims that his resignation was brought about because the documents disclosed prior to the Hearing revealed that his fellow employees had made many damaging and hurtful remarks about him. In this circumstance it is not possible to hold that the repudiatory breach constituted by the Doodle Poll was accepted by the Claimant. It did not lead to the rescission of the contract. For a discussion of the need to accept a repudiation of contract in the law of contract generally see McBryde Contract Law in Scotland para. 6.51

Ground 4.2 (vii)

120. Mr Grundy QC did not make any submissions in support of this ground of appeal. It is not possible to complain that convening the disciplinary process breached the obligation of trust and confidence. If the Claimant has a complaint about the process e.g. an alleged failure to investigate, this sort of objection should have been raised at the time. Likewise if the Claimant was unwell and therefore unfit to participate effectively these were matters that should have been raised in the process itself. No Findings of Fact are available to me that engages the E.A.T.'s jurisdiction and no issue of law is focussed. If an attack is to be mounted on a failure to make suitable findings in fact notice of this must be given. This has not occurred.

Ground 5

121. The Claimant in the ground of appeal directs attention to the term of paragraph 589 where the Tribunal states that it looked at "the whole course of conduct in this case" and the

Respondent's "actions in endeavouring to resolve the difficulties". The Claimant submits that the Tribunal should not have taken account of the steps the Respondent took to "resolve the difficulties" nor should it have focussed on the Claimant's conduct. He submitted that it could only be relevant to the question of contributory fault. He submitted that it was very rare for an employer to submit that they were entitled to act in repudiatory breach because of the conduct of the worker.

122. The Tribunal sets out the issues that underpinned the Claimant's claim of breach of the implied term of trust and confidence:

> **"…the course of conduct, the cumulative effect of which was said to have breached the duty of trust and confidence, was (i) the failure to disclose documents which the claimant thought ought to have been disclosed as part of the SARs; (ii) the discovery of damaging and untrue statements made by various members of staff and (iii) the acts to which those statements referred. "(**paragraph 570**)**

123. The Tribunal rejected the argument that the Respondent had failed to disclose documents under the Subject Access Request.

124. In connection with the discovery of damaging and untrue statements and the acts referred to in those statements the Tribunal held:

> **"the claimant was very well aware of all of the issues raised or commented upon in the statements. We acknowledge the claimant may not have seen every email or document, but he was very well aware of the complaints and the matters causing tension, frustration and concern. The claimant's grievance and grievance appeal demonstrated the level and depth of his knowledge of these matters." (**paragraph 566**)**

125. These issues are set out at paragraph 571. I consider that in a case where the complaints the staff were making about the Claimant were already known, and where the Claimant did not despite that knowledge resign, the right to accept the repudiatory acts does not revive when documents providing confirmation of and further detail of those acts are disclosed. The Tribunal acknowledges that reading the emails that disclosed in detail what the staff thought of him must have been unpleasant. This is not the test. Provided he knew what they thought of him and was conscious of how they treated him at the time they occurred, I do not consider

confirmation of what he knew as a result of document discovery could revive his right to resile or create a fresh opportunity to accept the repudiatory act.

126. I do not consider that the Tribunal required to review the "whole course of conduct" (paragraph 589). The Tribunal's reprise of the evidence and what senior members of management did to resolve the dispute leave out of account those aspects of the staff's conduct that were antagonistic and vengeful. As I have indicated however with the exception of the Doodle Poll I do not consider that the staff's conduct represented a breach by the Respondent of the implied obligation of trust and confidence. I reject Mr Grundy QC's argument that it required to be considered apart from the Claimant's own conduct. Respondent. I do not accept that that misconduct on his part was relevant only to the question of contributory fault.

Ground 6

127. The Respondent accepted that it was responsible for the actions of its employees. This issue does not affect the outcome of the appeal.

Ground 7

128. Mr Grundy QC did not speak to this ground of appeal. In any event it does not specify what the Tribunal's misunderstanding was. I have no basis thinking that the Tribunal misunderstood the Claimant's position.

Ground 8

129. I accept that a detriment under s. 43B(1) of the 1996 Act may be a breach of the obligation of trust and confidence. In light of my conclusions above, I do not consider that the Tribunal's view of detriments has any adverse affect on the issue of the implied obligation of trust and confidence.

Dismissal for some other substantial reason

Ground 9

130. In this connection the Tribunal addresses the situation that would arise if contrary to its conclusion the Respondent had acted in breach of contract. The mater is complicated by the fact that I hold above that the Tribunal did not require to examine the whole course of the Respondent's conduct. I have held above that where an employee does not resign in response to known repudiatory breaches he or she cannot rely on those repudiatory acts at a later stage unless some feature emerges that materially alters his or her understanding of the repudiatory acts. For the purposes of this ground of appeal I must therefore assume that the documents disclosed did reveal details that were previously unknown to the Claimant and those details materially altered his state of knowledge, so that he became potentially entitled to resign and to assert that his resignation should be regarded as an unfair contrastive dismissal. The Claimant argues that the Tribunal approached the question the wrong way round. He argues that the Tribunal should have focussed on whether the Respondent's conduct gave rise to the right to resign. The Tribunal refers at paragraph 594 to **Berriman v Delabole Slate Limited** [1985] ICR 546; [1985] IRLR 305. There Lord Browne-Wilkinson put the matter as follows at pp. 550-551

> **"… in our judgment, even in a case of constructive dismissal [s98(1) of the 1996 Act] imposes on the employer the burden of showing the reason for the dismissal, notwithstanding that it was the employee, not the employer, who actually decided to terminate the contract of employment. In our judgment, the only way in which the statutory requirements of the [1996 Act] can be made to fit a case of constructive dismissal is to read [s98(1)] as requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."**

131. The Tribunal accurately summarises the law. Mr Grundy QC argued that the Tribunal had focussed on the Claimant's conduct rather than the Respondent's conduct. The Tribunal certainly did that.

> **We had regard to the fact the Claimant's behaviour lay at the heart of all of the issues which the Respondent had to address. It was the claimant's behaviour which was the cause of the dysfunctional relationship with the members of the history group and the cause of the difficulties in the Centre. We acknowledged the claimant's case was that all of these issues only arose after, and because, he raised the issue concerning Dr Greenlees. However, that position was not factually correct: the Claimant's relationship with his colleagues in the history group had broken down prior to any disclosure being made. (**paragraph 596**)**

132. The Tribunal refers to the "issues the Respondent had to address". This indicates that the Tribunal has confined itself to considering the Respondent's actions in seeking to address the breakdown in relationship between the staff and the Claimant. The Tribunal do not appear to have considered that repudiatory conduct could emerge from the conduct that evidenced the breakdown in relations. As I have indicated however even if that conduct is included in the scope of enquiry I do not consider it is possible to treat it independently. Looked at in isolation it might appear to be repudiatory conduct but looked at in context it may be regarded as understandable conduct. In that situation I do not consider it could repudiatory. The Tribunal makes it plain here that in its view the Claimant's behaviour was the cause of the difficulties with the Claimant's fellow employees. In my opinion therefore it makes no difference to the final outcome. I therefore accept that the Tribunal was correct to hold that the reason for dismissal should be regarded as "some other substantial reason" within s. 98(1) of the 1996 Act. That substantial reason was the conduct of the Claimant.

133. I am not confident after consulting my notes or reading the Skeleton Argument that Mr Grundy QC spoke to this Ground of Appeal. The Notice does not assist me to understand the point the Claimant wishes to make. It states the Tribunal erred by adopting a "flawed approach" (10.1), by asking itself the "wrong question" (10.2 and 10.3) and by engaging in "illogical" reasoning (10.4). But it does not explain the nature of the flaw, or what the right question should have been or why the Tribunal's approach was illogical. Nothing in paragraphs 10.1-10.4 requires a response.

Conclusion.

134. The parties acknowledged that my views on the other grounds of appeal had the capacity to affect my views on the constructive dismissal claim. Thus for example if I took the view that the Tribunal had erred in its handling of causation and the burden of proof, I might be of the opinion that some or all of the detriments should be regarded as having been established or that

I might take the view that the case should be remitted back to establish whether on In that situation the detriments might constitute a breach by the Respondent of the contract of employment. In light of my conclusion that the errors of law disclosed in the Tribunal's assessment of causation and the burden of proof were immaterial to the Tribunal's conclusion that the detriments were causally unconnected to the protected disclosures, this issue does not arise.

135. In these circumstances I refuse the appeal.