Appeal No. UKEAT/0092/20/BA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 March 2021

Before

THE HONOURABLE MR JUSTICE CAVANAGH

(SITTING ALONE)

MR P WATSON — APPELLANT

(1) HILARY MEREDITH SOLICITORS LIMITED

(2) MS H MEREDITH — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHAN ROBERTS (of Counsel) Instructed by: Slater and Gordon UK Limited Haywood House North Dumfries Place Cardiff CF10 3GA
For the Respondents	MR STEFAN-BROCHWICZ-LEWINSKI (of Counsel) Instructed by: Weightmans LLP No1 Spinningfields Hardman Square Manchester M3 3EB

SUMMARY

PRACTICE & PROCEDURE

WHISTLEBLOWING, PROCTECTED DISCLOSURES

The Employment Tribunal was entitled to dismiss the Appellant's "protected disclosure" claim on the basis that the Respondents' decision to subject him to detriment in the form of dismissal was not materially influenced by his protected disclosures, but was influenced entirely by his behaviour following the disclosures, and specifically his decision to resign rather than to stay on to help the Respondents resolve their difficulties. The Employment Tribunal was entitled to find that this behaviour was separate and distinct from the protected disclosures themselves.

The Employment Tribunal did not misdirect itself or reach a perverse conclusion in deciding the scope of the waiver of privilege by the Respondents. The Tribunal was entitled to find that the Respondents had waived privilege on in relation to the issues of the reason for the Appellant's dismissal, and the timing of the decision to dismiss the Appellant.

The leading authorities on waiver of privilege are considered in the judgment.

THE HONOURABLE MR JUSTICE CAVANAGH

Introduction

1. This is an appeal by the Appellant, who was the Claimant below, against the judgment of the Employment Tribunal (Employment Judge Slater, sitting with members), sent to the parties on 21 February 2019, in which the Tribunal dismissed the Appellant's complaints that he had been subjected to detriments on the ground of making protected disclosures and that he had been automatically unfairly dismissed by the First Respondent for making protected disclosures.

2. The Appellant is a solicitor. The First Respondent is a law firm, and the Second Respondent is its founder and Chair. The Appellant joined the Respondent as its Chief Executive Officer (and as a statutory director) on 1 June 2017. He had a contractual notice period of 12 months. The Appellant also invested £100,000 into the First Respondent by way of share purchase.

3. In September 2017, a new Finance Director, Tim Ritchie, joined the First Respondent. He had been recommended by the Appellant. Pretty well immediately, Mr Ritchie discovered that there were financial irregularities in the business. The Tribunal found (and it is not now challenged) that, with effect from 5 September 2017, the Appellant and Mr Ritchie made protected disclosures to the Second Respondent.

4. The disclosures related to two matters. The first was that costs advances made to the First Respondent had not been recorded as loans, but had wrongly been treated in the First Respondent's accounts as profit costs. This meant that the First Respondent's accounts were misleading by about £300,000. It also meant that the First Respondent was in breach of its

overdraft facility with its bank. The second matter was that there was approximately £1m worth of unpaid disbursements, which represented debts owed by the First Respondent that had not been recognised in the accounts. There was a related issue, which was that when the payments for disbursements had been received by the First Respondent, they had been placed in the First Respondent's office account, rather than placed in the relevant client account or being used immediately to pay the supplier. This was a breach of the Solicitors Regulatory Authority's ("SRA's") accounts rules. The Respondents had accepted, in advance of the Tribunal hearing, that the latter disclosures, relating to the disbursements, were protected disclosures.

5. I will summarise the facts later in this judgment, but in brief, shortly after these matters came to light, the Appellant gave notice of his resignation. At first he was placed on garden leave, and, for a while at least, the relationship between the Appellant and the Second Respondent remained friendly. The Second Respondent tried to persuade the Appellant to return to work and to help the business sort out the problems. He declined to do so. He was then told that he had to return to work with immediate effect, but he refused to do so. Negotiations took place, supported by solicitors, to try to reach an amicable settlement between the parties, but they were unsuccessful. The Appellant did return to work was summarily dismissed by letter dated 17 October 2020. Privilege was waived by the Respondents in relation to some, at least, of the privileged documents that had come into existence in the period leading up to the Appellant's dismissal.

6. The central issue in the proceedings before the Tribunal was whether the dismissal and associated detriments that the Appellant had been subjected to were materially influenced by the Appellant's protected disclosure or whether, as the Respondents had contended, the Appellant had been dismissed because the Second Defendant was dissatisfied with him as she felt that his

immediate resignation had made things worse, especially by unsettling others, and that he should have stayed on to help the business out of its difficulties.

7. The Tribunal concluded that the protected disclosures had not materially influenced the decision to dismiss. The Tribunal decided that the Appellant was dismissed because of the way that he behaved following the protected disclosures, and that these actions could be severed from the protected disclosures themselves (judgment, paragraph 189). For this reason, the Tribunal dismissed the Appellant's protected disclosure "detriment" claim, relating to his dismissal, under the Employment Rights Act 1996 ("ERA"), section 47(1)(b). The Tribunal also concluded, for the same reasons, that the protected disclosures were not the reason or principal reason for the dismissal. As a result, the Tribunal dismissed the Appellant's "automatic" unfair dismissal claim under the ERA, section 103A.

8. The appeal was rejected on the paper sift by Judge Keith. However, the appeal was permitted to proceed to a full hearing by Naomi Ellenbogen QC (as she then was) at a rule 3(10) hearing on 18 July 2020.

9. The Appellant relies on seven grounds of appeal. The first four grounds contend that the Tribunal erred in law in dismissing the Appellant's protected disclosure claims. These grounds are that:

(1) The Tribunal failed to make relevant factual findings and/or to address the Appellant's arguments in relation to whether the reasons for dismissal were materially influenced by the Claimant's protected disclosures;

(2) The Tribunal misapplied the "material influence" test by failing to take into account whether the reasons for dismissal were themselves materially influenced by the Appellant's protected disclosures;

(3) The Tribunal's decision was perverse and the only conclusion that was open to a reasonable Tribunal was that the reasons for dismissal were materially influenced by the Appellant's protected disclosures; and

(4) The Tribunal failed to make a relevant finding of fact, namely whether it was the Appellant or the Second Respondent who had proposed that the Appellant should go on garden leave.

10. In essence, the Appellant contended that the Tribunal failed properly to address the question whether his dismissal had been materially affected by the disclosures and/or reached a perverse conclusion on this issue. The Appellant submitted that the Tribunal did not properly deal with the issue as to whether it was a false dichotomy to differentiate between the Respondents' response to the disclosures themselves, and the way that the Appellant had acted in the aftermath of the disclosures. Further or alternatively, it was submitted that the Tribunal had, in particular, failed to deal with his contention that the Second Respondent had unconsciously been materially influenced by the disclosures.

11. The remaining three grounds of appeal relate to the Tribunal's refusal to order the Respondents to disclose additional privileged documents beyond the ones that the Respondents had disclosed voluntarily. These grounds are that the Tribunal erred in law in that:

(5) The Tribunal failed to apply the correct disclosure test in relation to privileged documents;

(6) The Tribunal failed to identify the correct issue that had been waived by the Respondents; and

(7) The Tribunal failed to order further disclosure in order to avoid unfairness or misunderstanding of what had been disclosed.

12. The Appellant has been represented before me by Mr Nathan Roberts of counsel, and the Respondents by Mr Stefan Brochwiz-Lewinski, both of whom appeared below. I am grateful to both counsel for their submissions, both oral and in writing.

13. I will first set out the key findings of fact and reasoning of the Tribunal. I will then deal in turn with the grounds of appeal.

The Tribunal's findings of fact and conclusions

14. The First Respondent is a solicitor's firm which specialises in personal injury work for people in the British Armed Forces and their families. The Appellant joined the business as CEO as part of a plan to grow the business. As I have said, he invested £100,000 into the business, in return for shares. He entered into a service agreement on 1 June 2017. He and the Second Respondent, who was the prime mover in the firm's business, had a very positive relationship.

15. As part of the plans for expansion of the business, the Appellant persuaded the Second Respondent that Mr Ritchie should be brought into the business as Finance Director. Mr Ritchie started on 4 September 2017 and, on the same day, brought concerns to the attention of the Appellant about the way in which certain costs advances had been dealt with as profit costs, rather than as loans to the business. This had the effect of bringing forward around £300,000 of profit costs into the 2016/2017 financial year, and increased the business's net debt by the same amount. Both the Appellant and Mr Ritchie were concerned that the business's statutory and management accounts were materially misleading. This could place them in a difficult position personally.

16. The following day, 5 September 2017, Mr Ritchie notified the Appellant of something else that had come to light. This was that payments received in respect of disbursements had not been used to pay the suppliers, or placed in the relevant client accounts. Instead, they had been transferred to the First Respondent's office account. He estimated the unpaid disbursements to be in the region of £1 million.

17. The Appellant and Mr Ritchie agreed that they had to inform the Second Respondent straight away and they spoke to her on the evening of 5 September 2017.

18. The Tribunal found that the disclosures made by the Appellant and Mr Ritchie to the Second Respondent on 5 September and on the days that followed were protected disclosures, and this is not challenged on appeal.

19. There was no suggestion that the Second Respondent was aware of these problems prior to being alerted by the Appellant and Mr Ritchie, or that she was involved in the failure to pay disbursements or the incorrect retention of money in the office account. The Tribunal found that she was keen to get to the bottom of the problems. She had been shocked and very upset upon hearing of the problems, and the Tribunal found that she considered that the Appellant and Mr Ritchie had acted correctly in drawing the problems to her attention. There was no suggestion that she was annoyed with them for bringing the matters to light.

20. A meeting took place between the Appellant, Mr Ritchie, and the Second Respondent on 6 September 2017, at which the Second Respondent said that she would understand if they wanted to leave. Further meetings took place over the next few days, during one of which it was suggested that the Appellant might leave. All three of them were trying to appreciate the scale and nature of the problems. The Second Respondent was trying to raise additional funding and

A it appears that she was more optimistic about finding a solution to the problems than the Appellant and Mr Ritchie.

21. At a meeting on 7 September 2017, the Appellant and Mr Ritchie told the Second B Respondent that they were resigning and handed her letters of resignation. This was 2-3 days after the problems first came to light. The Appellant's letter said that the problems meant that the business would not be able to execute the strategy that he had been brought in to lead. He C noted that he had a 12-month notice period and said that he hoped that some agreement could be reached about this. The Appellant said that he did not know how long he could stay.

22. A board meeting was then convened the same day with another director, Zoe Holland, to D notify the board that the Appellant and Mr Ritchie had tendered their resignations as employees and that the Appellant was resigning as a statutory director with immediate effect.

23. The Second Respondent did not immediately tell staff that the Appellant had resigned: E she said that he was working at home. Later on 7 September, she emailed the Appellant to ask him if he really wanted to leave, saying that the business's debt was manageable. The Appellant replied saying that he felt that he had to leave.

F

24. The following day, 8 September, the Appellant, Mr Ritchie and the Second Respondent had a meeting with Mr James Pike, employment lawyer at Squire Patton Boggs, and discussed possible settlement. The Second Respondent said that she wanted them to stay on and felt that G the business could trade through the problem.

25. Around this time, Ms Holland told the Second Respondent that she wanted to resign as a non-executive director. Another director, Claire Stevens, resigned as a statutory director without H telling the Second Respondent, but continued working in the business.

26. On 12 September 2017, the Second Respondent wrote to the Appellant to confirm that he was on garden leave, on full salary. In a covering email she said that she had been told to send this letter. The letter recorded that the First Respondent reserved the right to terminate the garden leave arrangements at any time and to recall the Appellant to work.

27. The Tribunal found that the relationship between the Appellant and the Second Respondent remained friendly at this time. She kept the Appellant updated on developments. On 18 September 2017, in an updating email, she said that she had spoken to Claire Stevens and they both wanted the Appellant to stay. Settlement negotiations had been ongoing between solicitors but had not resulted in settlement.

28. On 27 September 2017, the First Respondent wrote to the Appellant informing him that his period of garden leave would cease as of Friday 29 September and he would be expected to attend work on Monday 2 October. The Appellant's solicitors replied, saying that it was wholly unreasonable for the Second Respondent to require the Appellant (and Mr Ritchie) to return to work without evidence showing that the breaches of the SRA rules had been addressed, and without assurance that they would not face any further professional or personal risk by returning to work. In the event, Mr Ritchie's employment came to an end on 27 September. The Tribunal assumed, no doubt correctly, that Mr Ritchie reached a settlement with the Respondents.

29. In the days that followed, there was discussion between the Second Respondent and Mr Pike about threatening to terminate the Appellant's contract for gross misconduct because he had refused a lawful instruction to return to work. The advice received by the Second Respondent was to the effect that the Respondents would not have a good argument that the Appellant had committed gross misconduct in all the circumstances. This advice was disclosed following on from the waiver of privilege and the Tribunal's order for further disclosure.

30. A letter was sent by the Respondents' solicitors to the Appellant's solicitors after business hours on 2 October 2017, saying that he was expected to attend work the next day and that he would be considered to be in breach of contract if he did not so do.

31. In the event, the Appellant attended work on 4 October, and met with the Second Respondent. The Second Respondent expressed her view to the Appellant that the problems were not as bad as had been feared. She alleged that the Appellant and Mr Ritchie had overreacted by resigning and that this had damaged the business. This was the first time that she had expressed this criticism to him. She said that the Appellant should have stayed to work through the problem, rather than running for the hills. She alleged, in effect, that they had "spooked" Zoe Holland into resigning. Despite this, the Tribunal found that, at this stage, the First Respondent still wanted the Appellant to come back permanently, and, at the end of the meeting, she was hopeful that, at least, he would return to work out his 12-month notice. They agreed to meet again on 9 October 2017.

32. At the next meeting, on 9 October 2017, the Appellant said that he was prepared to work out his notice. He complained that whilst relations had been amicable for the first couple of weeks after he went on garden leave, the tone had changed. The Second Respondent said that this was because everyone was advising her that the Appellant and Mr Ritchie had behaved badly by resigning and should have stayed to sort out the problem rather than running for the hills and leaving her to sort it out on her own. The Second Respondent said that they had "spooked" the staff, the bank, and Zoe Holland, and that Zoe's resignation was a big blow to the business. The Appellant said that he would be returning as an employee, not as a director, and that they would have to discuss whether he returned for the whole of the notice period or something shorter. He wanted to work for part of the week at his home in Yorkshire, but the Second Respondent refused this request (the firm's office was in Wilmslow, Cheshire).

33. Immediately after the meeting on 9 October 2017, the Second Respondent reported back to Mr Pike. She said, "In reality he doesn't want to come back and I don't want him back, anything I can do?" Mr Pike replied by saying that she could negotiate financial terms with him, or keep pushing him to return to work, knowing that he did not want to do so, so that, if he refused, he could be dismissed for gross misconduct.

34. Also on 9 October, the Second Respondent sent to Mr Pike a first draft of a letter to be sent to the Appellant. In the event, it was never sent but the Tribunal found that it shed light on the Second Respondent's thoughts at that time. It said:

> **"Thank you for coming in today and we have left it that we will each come up with details of work that needs to be done and a plan for you to come into Wilmslow 5 days a week 9-5.00.**
>
> **You asked me why my attitude may have changed somewhat and I have confided in you that at the time this happened I was in complete shock and disbelief.**
>
> **You and Tim dictated the events that followed and you both insisted that a quorum of 4 directors was formed immediately with Zoe Holland on the phone so you two could resign. This subsequently forced Zoe Holland to also resign.**
>
> **The panic that ensued and your leaving me on my own to deal with this has most definitely changed my views on the way both you and Tim reacted at the first sign of a problem, (you ran for the hills.) I thought you were made of more than this.**
>
> **You have destabilised the company and forced a further Director to resign in the wake of your panic.**
>
> **….**
>
> **On reflection Peter I'm afraid my feelings are, that you left me at the first sign of a situation. You relied on figures produced to you by Tim Ritchie who, had only been in the company 4 days and an FD from a failed plc who you insisted on bringing in. Without checking those figures you relied on the information he provided and ran.**
>
> **….**
>
> **My view now is that you should be dismissed for gross misconduct and appalling behaviour. I will take this under advice from my lawyers."**

35. During this period, the Second Respondent wanted to dismiss the Appellant on the basis of gross misconduct but she was being advised by her legal advisers that she did not have a good case of gross misconduct against him. On 16 October 2017, the Appellant's solicitors informed

A the Respondents that the Appellant wished to lodge a formal grievance concerning his treatment by the Second Respondent since 6 September.

B 36. On 17 October 2017, the Second Respondent sent a letter of dismissal to the Appellant, terminating his employment with immediate effect, for gross misconduct. She said that it was only recently that she had time to reflect on events and that it was her view that his conduct fell substantially short of what should be expected of a director and fiduciary and was in breach of

C numerous obligations to the company. She then reviewed what the Appellant had done since Mr Ritchie had brought the problems with the accounts to his attention. She said,

D **"Upon learning about this alleged hole in the accounts you then took no steps whatsoever to seek to protect the position of the Company. Instead, yourself and Tim insisted on a quorum of directors being formed immediately with Zoe Holland on the phone, so that you could resign from your employment….**

Your actions have destabilised the Company significantly and have meant that it has suffered substantial damage way beyond what might reasonably have been expected had these matters been dealt with in a responsible and professional manner and in accordance with your duties to the Company. That failure to do so means, in my view, you have acted in serious breach of

E **your duties as a director and of the terms of your service agreement."**

37. In coming to its conclusions, the Tribunal directed itself that it had to consider, in relation to the detriment claim, whether the decision to dismiss was materially influenced by the protected

F disclosures. In relation to the unfair dismissal claim, since the Appellant did not have two years' continuity of employment, the Tribunal said that the burden of proof was on him to establish that the reason or principal reason for the dismissal was that he had made a protected disclosure.

G

38. At paragraph 176 of the judgment, the Tribunal said:

H **"176. We turn then to the evidence relating to the reason for dismissal. In relation to the detriment claim, the burden is on Ms Meredith to satisfy us that her decision was not materially influenced by the protected disclosures. We have taken account of all relevant evidence in considering whether she has satisfied this burden of proof. We consider the following matters to be of particular significance. Ms Meredith has never made any criticism of the claimant for making disclosures. Ms Meredith acted immediately to investigate fully the issues raised and made appropriate notification to the SRA after the matters were raised**

> **with her. She made no attempt to hide the problem. Ms Meredith and the claimant had an amicable relationship until around the meeting of 4 October when Ms Meredith began to criticise the claimant and Mr Ritchie for acting as she considered precipitously by resigning. She suggested that they had overreacted by resigning and suggested that Mr Watson should have stayed to work through the problem rather than "running for the hills". She also alleged, in terms, that they had "spooked" another director into resigning. Despite that, we found that she still wanted Mr Watson, as at 4 October 2017, to return to his permanent role. Consideration of dismissal arose in the context of ongoing settlement negotiations. The settlement negotiations were considering a bigger picture than just the claimant's employment situation; they were considering also the investment the claimant had made of £100,000 in shares of the first respondent and his wish to recover that investment. Formal communications between the parties and their solicitors must be viewed in the context of ongoing negotiations and be seen as part of a strategy by all involved parties to try to negotiate a deal on terms acceptable to them. This is supported by some of Mr Pike's communications to Ms Meredith which talk of a strategy."**

39. At paragraph 177, the Tribunal said that it found the most illuminating material to be the draft letter that the Second Respondent sent to Mr Pike, the key extracts of which I have set out at paragraph 34, above. The Tribunal said that its contents were consistent with the criticisms that she made in the meetings of 4 and 9 October, and the Tribunal noted that she did not expect the draft letter to be seen by anyone but her legal adviser. At paragraph 179, the Tribunal said:

> **"179. What Ms Meredith wrote in this draft letter all relates to how the claimant reacted to the problems after disclosure had been made; it did not make any criticism of the claimant making the disclosures."**

40. At paragraph 188, the Tribunal set out its conclusion that, on the basis of all of the evidence, the Second Respondent's reasons for dismissal were not materially influenced by the disclosures. All of the evidence was consistent with the Second Respondent not taking issue with the making of the disclosures. Rather, she took issue with the way that the Appellant resigned so quickly, without staying to see the real extent of the problem and working to see if it could be resolved. She decided to dismiss the Appellant once it became apparent that settlement terms were not going to be reached. Neither she nor the Appellant wanted the Appellant to return to work and his dismissal would get him "off the books".

41. The Tribunal recognised that there was a causal link between the protected disclosures and the matters forming part of the reason for dismissal. However, the Tribunal observed that

the test is not whether "but for" the protected disclosures the Appellant would have been dismissed. The question was whether the Appellant's actions could be severed from the protected disclosures themselves, so that the protected disclosures did not materially influence the decision to dismiss. The Tribunal decided that they could.

42. In light of these conclusions the Tribunal decided that the complaint in relation to detriment in relation to dismissal was not well-founded and that, since the reason or principal reason for dismissal was not the protected disclosures, the automatic unfair dismissal claim must also be dismissed.

Grounds 1-4: the challenge to the Tribunal's conclusion that the decision to dismiss the Appellant was not materially influenced by the protected disclosures

43. If the Tribunal was entitled to find that the protected disclosures did not materially influence the Appellant's dismissal, then it must follow also that the Tribunal was entitled to find that the sole or principal reason for the Appellant's dismissal was not the disclosures. Accordingly, Mr Roberts, on behalf of the Appellant, was right to focus his submissions on the "materially influenced" issue.

The law

44. ERA, section 47B(1) provides that:

> **"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."**

45. ERA, section 48(2) provides that in relation to a complaint including a complaint that the worker had been subjected to a detriment in contravention of section 47B:

> **"On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

46. The meaning of an act done "on the ground that" the worker has made a protected disclosure is now well-established. It is set out by the Tribunal at paragraph 164 of the judgment. In order for a "detriment" claim under section 47B(1) to be made out, the Tribunal must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence upon) the employer's detrimental treatment of the claimant: **Fecitt v NHS Manchester** [2012] IRLR 64 (CA), at paragraphs 38-39 and 43-46.

47. Whilst the test is now clear, its application to a particular case may not always be straightforward.

48. As for automatic unfair dismissal for making a protected disclosure, ERA, section 103A provides:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

Grounds 1 to 3

49. The Appellant relied on three overlapping grounds. The Appellant submitted that the Tribunal erred in law, in the circumstances of this case, by drawing a distinction between the protected disclosures themselves and the consequences of the disclosures. The Appellant also submitted that the Tribunal erred in law in failing to deal properly or at all with the possibility that the Second Respondent had unconsciously been materially influenced by the Appellant's protected disclosures in deciding to dismiss the Appellant. The Appellant further submitted that the Tribunal's decision on the "material influence" issue was perverse.

A 50. In his skeleton argument, Mr Roberts said that:

> **"The Tribunal took an unduly high-level approach in examining R2's state of mind, without having regard to whether the protected disclosures formed (a) an essential and/or (b) an unconscious part of R2's reasons for dismissal."**

B 51. In my judgment, the Tribunal did not err in law or act perversely in finding that the Appellant's dismissal was not materially influenced by the Appellant's protected disclosure.

C 52. The starting point is that there is no basis for a contention that the Tribunal misdirected itself on the law in relation to the "materially influenced" test. It is open to a Tribunal, in an appropriate case, to decide that a claimant's protected disclosures did not materially influence the detriment, because the respondent subjected the claimant to the detriment in response to the D consequences of the disclosures, rather than because of the disclosures themselves.

E 53. The appellate courts have recognised that a distinction can be drawn between the protected disclosures themselves, on the one hand, and the way that they are made and/or their consequences, and/r the subsequent conduct of the person making the disclosure, on the other. See **Martin v Devonshires Solicitors** [2011] ICR 353. **Martin** was a victimisation case, but I F agree with Mr Roberts that the guidance applies equally to whistleblowing cases. In **Martin**, at paragraphs 22-23, Underhill J said that there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense G and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example, Underhill J said, is where the reason relied on is the manner of the complaint, but it can also apply H where the reason relied on is related to the consequences of the complaint, if they are properly and genuinely separable from the making of the complaint itself. Underhill J said also that

Tribunals must be careful to ensure that this line of argument is not abused. These points were reiterated by Simler J in **Shinwari v Vue Entertainment Ltd** [2015] UKEAT/0394/14/BA, at paragraph 56, a protected disclosure case. She referred to the potential distinction that might be drawn between the making of the disclosure and the conduct which follows (the transcript of the judgment refers to the conduct of "the Respondent" but I wonder whether Simler J was referring to the conduct of "the Claimant").

54. In **Shinwari,** Simler J said, at paragraph 58:

> **"Both Martin v Devonshire Solicitors and Woodhouse [Woodhouse v North West Homes Leeds Ltd [2013] IRLR 773] support the conclusion that it is permissible in appropriate circumstances for a Tribunal to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, provided the Tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did."**

55. Simler J rejected the proposition that there was an additional requirement that it would only be in an exceptional case that the detriment or dismissal would not be found to be done by reason of the protected act.

56. In the present case, Mr Roberts directed the Tribunal's attention to the **Martin** and **Shinwari** cases (see paragraph 152 of the judgment). The Tribunal directed itself, correctly, that the test is not whether "but for" the protected disclosures the Appellant would have been dismissed. Rather, the test is the "materially influenced" test, as set out in **Fecitt**. The Tribunal went on to consider whether, in this case, dismissal arising from the consequences of the Appellant's disclosures could properly and genuinely be separately from treatment arising from the disclosures themselves. There was no error of law in the Tribunal's approach.

57. Moreover, in my judgment, it was plainly open to the Tribunal, on the basis of the findings of fact made by the Tribunal, to find that the Appellant's actions following the making of the protected disclosures could be severed from the protected disclosures themselves. The Tribunal gave detailed reasons for this conclusion, at paragraphs 176 and 177 of the judgment, as set out above. The key reasons, in my words, were:

(1) The Second Respondent did not at any stage criticise the Appellant for making his disclosures;

(2) The Second Respondent was not herself at fault for the accounting problems which were the subject-matter of the disclosures;

(3) She did not try to cover up the disclosures, but acted immediately to investigate the issues raised and to notify the SRA;

(4) For about a month after the disclosures were made, she maintained an amicable relationship with the Appellant. This only began to change when the Second Respondent started to reflect on events and decided that she was not happy that the Appellant's almost immediate reaction was to resign and leave the Respondents to it, by "running for the hills";

(5) Whether the criticism of the Appellant's behaviour following the disclosures was or was not a valid one (on which there could be different views), there was material that could lead a person in the Second Respondent's position to the view that it was open to criticism. The Second Respondent's view was not inexplicable. It was understandable that the Second Respondent might have felt that the resignation of the Appellant would make the job of the Respondents to deal with the fall-out of the problems more difficult, especially when Ms Holland resigned her directorship so soon after the Appellant did so. It was also understandable that the Second Respondent might have felt resentful that she was being

left to deal with the problems on her own. This sense of resentment gradually grew on the Second Respondent;

(6) Also, by the time that the Appellant was dismissed, the Second Respondent's focus was upon ways of arranging for the termination of the Appellant's employment, given the inability to reach a settlement and the recognition that the Appellant did not want to stay, and the Second Respondent did not want to keep him. Dismissal served a perceived business need.

58. In my judgment, each of these reasons was a matter that the Tribunal was entitled to take into account in coming to its decision. These reasons provide a legitimate factual basis for the conclusion that the Appellant's dismissal was not materially influenced by the disclosures themselves Therefore, and, in light of the findings of fact and the reasoning of the Tribunal, I do not accept that the decision of the Tribunal was perverse. As Mr Roberts rightly accepted, a ground of appeal alleging perversity will only succeed where there is an overwhelming case that no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached the conclusion that was reached: **Yeboah v Crofton** [2002] IRLR 634, CA at paragraph 93. The conclusions of the Tribunal in the present case do not come anywhere close to being perverse. The fact that some aspects of the Second Respondent's evidence were not entirely satisfactory did not mean that the Tribunal was required to reject her evidence on the main issue.

59. The "damage" which, as Mr Roberts points out, the Tribunal alluded to at a number of places in its judgment as having led to the Appellant's dismissal, was the damage that resulted from the Appellant's (and Mr Ritchie's) resignation, and its destabilising effect, and from the fact that they were not around to help to address the problem. The Tribunal did not err in law in concluding that this "damage" was logically separate from the damage caused by the making of

A the disclosures themselves, and the Tribunal's judgment, taken as a whole, did not fail to deal with Mr Roberts' submissions on this regard.

60. In **Martin**, at paragraph 22, Underhill J said:

B

> **"Employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."**

61. As for the contention that the Tribunal erred in law in that it failed to consider expressly C whether the Second Respondent had unconsciously been materially influenced by the disclosures made by the Appellant, I accept that, even if a Tribunal makes positive findings in favour of an employer regarding conscious motivation, the Tribunal may, in an appropriate case, have to consider the possibility of unconscious motivation. Mr Roberts relied on some observations by D Kerr J in **Geller v Yeshurun Hebrew Congregation** [2016] ICR 1028 at paragraphs 52-57. Mr Roberts submitted that it is incumbent upon the Tribunal to consider unconscious motivation, but I do not accept that the **Geller** case is authority for the proposition that a Tribunal must do this in E every case, still less for the proposition that an Employment Tribunal has a duty expressly to deal with the possibility of unconscious motivation in its judgment whenever it is considering the reason why a respondent did a particular act. In the **Geller** case, at paragraph 52, Kerr J said:

F

> **"I do not say that it is necessary explicitly to refer to and make a finding on the issue of unconscious or subconscious discrimination in every case - it will depend on the circumstances - but I am satisfied that here, it was a misdirection not to do so."**

62. In the **Geller** case there were features in the evidence which should have alerted the G Tribunal to the risk of unconscious discrimination. That was a case in which there was evidence that the work environment was not entirely gender neutral, and gender was relevant to the Tribunal's own analysis (see judgment, paragraph 54). Kerr J said, at paragraph 49, "it seems to H me that this was a case in which it was very much necessary to go on to consider and exclude subconscious or unconscious discrimination before any conclusion in favour of the respondent

could be definitively reached." However, there will be other cases in which it is not necessary, in light of the evidence, for a Tribunal specifically to go on to examine whether there was an unconscious motivation.

63. In my judgment, the present case falls into the latter category. The findings of fact by the Employment Tribunal on the issue of the conscious motivation for the Appellant's dismissal do not leave any room for the possibility that the Second Respondent was unconsciously materially influenced by the Appellant's disclosures. The findings of fact and conclusions reached by the Tribunal are only consistent with the position that the Second Respondent was entirely motivated by the decision of the Appellant to "run for the hills" and his failure to stay around to help her solve the business's problems and so close off the possibility that she may, consciously or unconsciously, have been partially motivated by his disclosures. This is so, even though it is well-known that discriminators and those who subject workers to a detriment on protected disclosure grounds rarely admit as much, and often may not themselves realise that this is why they are treating the worker in a particular way.

64. In so far as the appeal is based on the contention that the Tribunal did not give sufficient reasons for its conclusion on the "materially influenced" issue, I do not accept that the Tribunal erred in law in this regard. This was a 35-page judgment, running to 191 paragraphs. The Tribunal made detailed findings of fact, before directing itself impeccably on the law and setting out its conclusions in a clear, careful, and thorough manner. The Tribunal's analysis was not superficial. The Tribunal rightly focused, in its conclusions section, on the "materially influenced" issue and it is, in my judgment, plain from the judgment why it is that the parties won or lost (see **Meek v City of Birmingham DC** [1987] IRLR 250 (CA)). I do not accept that the Tribunal failed to address the arguments that were put forward on behalf of the Appellant. It recorded the Appellant's argument at paragraph 155 of the judgment, including the contention

that the majority of the damage to the firm was caused by the Appellant's disclosure of the problem. The Tribunal plainly rejected the argument on behalf of the Appellant that the real reason for the dismissal was the damage caused by the disclosures, rather than the damage caused by the Appellant's actions following on from the disclosures. Mr Roberts drew attention to arguments that he had advanced to the Tribunal about why at least some of the Second Respondent's criticism of the Appellant was unjustified, such as that his resignation could not have unsettled staff and the bank, because as far as they were aware the Appellant was on garden leave, rather than having resigned, but this does not undermine the Tribunal's conclusion that the Second Respondent decided to dismiss the Appellant because she felt that he had left her in the lurch, rather than because of the original disclosures. The Tribunal gave detailed reasons for its conclusion. At the heart of its conclusion was that it accepted the Second Respondent's evidence as to her motives for dismissing the Appellant, particularly as it was corroborated by a contemporaneous draft letter that she wrote for her solicitor. This conclusion is not appealable.

65. In my view, these grounds of appeals, though skilfully put, are essentially an attempt to reargue before the Employment Appeal Tribunal the arguments that had been advanced unsuccessfully before the Employment Tribunal.

Ground 4

66. Ground 4 is that the Tribunal erred in law in failing to make a finding of fact on the question of who it was who first proposed that the Appellant should go on garden leave. It had been the Appellant's pleaded case that, when he gave notice of resignation on 7 September 2017, the Second Respondent had said that he should go on garden leave. He had given evidence to this effect that was not specifically challenged in cross examination.

67. The Tribunal noted, at paragraph 65 of the judgment, that there was a dispute about whether the matter of garden leave was raised at the meeting on 7 September 2017, and if so, who raised it. The Tribunal said that the note made by the Appellant and Mr Ritchie did not make clear who raised garden leave. The Tribunal did not specifically resolve this dispute.

68. Mr Roberts submitted that this was an important issue on which the Tribunal should have made a finding of fact, and that it was an error of law for the Tribunal to fail to do so.

69. I am unable to accept this submission. It is trite that an Employment Tribunal, like any court, is not obliged to make a finding of fact on every disputed factual issue that arises before it. In the present case, the question of whether anyone raised the issue of garden leave, and, if so, who it was, was of no real significance. In my judgment, reading paragraph 65 of the judgment as a whole, it is clear that the Tribunal accepted the Appellant's evidence that the issue was raised at the 7 September 2017 meeting, as that is consistent with the only contemporaneous record. But it simply does not matter when garden leave was raised, or who raised it. This is because the Tribunal found that in the early days after the disclosures, the Appellant and the Second Respondent's relationship was amicable. Garden leave was raised at a time when the parties were discussing settlement. It was only a few weeks after the disclosures that the Second Respondent's attitude changed and she began to resent the Appellant because, in her view, perhaps encouraged by others, the Appellant's immediate decision to resign after the disclosures had exacerbated the business's problems. It was only much later than 7 September that the Second Respondent began to feel that the Appellant should have stayed and helped to work out the problems, and was not being as helpful as the Second Respondent wished him to be. In any event, it was an undisputed fact that the Second Respondent gave written confirmation to the Appellant that he had been placed on garden leave on 12 September 2017. At this point, the Tribunal found, the relationship was still a friendly one (see judgment, paragraph 81). Even if it was the Second Respondent

who had raised the issue of garden leave on 7 September 2017, this does not in any way undermine the Tribunal's conclusion that later on she began to resent the Appellant's behaviour and decision to resign, and unwillingness to come back on a long-term basis.

Grounds 5-7: the disclosure and privilege issues

70. The issue of disclosure and waiver of privilege arose at a late stage in the preparation of this case. On Sunday 3 February 2019, the night before the hearing began, the Respondents' solicitors served a two-page further statement from the Second Respondent which, inter alia, addressed the timing of the decision to dismiss the Appellant and the reasons for it. The statement referred to privileged legal advice that the Respondents had received from Squire Patton Boggs and exhibited two emails from Mr Pike of Squire Patton Boggs to the Second Respondent. This led the Appellant to make an application the following day for further disclosure on the basis that the Respondents had waived privilege on the legal advice that they had received.

71. Following argument, the Tribunal made the following orders for further disclosure on Tuesday 5 February 2019:

> **"The respondent shall disclose and produce for inspection the redacted part of an email from James Pike to Hilary Meredith sent on 16 October 2017 at 12:35 and the email chains into which that email and a further email of 16 October 2017 from James Pike to Hilary Meredith sent at 8:50.**
>
> **The respondent shall disclose and produce for inspection all documents setting out or recording the instructions given to the respondents' solicitors and the advice given relating to the reason for the claimant's dismissal and when the decision to dismiss was taken up to the sending of the termination letter on 17 October 2017, at 14.35."**

72. The Tribunal had been asked by Mr Roberts to order disclosure on a wider basis, on the ground that there had a been a broad waiver of privilege. The Tribunal explained where it had drawn the line, and why, at paragraphs 16 and 17 of its judgment as follows:

> **"16. We then go on to deal with the wider question which requires us to look at the scope of the waiver which has been made. To consider this, we must identify the relevant issue or transaction. We consider the emails, the contents of the emails themselves, and also the purpose for which the claimant adduced the emails in evidence. The purpose is shown by the contents of the supplemental witness statement and, in particular, paragraph 1 of that, which says that it is response to a statement that the letter of dismissal to the claimant was in response to his solicitor's email to Squire Pattern Boggs of 16 October 2017. We find that the contents of the emails and the purpose for which the respondent adduced the email in evidence assists us to identify the transactions as follows. We consider that the relevant issues or transactions are:**
>
> **(i) Why the respondents acting through the second respondent decided to dismiss the claimant; and**
>
> **(ii) When the respondent acting through the second respondent decided to dismiss the claimant.**
>
> **17. We were not persuaded by Mr Roberts' arguments that there was a wider issue or transaction about all matters to do with the claimant's employment and the handling of the grievance. We, therefore, consider that privilege has been waived in relation to legal communications relating to those two issues or transactions and we order that the respondents disclose and allow inspection of all documents setting out or recording the instructions given to the respondent's solicitors and advice given relating to the reason for the claimant's dismissal and when the decision to dismiss was taken up to the sending of the termination letter on 17 October 2017 at 14:35."**

73. Accordingly, the Tribunal found that the Respondents had waived privilege only in relation to documents concerned with the issues of why the Appellant had been dismissed, and when the decision to dismiss him had been taken.

74. There was then a disagreement between the parties as regards the scope of the orders that were made on 5 February 2019. This came down to whether the orders meant that the Respondents were required to disclose privileged communications that had come into being prior to 4 October 2017. This was the day that the Appellant came back into the office for a meeting after being sent on garden leave. Mr Roberts argued that the orders made on 5 February 2019 were wide enough to require disclosure of the Second Respondent's reactions to the events in September, and how she characterised his conduct at the time. The Tribunal rejected this submission in a ruling on 7 February 2019. The Tribunal noted that the Respondents had given an assurance that there was no material not disclosed which fell within the category of advice requested or given about dismissal.

The relevant law

75. A Tribunal's power to order disclosure is the same as that of the County Court: Employment Tribunal Rules of Procedure 2013, regulation 31.

76. The three guiding principles of the law in this area are, first, that if a party waives privilege, it is taken to have waived privilege in relation to all documents or communications that are concerned with the same issue or transaction. Second, that the overriding principle is fairness, and a party is not entitled to waive privilege in a selective way, which would be misleading or give rise to unfairness. Therefore, if privilege is waived in relation to a document or matter, the party concerned is obliged also to disclose any other documents which, if they were not disclosed, would render the disclosed documents misleading or would give rise to unfairness. However, the third principle is that waiver of privilege in relation to one matter or document does not mean that the party has waived privilege in all of the privileged documents in its possession (see, for example, **Paragon Finance plc (formerly National Home Loans Corp plc) v Freshfields (a firm)** [1999] 1 WLR 1183 (HL), at 1188, per Lord Bingham of Cornhill).

77. The parties are not permitted to "cherry-pick" materials. In **Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Co (No 2)** [981] Comm LR 138 (CA), at 139, Mustill LJ said:

> **"… where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."**

78. The relevant legal principles concerning collateral waiver of privilege (i.e. waiver of materials that go beyond the materials in respect of which the party chose to waive privilege) are

now well established They are set out in the judgment of Mann J in **Fulham Leisure Holdings Limited v Nicholson Graham and Jones** [2006] 2 All ER 599. These principles were more recently approved and applied in **Holyoake v Candy** [2017] EWHC 387 Ch (Nugee J): see paragraph 23.

79. At paragraph 11 in **Fulham Leisure,** Mann J said:

> **"Based on the authorities which I am about to refer to, it seems to me that the relevant process should be as follows: (i) One should first identify the 'transaction' in respect of which the disclosure has been made. (ii) That transaction may be identifiable simply from the nature of the disclosure made—for example, advice given by counsel on a single occasion. (iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed. (iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed. That chain is not articulated in terms in the authorities to which I am about to refer, but it seems to me that it is apparent from it."**

80. In **Holyoake v Candy,** Nugee J said that what "transaction" means in this paragraph is what was said on a particular occasion (**Holyoake**, paragraph 35, referring to **General Accident Corpn v Tanter** [1984] 1 WLR 100, per Hobhouse J at 7A). In **Fulham Leisure,** Mann J said that the Court must then go on to identify "the issue in relation to which the material has been deployed" or "the issue in question" (judgment, paragraphs 15 and 16), and disclosure is required in relation to the entirety of the privileged material going to, or relevant to, that issue. At paragraph 16, the judge said:

> **"The issue may be confined to what was said or done in a single transaction or it may be more complex than that and extend over a series of connected events or transactions. In each case the question for the court is whether the matters in issue and the document or documents in respect of which partial disclosure has been made are respectively severable so that the partially disclosed material clearly does not bear on matters in issue in respect of which material is withheld."**

81. At paragraph 19, Mann J said that "The court will determine objectively what the real transaction is so that the scope of the waiver can be determined." Nugee J made an observation to the same effect in **Holyoake** at paragraph 43. This is using the word "transaction" in a broader sense that was used in **Tranter**. It is not a matter to be left to the subjective views of the

disclosing party. However, in **Holyoake,** at paragraph 42, Nugee J recognised that determining the scope of the relevant privileged material that must be disclosed is a matter for the court's discretion, and that, as this discretion has a generous ambit, different judges may come to different conclusions in the exercise of the discretion. In **Holyoake,** Nugee J held that fairness did not require disclosure of later privileged communications on the same topic (paragraph 51).

82. The importance of a fair approach to disclosure and waiver of privilege was emphasised by the EAT in **Brennan and others v Sunderland City Council and others** [2009] ICR 479, in which Elias J said, at paragraph 63:

> **"In our view the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material. The court must not allow cherry picking but the question is: when has the cherry been relevantly placed before the court?"**

The grounds of appeal

83. The Appellant submitted that the Tribunal erred in law in its decision on the scope of the waiver of privilege, in three respects. On his behalf, Mr Roberts submitted that the Tribunal applied the wrong test (Ground 5), failed to identify the correct issue that had been waived by the Respondents (Ground 6), and/or should have ordered further disclosure to avoid unfairness and misunderstanding of what had been disclosed (Ground 7).

Ground 5

84. This was described by Mr Roberts in his skeleton argument as the Appellant's "principal argument" on the waiver of privilege issue.

85. The Tribunal set out the law relating to waiver of privilege at paragraphs 6-13 of its judgment. At paragraph 12, the Tribunal set out the passage at paragraph 63 of the **Brennan** case that I have set out at paragraph 82, above. At paragraph 12, the Tribunal said that it derived the following principles from the **Fulham Leisure** case:

> **"The court determines objectively what the transaction is. The court is entitled to look to see the purpose for which the material is disclosed or the point in the action to which it is said to go to help decide this and, once the transaction has been identified, the whole of the material relevant to that transaction must be disclosed. If only part of the material involved in that transaction has been disclosed then further disclosure will be ordered and it can no longer be resisted on the basis of privilege. At paragraph 19, Mann J went on to deal with the case where, if the transaction is part of some bigger picture, fairness and the need not to mislead may require further disclosure."**

86. In my judgment, this was an entirely accurate summary of the law and the principles that the Tribunal had to apply.

87. Mr Roberts submitted that the Tribunal went on to apply the wrong test. I do not accept this submission. At paragraph 16 of its judgment, the Tribunal made clear that it had to identify the relevant issue or transaction and then should order disclosure in relation to that issue (or those issues). This was the right test to apply. The Tribunal did not limit itself to the transaction in the narrow sense, consisting of the words used in the two emails that had been voluntarily disclosed. It followed, inevitably, that there was no unfairness in restricting the disclosure order to privileged documents that were relevant to why, and to when, the Second Respondent decided to dismiss the Appellant. I do not think that it is realistic to infer that the Tribunal directed itself correctly about the relevant legal principles at paragraphs 6-13 of the judgment, and then failed to apply them at paragraphs 14-19 of the same judgment. The Tribunal understood the nature of the Appellant's submission on the privilege issue, because it was summarised at paragraph 17 of the judgment.

88. Mr Roberts referred to the case of **Ms Tracey Kasongo v Humanscale UK Ltd**, UKEAT/0129/19/LA, in which, in a judgment handed down on 30 September 2019, Her Honour Judge Stacey (as she then was) held that a Tribunal had acted perversely by applying too narrow a definition to the issue in respect of which privilege was waived. But that case depended on its own facts. It does not mean that there was an error of law in the present case, and the very fact that HHJ Stacey regarded the issue as being one of perversity serves to emphasise the breadth of a tribunal's discretion in this regard.

89. In my judgment, Mr Roberts's submission on Ground 5 worked backwards from his contention that the Tribunal erred in limiting the further disclosure in the way that it did. In other words, he was really submitting that the Tribunal defined the issues in respect of which privilege had been waived too narrowly, or, put another way, interpreted their own delineation of the issues too narrowly, and so the Tribunal must have erred in law. In my view, however, the Tribunal was entitled to define the issues in the way that it did. The privileged emails that were disclosed by the Respondents were specifically about the reasons for the Appellant's dismissal and they also were relevant to the point at which the decision to dismiss was taken. The issues which these emails covered did not extend, more generally, to all matters that were to do with the Appellant's employment and the handling of the grievance.

90. The Appellant may suspect that there were other relevant earlier documents, but the Respondents' solicitors had given an assurance that there were no other documents in the disclosable categories (referred to at paragraph 19 of the judgment). In other words, there was no other documentation relating to dismissal. There was no basis on which the Tribunal could go behind this and, as the Tribunal mentioned at paragraph 19 of its judgment, it was open to the Appellant to cross-examine and make submissions on the basis of the absence of any such

A additional material. The Tribunal considered and rejected the suggestion that there had been a failure of disclosure by the Respondents, at paragraph 94 of its judgment.

B 91. If, and in so far as Mr Roberts is contending, as Mr Lewinski says that he is, that the Tribunal should have ordered the Respondent to disclose privileged materials from 7 September 2017 onwards, simply to show that these materials did not relate to dismissal, I do not accept this submission. If that logic were followed, then all privileged materials would be disclosable even C if there had been only a limited waiver. All parties which waived privilege in relation to a particular issue would be deemed to have waived privilege in relation to all privileged documents, because they would be obliged to disclose the documents relevant to that issue and they would D be obliged to disclose all other documents to prove the negative that they do not have anything to say about the issue. That would mean in practice that a party could not make a limited waiver of privilege, because any limited waiver of privilege would give rise to an obligation to disclose all privileged documents, so that they could be examined to see if they were relevant to the issue. E This would run counter to the guidance of the Court of Appeal in **Paragon Finance.**

92. Again, as Mr Roberts accepts, there is no ground for complaint on the basis of unfairness or perversity simply because the Tribunal then relied upon the disclosed privileged documents, F and in particular the letter that the Second Respondent sent to Mr Pike on 9 October 2017, in deciding to reject the Appellant's claims.

G **Ground 6**

93. The next ground relied upon by the Appellant is that even if the Tribunal adopted the correct test, it defined the waived issues too narrowly. Mr Roberts advanced this argument only H faintly. I have already dealt with it. As I have said, the Tribunal was fully entitled, applying the law correctly, to define the issues in the way that it did.

Ground 7

94. The final ground of appeal is that the Tribunal erred in law in failing to order wider disclosure in order to avoid unfairness or misunderstanding. I do not accept this submission either. Having found that privilege had been waived only in relation to two specific issues, namely the reason for and the timing of the decision to dismiss, there was no reason why the Tribunal should consider that disclosure limited to these two issues would be unfair or give rise to a misunderstanding. The Respondents were required to disclose the whole of the documents that they possessed in relation to these two issues, and so there was no scope for cherry-picking or the giving of a false impression. The Tribunal found that the Respondents had not waived privilege in relation to the whole sequences of events from the making of the disclosures on 5 September 2017 onwards, and so there was no unfairness or misunderstanding that resulted from the Tribunal declining to grant disclosure of privileged materials in relation to those wider issues, and, in particular relating to the period prior to 4 October 2017. Disclosure of earlier privileged material was not covered by the Tribunal's order. The question of what was to be disclosed as a matter of fairness was a question for the discretion of the Tribunal and there is no basis for concluding that the Tribunal exceeded the broad limits of its discretion.

Conclusion

95. For these reasons, this appeal is dismissed.