Neutral Citation Number: [2025] EAT 124

Case No: EA-2023-000815-LA & EA-2023-000816-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 August 2025

HIS HONOUR JUDGE JAMES TAYLER
MR NICK AZIZ
DR GILLIAN SMITH MBE

- -

Between :

Mr O Argence-Lafon

Appellant

- and -

Ark Syndicate Management Limited

Respondent

- -
- -

Mr O Argence-Lafon, the **Appellant** in person
Nicholas M Siddall KC (instructed by Morgan, Lewis & Bockius UK LLP)
for the **Respondent**

Hearing date: 6 August 2025

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JUDGMENT

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The Employment Tribunal did not err in law in its analysis of protected disclosures, or in holding that two detriments were not done on the grounds that the claimant made protected disclosures and that the reason, or principal reason, for dismissal was not the making of the protected disclosures. The Employment Tribunal erred in law by not analysing the appeal process when considering the fairness of the claimant's dismissal.

His Honour Judge James Tayler, Mr Nick Aziz and Dr Gillian Smith MBE:

Introduction

1. This is an appeal against a judgment of the Employment Tribunal sitting at London Central, Employment Judge H Grewal sitting with members, after a hearing between 8 and 17 August 2022. The judgment was sent to the parties on 2 December 2022. The claimant also appeals against a refusal of reconsideration sent to the parties on 22 December 2022.

2. The claimant brought complaints that he had been subject to detriments done on the grounds that he had made protected disclosures, that he had been automatically unfairly dismissed because the reason, or principal reason, for his dismissal was the making of protected disclosures and that his dismissal was otherwise unfair.

Relevant substantive law

3. The term "qualifying disclosure" is defined by section 43B **Employment Rights Act 1996** ("**ERA**"), which provides, so far as is relevant:

> 43B.— Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …

4. There must be a disclosure of information. In the reasonable belief of the worker making the disclosure, the information must tend to show one of the matters set out at sub-sections 43B(1) (a) to (f) **ERA**. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731, Underhill LJ described this as "wrongdoing". I shall adopt that shorthand.

5. In the reasonable belief of the worker making the disclosure, it must be made in the public interest. The worker must believe, at the time of making it, that the disclosure is made

in the public interest, and that belief must be reasonable.

6. A qualifying disclosure becomes a protected disclosure because of whom it is made to. The most common example is the employer: section 43C **ERA**.

7. Workers are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B **ERA**:

> 47B.— Protected disclosures.
>
> (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. …

8. Employees are protected against being dismissed for making protected disclosures by section 103A **ERA**:

> 103A. Protected disclosure.
>
> 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.

9. Claims of unfair dismissal are governed by section 98 **ERA**.

> 98 General.
>
> (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.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee, …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

10. The fundamental test in a claim of unfair dismissal is that set out in section 98 **ERA**. The employer is required to establish the reason, or principal reason, for the dismissal. The employer must establish that the principal reason for dismissal is one of the potentially fair reasons. If the employer establishes that the employee was dismissed for a potentially fair reason, the Employment Tribunal will go on to determine whether the dismissal was fair or unfair on application of the provisions of section 98(4) **ERA**. Fairness is determined on a neutral burden of proof.

11. Where there is a hearing followed by an appeal, fairness is assessed by consideration of both stages – it is not helpful to analyse whether the appeal is a "rehearing" or "review"; **Taylor v OCS Group Ltd** [2006] ICR 1602 at p1615:

> 47 ... The use of the words "rehearing" and "review", albeit only intended by way of illustration, does create a risk that employment tribunals will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if employment tribunals realise that their task is to apply the statutory test. In doing that, they should **consider the fairness of the whole of the disciplinary process**. **If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care.** But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but **to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**
>
> 48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal,

> as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

Key findings of fact and conclusions of the Employment Tribunal

12. We take the key findings of fact from the decision of the Employment Tribunal.

13. The respondent manages the underwriting of Syndicates 3902 (Energy) and 4020 at Lloyd's. The respondent provides operational resources for all reinsurance and insurance business written by the Syndicates.

14. On 1 May 2018, the employment of the claimant transferred to the respondent under the **Transfer of Undertakings (Protection of Employment) Regulations 2006**. The claimant worked as a Senior Underwriter.

15. Initially, the claimant's line manager was Paul Dawson. Elliot Burton was appointed as head of the team and became the Claimant's line manager in February 2020.

16. The respondent was one of the Lloyd's insurers providing reinsurance in respect of a policy of insurance that covered oil drilling undertaken by the Italian company ENI in Vietnam. Zurich Insurance was the overall lead on the placement. Zurich is not a Lloyd's insurer. The commercial market placement of the reinsurance was handled by the broker Willis Towers Watson.

17. On 18 July 2019, ENI submitted an insurance claim to Willis Towers Watson for an "underground blowout" while drilling a well named Ken Bau-1x. On 22 July 2019, Zurich instructed Matthews Daniel, one of the pre-agreed loss adjusters written into the policy, to investigate the claim.

18. On 9 September 2019, Matthews Daniel completed a preliminary report stating that the insured believe there had been an underground blowout that would be covered by the insurance policy. Matthews Daniel suggested that technical discussions should take place to establish what had occurred to assess whether the event was covered.

19. On 7 October 2019, the respondent was informed of the claim, and it was agreed that the respondent would be Lloyd's second lead on the claim.

20. On 11 November 2019, Matthews Daniel issued a first interim report. The detailed technical report was supportive of the claim. The total potential costs of the claim were said to be around US$53,600,000.

21. On 15 November 2019, ENI and Willis Towers Watson hosted a meeting at the ENI offices in Milan. Mr Burton attended on behalf of the respondent. The presentation dealt with matters including the Ken Bau-1x incident and the lessons learnt from such events in the context of ENI's oil well operations worldwide.

22. On 27 November 2019, Mr Burton organised a meeting of the Energy 3902 team. He showed the team the ENI presentation. Following the presentation the claimant told those present, including Mr Burton, that the claim was probably not valid because ENI had been vague in its presentation about the claim. He said that he did not think that the claim was covered under the policy. He did not explicitly allege that it was fraudulent, but Mr Burton understood it to be implicit in what he said. The claimant suggested that the failure of the well was most likely caused by a loss of circulation and not an underground blowout. This was asserted to be the first protected disclosure (D1).

23. Following the meeting the claimant spoke to Mr Dawson about the ENI claim. He repeated what he had said to Mr Burton. This was asserted to be the second protected disclosure (D2). The Employment Tribunal accepted that D1 and D2 were protected disclosures:

> 95 **These relate to what the Claimant said to Mr Burton and his colleagues, and then to Mr Dawson, on 27 November 2019 after seeing the ENI presentation**

> **slides about the incident at the Ken Bau well** (see paragraphs 32 and 33 above). At that stage that was the only information that the Claimant had about the incident and the claim. We considered these two together because the substance of what the Claimant said in the two conversations, and his basis for it, is not very different. **He told them that ENI had been vague in its presentation about what had happened. The clear implication of that was that it had been deliberately vague because it did not want to disclose the full picture. He also said that on the basis of what was in the presentation there was another possible explanation for the incident which would not be covered by the insurance policy. One the basis of what he had seen and what he knew (acknowledging he was not a drilling engineer) he believed that that the claim was probably not valid and ENI was not giving the full picture in order to conceal that. He did not use the word "fraudulent" but it was implicit in what he said that he was saying that he believed that it was probably a fraudulent claim.** Messrs Burton and Dawson understood him to be saying that. The Claimant did not say that it was definitely a fraudulent claim that was not valid. He could not do so on the information available to him. **He highlighted to his managers that the claim was probably not valid and fraudulent.**
>
> 96 **The Claimant believed that the information which he gave tended to show that ENI was probably committing a criminal offence by making the claim and the Respondent would probably be in breach of its legal obligations by paying the claim without looking further into it. On the basis of what the Claimant had seen in the presentation and his knowledge of such issues, his belief was reasonable.** The fact that his managers did not discard what he said as having no merit, but encouraged him to take it up with their own Claims Adjuster and later, the loss adjusters, also supports our conclusion that the Claimant's belief was reasonable. **The Claimant believed that it was in the public interest to raise what he did; he personally had nothing to gain by it. We concluded that in those two conversations on 27 November 2019 the Claimant gave information which he reasonably believed was in the public interest and tended to show that a criminal offence was being committed or likely to be committed by ENI and that the Respondent was likely to fail to comply with its legal obligations if it paid on the claim without making further inquiries. They were protected disclosures.** [emphasis added]

24. In the evening of 27 November 2019, Mr Burton sent the Claimant Matthews Daniel's interim report of 11 November 2019.

25. Matthews Daniel issued a second interim report on 2 December 2019.

26. On 14 January 2020, Clyde & Co solicitors advised on two aspects of the claim – (i) whether the costs of approximately US $ 1.9 million for the failed side-tracking attempt were recoverable, and (ii) whether the costs of approximately US $ 2.5 million for the plugging and abandonment of the original well were recoverable. Their advice was that the former were recoverable under the policy, but the latter were not. Clyde & Co advised on the basis of the

two interim Matthews Daniel reports assuming that there had been an underground blowout.

27. Mr Burton provided the Clyde & Co advice to the claimant and asked his opinion. The Employment Tribunal recorded:

> In the intervening period **the Claimant, who had a degree in engineering but (as he accepted) was not a drilling engineer or a drilling expert**, had **discussed the matter with drilling engineers which had strengthened his view that the claim was probably not valid**. [emphasis added]

28. In April 2020, the claimant again raised concerns about the Ken Bau-1x claim with Mr Burton and Christine Fenner, the Senior Energy Claims Adjuster.

29. Ms Fenner fixed a meeting with Matthews Daniel on 5 May 2020 to which she invited the claimant. Ms Fenner discussed the claimant's concerns with him prior to the meeting. The claimant summarised his concerns in an email on 4 May 2020:

> I am not saying that I am concerned they may have pressures [put on them on how to conduct the investigation] and we should therefore be questioning their job. I am saying that:
>
> 1. **There is a possibility that the fluids migrated through the formation which they may prove wrong (because they are the experts)**, then all good and the case is closed.
>
> 2. If the possibility is confirmed, then we can question their job:
>
> a. They didn't do their job properly, or
> b. They have willingly not challenged the facts.
>
> I don't have a preference a priori for one option or the other.
>
> Because they always insist the scenario of the ugbo is the one defined by ENI without validating it, I would choose b) if we are in 2). Then b) could be explained by corporate issues, which I agree would have serious consequences [emphasis added]
>
> [the term "ugbo" refers to an underground blowout]

30. This email was asserted to be the third protected disclosure (D3). The Employment Tribunal accepted that this was a protected disclosure:

> 97 The email of 4 May 2020 needs to be looked at in the context in which it was sent and not in isolation. The background to the sending of that email is as follows. The Claimant had by then seen the interim MD report of 11 November 2019 and the advice given by Clyde & Co which was based on the MD conclusion. He had done his

> own research and it was clear to him that there were other possible explanations. **It was not clear to him from MD's report whether they had considered the other possibilities and, if they had, why they had discounted them and concluded that on balance there had been an underground blowout. From 21 April 2020 onwards the Claimant had discussions with Ms Fenner and Mr Burton in which he raised questions about why MD was not challenging the insured's data and assumptions and not considering other possibilities. It was in that context that he sent the email of 4 May 2020.** What he said in that email was that if MD were able to prove that other scenarios were not possible (i.e. other possibilities did not exist) that would be the end of the matter. Realistically, it was unlikely that MD would be able to do that. If, however, there were other possibilities then his view would be that they had deliberately ("willingly") not challenged the facts which could be explained by "corporate issues" [and] would have "serious consequences". **He was saying that if there were other possibilities (which there would always be in a complex claim of this kind), then his position would be that MD had been complicit in the fraud. They had deliberately not looked at the other possibilities.**
>
> 98 **We concluded that in this email the Claimant was giving information which he believed tend to show that the claim was probably fraudulent and that it was likely that MD was complicit in the fraudulent claim.** On the basis of what he had seen and his knowledge and research, the Claimant believed that there were other serious possibilities. **There was nothing in MD's first interim report that indicated to him that they had either challenged the data provided by the insured or considered and rejected other possibilities. In those circumstances, his belief was reasonable.** Ms Fenner and Mr Burton must have thought that it was reasonable for them to arrange the meeting with MD and to afford the Claimant the opportunity to question MD. **In the email of 4 May 2020, seen in the context in which it was sent, the Claimant was giving information which he reasonably believed tended to show that ENI was probably making a fraudulent claim and that it was likely that MD was complicit in that fraud and therefore it/they were both probably committing a criminal offence. Furthermore, he reasonably believed that it tended to show that the Respondent was likely to be in breach of its legal obligations if it paid out on the claim without investigating it further. We concluded that that was a protected disclosure.** [emphasis added]

31. The meeting with Matthews Daniel took place on 5 May 2020. It lasted about two hours. The claimant asked questions and Matthews Daniel answered them. Following the meeting the claimant continued asking questions and Ms Fenner forwarded them to Matthews Daniel who responded. The claimant attended a second meeting with Matthews Daniel on 18 June 2020 which also lasted about two hours. On 18 June 2020, the Claimant sent Matthews Daniel a presentation, entitled "ENI – Ken Bau 1X loss – Why it is not covered". Matthews Daniel commented and answered further questions from the claimant.

32. On 17 July 2020, Matthews Daniel wrote stating that they were "conscious of the

seriousness of the issues raised" and to ensure that the responses that they provided were fully thought through, they had brought in a colleague from Houston to provide a fresh pair of eyes. They said that they would revert to the claimant after consulting with the colleague.

33. On 23 July 2020, Matthews Daniel provided a detailed response to the questions asked by the claimant. Matthews Daniel remained of the opinion that a cross-flow had occurred in the well as stated in their first interim report of 11 November 2019.

34. Having read this report the claimant suggested to Ms Fenner and Mr Burton that they should appoint an independent expert. Mr Burton's response was that in his view Matthews Daniel had provided a sufficient response to the key questions raised and he could not see any reason to continue any further with the issue. Ms Fenner agreed.

35. The claimant continued to challenge the Matthews Daniel report. Ms Fenner arranged for another loss adjuster, Lloyd Warwick International, who had an adjuster who was a drilling expert who had been appointed on numerous large/complex ugbo claims and was well respected, to undertake an informal review. In late August 2020, Lloyd Warwick International provided a review presentation concluding that "Balance of probabilities suggests that cross flows were occurring". On 14 September 2020, Mr Burton told the claimant the outcome by email, concluding:

> Both adjustors have reviewed this independently, as has the leader, and with all parties coming to the same conclusion.
>
> Claims are grey, we know nothing ever really falls into a perfect box we can tick but fundamentally there is nothing more we can do here. …
>
> Thanks for your efforts, but it is time to move on from this one.

36. The claimant replied to Mr Burton on 14 September 2020 "Based on the information provided, I am convinced this is not a valid claim." This was asserted to be the fourth protected disclosure (D4).

37. On 16 September 2020, the claimant sent Mr Burton a link to an article in the Financial

Times about a corruption trial in Italy in which it was alleged that ENI and other oil companies had paid bribes to Nigerian oil ministers and others. The claimant spoke with Mr Burton and suggested that the Italian police could also have evidence of fraud in Vietnam. This was asserted to be the fifth protected disclosure (D5). The Employment Tribunal recorded that "Mr Burton did not consider that the article had any relevance to the claim with which they had been dealing".

38. The Employment Tribunal did not accept that either D4 or D5 were protected disclosures:

> 99 These relate to statements that the Claimant made in an email on 14 September 2020 and verbally on 16 September in connection with an article in the Financial Times (see paragraphs 51 and 52 above). We considered these together because they are close in time and the circumstances in which they are made are the same. Things had moved on considerably since the Claimant made the first three protected disclosures. On 21 April Ms Fenner sent the questions posed by the Claimant to MD and they provided a response the following day. The Claimant then raised further questions with Ms Fenner and Mr Burton, and Mr Burton suggested that the Claimant should speak directly with MD. A meeting was set up for 5 May and prior to that the Claimant provided the ENI presentation to share with MD. The meeting on 5 May lasted two hours and the Claimant had the opportunity to ask MD whatever questions he had. The Claimant asked further questions after the meeting and MD responded to them. As the Claimant was still not satisfied there was a second meeting with MD on 18 June which also lasted two hours. Following the meeting the Claimant sent MD a presentation of why the loss was not covered. They responded on 14 July. On 15 July the Claimant asked further questions and on 17 July MD informed him that they had asked a colleague from Houston to look at it and would revert to him. **On 23 July MD provided a detailed response to the questions asked by the Claimant and concluded that their view remained the same as that stated in their interim report of 11 November 2019, which was that on balance it seemed likely that a cross-flow had occurred.**
>
> 100 **The Claimant suggested that they should appoint an independent expert and, although Ms Fenner and Mr Burton were initially reluctant to do so, they agreed to do so and a second loss adjuster was instructed on 6 August to review the claim. The second loss adjuster was provided with all the information and material that the Claimant wanted to provide to it. The conclusion of the second loss adjuster was that on the balance of probabilities cross-flows had occurred.** On 14 September Mr Burton sent the Claimant an email setting out their conclusions, and pointed out that both adjusters and the leader had come to the same conclusion and there was nothing more that they could do.
>
> 101 **The Claimant's response was that he was convinced that it was not a valid claim and that a particular point had not been clarified by MD and it appeared**

> **that LWI had not done so other. That is alleged by him to be a protected disclosure. Although the Claimant did not say that he was convinced that the claim was fraudulent, that remained his view as can be seen by what he said to Mr Burton on 16 September. We accept that the Claimant believed that what he was saying tended to show that the claim was fraudulent and not valid.**
>
> 102 **The real issue for us is whether the Claimant could reasonably have believed that it was fraudulent and that the Respondent would be in breach of its legal obligations if it did not challenge the claim and paid out on it.** It was accepted by everyone that in such a situation it was not possible to be 100% certain that a particular scenario had occurred. **Three drilling experts (MD, the MD engineer from Houston and the second loss adjuster) had all agreed that it was probable or likely that a cross-flow had occurred and there had been an underground blowout. Zurich, the lead insurer, and the Lloyd's lead were satisfied that they should pay out on that basis. It is difficult to see how, in those circumstances, the Claimant, who was not a drilling engineer or an expert in the area, could reasonably believe that the claim was definitely not valid and fraudulent and that the Respondent would be in breach of its legal obligations in paying out on the claim.** The converse was true. **In circumstances where two loss adjusters had concluded that it was likely that there had been an underground blowout, the Respondent would probably have been in breach of its legal obligations to the insured if it had not paid out on the claim.** It could not have defended a claim in court on the basis that, regardless of what the loss adjusters said, its senior underwriter said that the claim was fraudulent and not valid. **We concluded that the Claimant's belief at that stage that what he said tended to show that ENI was committing or was likely to commit a criminal offence and/or that the Respondent would be in breach of its legal obligations by not challenging the claim and paying it was not reasonable. Nor could he have reasonably believed that it tended to show that the commission of a criminal offence or breach of a legal obligation was being deliberately concealed. That communication was not a protected disclosure.**
>
> 103 **What has been said above also applies to the statements made by the Claimant on 16 September. In addition, the Claimant could not reasonably have believed that the information about ENI and other oil companies being prosecuted in Italy for bribing Nigerian oil ministers tended to show that the claim for the Ken Bau well was fraudulent or that the Respondent was in breach of its legal obligations or concealing the commission of a criminal offence. We concluded that that communication was not a protected disclosure.** [emphasis added]

39. In about mid-November 2020, Ian Beaton, the respondent's Chief Executive Officer, made a formal presentation because the respondent was involved in discussions about a potential takeover by White Mountains. Mr Beaton said that setting objectives was a critical part of the respondent's company policies.

40. On 20 November 2020, Mr Burton and Mr Dawson had an online meeting with the

claimant to set him personal objectives for 2021. The claimant was set nine personal objectives. The claimant raised no issues about six but had reservations about the other three. The disputed objectives were subject to detailed discussions between the claimant and Mr Burton. Eventually, the claimant responded, "Let's go with your choices.", thereby agreeing the objectives. However, the Employment Tribunal accepted that the setting of the objectives constituted a detriment (Det 1):

> 107 The Claimant's complaint is not about all the objectives that were set on 20 November 2020 but about three specific objectives relating to risk count, submission count and premium written. The Respondent argued that the Claimant agreed to the objectives on 14 December 2020 and a reasonable worker could not consider treatment to which he had agreed to constitute a detriment. Hence, the Claimant had not been subjected to a detriment. In considering that argument it is important to look at what happened between 20 November and 14 December. **The Claimant was given the objectives verbally, without any prior warning, at the meeting on 20 November 2020. He had not been given any personal objectives before. The whole process was new to him.** He expressed reservations about those three objectives at the meeting. Having received them in writing, he responded in writing on 27 November, objecting to those three objectives. Mr Burton responded on 3 December that his view was that the objectives were appropriate, achievable and a fair reflection of the role. He said that if the Claimant was still in disagreement with them they would need to schedule another meeting with Mr Dawson and HR. The Claimant did not respond and Mr Burton chased him up on 14 December. **As it appeared to the Claimant that Mr Burton was not going to change his mind, he reluctantly accepted them ("*Let's go with your choices*.").**
>
> 108 In considering whether the Claimant was subjected to a detriment by the imposition of those three objectives and what the reason for it was, we considered the following factors to be relevant. We looked at the level at which the objectives were set. In 2020 the Claimant had a submission count of 16, the target set for 2021 was 120 (7.5 times what he had achieved the previous year). In 2020 the Claimant had a risk count of 22, the target set for 2021 was 120 (5.5 times what he had achieved the previous year). In 2020 the Claimant's premium income was 2.8 million, the target for 2021 was 5.6 million (double what he had written the previous year). It is not in dispute that Mr Burton was achieving considerably more than that. It was the Respondent's case that the targets set were appropriate for a senior underwriter. If that is correct, the Claimant must have been seriously underperforming ever since his employment transferred to the Respondent in April 2018. But in that period of two and a half years no one put him on a formal performance review or set targets for him so that he knew what was expected of him. Other than the very informal annual conversations when bonuses and salaries were reviewed, where very general comments were made about him needing to be more outcome focussed, no one raised any serious performance concerns with him. **At the time when the objectives were set, the Claimant had been an underwriter for that business for a period of 17 years. He had not been**

> **set targets like that before and no one had told him that he was underperforming. As the Claimant said at the disciplinary hearing, the objectives were not consistent with the way he had worked since he had joined the company. The Claimant believed that he was being subjected to a detriment by the setting of those objectives, and we considered that a reasonable worker in those circumstances would consider it to be a detriment. We concluded that the Respondent subjected the Claimant to a detriment by setting those particular three objectives. [emphasis added]**

41. The Employment Tribunal noted that Det 1 would be out of time unless it found that the later detriment, Det 2, was in time.

42. The Employment Tribunal held that Det 1 was not done on the grounds that the claimant had made protected disclosures D1-3:

> 109 **We then considered whether the fact that the Claimant had made protected disclosures on 27 November 2019 and 4 May 2020 materially influenced the Respondent's decision to set those objectives for the Claimant in November 2020.** We accept that **the Respondent believed that the Claimant's risk and submission count and premium written were lower than they should be for someone in his position. That is borne out by comparing his figures with those of others in his team.** We accept that there were some concerns about the level of his output and they were communicated in very general terms informally once a year. In those circumstances, **the Respondent was entitled to set objectives in those three areas to improve his performance. However, the level at which they set they did was (for the reasons outlined in the preceding paragraph) unfair and unreasonable, and it was unlikely that the Claimant would be able to achieve them.** They were also different from the objectives set for others in the team. They were not given specific targets in any of those three areas. **The real question that we had to consider was why Messrs Burton and Dawson set the targets at the level they did and whether the Claimant's protected disclosures materially influenced their decision to do so.**
>
> 110 **In determining that issue we looked at what their reaction had been to the Claimant making those protected disclosures in November 2019 and May 2020. Their reaction in November 2019 had not been to ignore his concerns or brush them under the carpet, but to encourage him to raise them with Ms Fenner** and to **provide him with further information by sending him the MD first interim report and sharing the Clyde & Co report** with him (see paragraphs 32-34 and 36 above). **In March 2020 he received a bonus which was considerably higher than what he had received in the previous year**. In April 2020 when the Claimant started raising questions which he wished to ask MD, **Mr Burton encouraged him to directly contact MD and facilitated it**, his view being that it was worth asking those questions as it was a big claim (see paragraph 39 above). Between May and the end of July 2020 the Claimant had two two-hour meetings with MD and numerous lengthy communications with them. **At the end of that lengthy process and having taken into account what the Claimant had said, MD's view remained unchanged. The Claimant's reaction to that was that they should instruct an independent expert.**

> **At that stage Mr Burton could have said to the Claimant that that was the end of the matter and he was not prepared to take it any further. That was his initial view, but he reluctantly agreed to instruct an independent expert. When that expert reached the same conclusion as MD, the Claimant refused to accept that and maintained that they were all wrong and he was right.**
>
> 111 **It is clear to us that Messrs Burton and Dawson had no issue with the Claimant making the protected disclosure[s] that he did and that they took them seriously and investigated the issues that he had raised.** There was, however, **towards the end of the process a certain frustration with his unwillingness to accept that the experts who had looked at it disagreed with what he said, he was not the expert and that the Respondent could not take it any further. By the end of July 2020 the Claimant had spent three months pursuing the matter with MD**. A considerable amount of time and expense had been spent on it. However, he was not prepared to accept what they concluded. **When Mr Burton agreed to instruct an independent expert he made it clear to the Claimant that if the expert agreed with the MD hypothesis, he did not want to continue questioning the assessment** (see paragraph 47 above). The Claimant ignored that and continued to question the assessment when the expert agreed with MD. **The Claimant spent a lot of time and effort in challenging the experts instead of focusing on his job of writing risks and generating premium income. In the summer of 2020 he had not written or reviewed any risks. In one of the internal investigations, Mr Burton referred to his having "disappeared" over the summer.**
>
> 112 **We concluded that the fact that the Claimant made protected disclosures on November 2019 and on 4 May 2020 played no part in Messrs Burton and Dawson setting the targets at the level at which they did. Their frustration with the Claimant's conduct after he made the disclosures – his unwillingness to accept the conclusions of the experts after they had considered all the points made by him and his continuing to challenge the assessments despite a number of experts reaching the same conclusion – played a part in their setting the targets at the level which they did.** We accept that the conduct follows on from the making of the protected disclosure, but it is quite distinct and separate from it. **We, therefore, concluded that the Respondent did not subject the Claimant to that detriment because he had made protected disclosures.** [emphasis added]

43. Mr Burton conducted an online meeting with the claimant on 15 January 2021 to review his performance against the objectives. Mr Burton said that the claimant had met some of the objectives and that other objectives were ongoing. Mr Burton suggested that the claimant needed to improve broker relationships with better communications.

44. At a review meeting on 22 March 2021, Mr Burton said that they were approaching the end of Q1 and the claimant had written only one risk since 2 January 2021, and his income premium was about 12% less than for Q1 in the previous year. The claimant's submission count

for March was 0 compared to 3 for March the previous year. He was considerably short of meeting the objectives for risk count, submission count and income premium. As a result, Mr Burton said that the claimant would be subject of a formal performance review.

45. Mr Burton held a performance review meeting with the claimant on 23 April 2021. Mr Burton said that the key objectives regarding risk count, written premium and submission count were not on track for April 2021 and "a long way off track cumulatively year to date". At the previous meeting the claimant had questioned the appropriateness of objectives 4, 5 and 6 and despite an ongoing email exchange the claimant had been unable to provide suitable alternative objectives. Mr Burton gave the claimant one further week to come back with a measurable proposal before HR were involved.

46. The claimant met with Mr Beaton on 27 April 2021. The claimant referred to the Ken Bau-1x claim and asserted that the respondent had paid a fraudulent claim. This was asserted to be the sixth protected disclosure (D6).

47. Mr Beaton understood the claimant to be asserting that Ms Fenner, Mr Burton, Mr Dawson and Matthews Daniel had been complicit in a fraudulent payment being made. The claimant said that a second loss adjuster's report had been asked for, but he had not seen it. Mr Beaton said that he would ask Joe Campbell, Head of Legal, and Neil Brothers, Risk Management and Compliance Director, to investigate and report back. Mr Beaton asked the claimant why he had not drawn this to his attention before the respondent had paid the claim but received no clear answer.

48. Mr Campbell and Mr Brothers reported the outcome of their investigation to Mr Beaton on 29 April 2021, concluding:

> **Hence, there is no reason to suspect there is widespread fraud involving multiple members of the claims process**. And given the evidence and the claims process followed, no reason to suspect negligence of any of the parties in the claims process.
>
> This is clearly a highly technical and complex claim. Whilst there must be an element of subjectivity over the exact quantum and indeed the cause of the claim, based on

> preliminary investigation, there is little evidence to substantiate even a suspicion of fraud.
>
> **There is also limited value in spending further time investigating (in the absence of any new evidence) whether there has been a potential fraud. If there were conflicting expert opinions over either the quantum or the cause of loss, this would not per se indicate a fraud – but in any case the expert opinions seem to be largely in agreement**. [emphasis added]

49. On 30 April 2021, Mr Burton invited the claimant to a meeting on 6 May 2021 to discuss ongoing concerns about his performance, particularly premium written, risk count and submission count which he said fell beneath the minimum level expected of a Senior Underwriter.

50. Mr Beaton met with the claimant again on 4 May 2021. At the start of the meeting the claimant gave Mr Beaton a two-page document headed "Why I consider the Ken Bau loss is fraudulent". This was asserted to be the seventh protected disclosure (D7).

51. The Employment Tribunal held that D6 and D7 were not protected disclosures:

> 104 **These relate to the Claimant telling Mr Beaton on 27 April 2021 why he believed that the ENI claim was fraudulent and providing Mr Beaton on 4 May 2021 with a document setting out why he considered the ENI Ken Bau loss to be fraudulent** (see paragraphs 65 and 70 above). **The reasons we have given above for the Claimant's belief not being reasonable in September 2020 apply equally to these statements. For the same reasons, the Claimant's belief that this information tended to show the commission of a criminal offence by ENI, the breach of legal obligations by the Respondent or the deliberate concealment of criminal offences could not be reasonable.**
>
> 105 **In addition, in order for these disclosures to be protected disclosures the Claimant would have to prove that he reasonably believed that he was making the disclosure in the public interest. It is noteworthy that between 16 September 2020 and 27 April 2021 the Claimant did not raise his concerns with anyone within the Respondent or anyone externally. If the Claimant had genuinely believed that it was in the public interest to make these disclosures, one would have expected him to have done so. For seven months he did not say anything to anyone about them. The obvious question is why did he suddenly think it was in the public interest to raise them again at the end of April 2021, and the only possible answer to that is that it was to derail the formal performance review that he was told on 22 March 2021 was about to commence.** After a failure to agree the objectives against which his performance would be measured, on 9 April 2021 the Clamant contacted Mr Beaton to meet with him. **In those circumstances, we do not accept that the Claimant genuinely believed, after seven months of inaction, that it was suddenly in the public interest, to give this information. He did so because**

> **he believed that it would benefit him to do so. He raised it because he believed that it was in his interest to do so. He did not make those disclosures because he reasonably believed that it was in the public interest to do so. For all the above reasons, we concluded that these were not protected disclosures.** [emphasis added]

52. The greater part of the meeting was taken up by the claimant giving examples of things that he felt were not right in the team. The claimant discussed possible options – staying on as a technical expert outside but alongside the team, moving to 2020 Energy or elsewhere within the respondent, writing energy treaties. Mr Beaton explained why he did not consider that any of those options were viable. Mr Beaton sent notes of the meeting to Mr Campbell the next day. In his email Mr Beaton said that it sounded like there was a breakdown in trust and relationship with the team that was not reparable. He also sent Mr Campbell a copy of the document that the claimant had handed him and asked him to look into it. On 6 May 2021, Mr Beaton was sent an updated version of the earlier report which incorporated the claimant's comments. Mr Campbell and Mr Brothers did not change their conclusions.

53. On 6 May 2021, Mr Dawson and Mr Burton met with the Claimant to discuss the Performance Improvement Plan ("PIP"). The possibility of a settlement agreement was raised. The claimant asserted that being put on a PIP on 6 May 2021 was the second detriment (Det 2). The Employment Tribunal accepted that this was detrimental treatment:

> 113 It is not in dispute that the Claimant attended the first formal performance review under the Respondent's Performance Improvement Process on 6 May 2021 and that a discussion about a settlement agreement, which would involve the Claimant leaving, took place at that meeting. **We accept that putting the Claimant on a formal PIP review, which could lead to warnings or the termination of his employment amounted to subjecting the Claimant to a detriment.** However, the decision to move to a formal review under the PIP procedure was not first made or communicated to the Claimant on 30 April 202[1] as the Claimant alleges. That is the date when he was sent the formal invitation to the meeting on 6 May. The decision was first communicated to the Claimant at the review meeting on 22 March 2021 (see paragraph 55 above). The formal review meeting did not take place soon after 22 March 2021 because there was an ongoing dispute between the Claimant and Mr Burton about the objectives to be used in the PIP. Mr Burton wanted to use the objectives that had been sent on 20 November but the Claimant did not accept three of them. There was a further review meeting on 23 April, when the Claimant was given one further week to suggest alternative measurable objectives.

54. The Employment Tribunal concluded that Det 2 was not done on the grounds of making protected disclosures:

> 114 We have found that the Claimant's disclosures on 27 April and 4 May 2021 did not amount to protected disclosures. Even if they had, the decision to move to the formal PIP review could not have been on the ground of those disclosures because the decision to move to the formal review had been made before those disclosures. **The issue for us, therefore, was whether the decision to move to the formal PIP review was on the grounds that the Claimant had made protected disclosures on 27 November 2019 and 4 May 2020**.
>
> 115 **We accept the Respondent's evidence that the decision to move to the formal PIP review was made because of the Claimant's performance in the first three months of 2021. The Claimant's performance against the three particular objectives was in most cases worse than it had been in the same three months in the preceding year. Even if the objectives had been set at a lower level, he would not be meeting them. There had simply been no significant improvement in those three areas. We concluded that the decision to move the Claimant to a formal performance review process on 22 March 2021 was not in any way influenced by the fact that he had made protected disclosures in November 2019 and May 2020. The Claimant was not subjected to this detriment on the grounds that he had made protected disclosures.** [emphasis added]

55. The Employment Tribunal also stated that its findings meant that Det 1 was out of time:

> 106 The Claimant's case is that he was subjected to two detriments on the grounds that he had made protected disclosures. The first is that he was set certain objectives on 20 November 2020 and the second was that he was put on a performance improvement plan on 6 May 2021. Unless the Tribunal finds that the Claimant was subjected to both those detriments on the grounds that he had made protected disclosures and they are part of a series of similar acts, the first claim will not have been presented in time. In those circumstances, the Tribunal will only have jurisdiction to consider if it is satisfied that it was not reasonably practicable for the complaint to have been presented before 19 February 2021 and that it was presented within such further period as it considered reasonable. The Claimant has not put forward any basis to suggest that it was not reasonably practicable for him to have presented the complaint before 19 February 2021, or any explanation for not commencing Early Conciliation until 18 July 2021. In those circumstances, unless we concluded that it was part of a series of acts that continued until 4 May 2021, our conclusion would be that we do not have jurisdiction to consider it.
>
> 116 It follows from our conclusion on the second detriment (for the reasons set out at Paragraph 106 above), that the Tribunal does not have jurisdiction to consider the complaint about the first detriment.

56. On 20 May 2021, solicitors acting for the claimant submitted a grievance. The grievance was dismissed on 11 June 2021. An appeal against the grievance outcome was dismissed by

Mr Beaton on 9 July 2021. Mr Beaton stated that the claimant's allegations around the Ken Bau 1x loss had been investigated in accordance with the company's fraud policy and that the investigation had concluded that there was insufficient evidence of fraud to pursue the matter any further. The allegations that Mr Burton and Mr Dawson had been complicit in the fraud were serious allegations and had been made with no supporting evidence. Mr Beaton reiterated that they had found no evidence of fraud by any party involved in the matter. He continued that the PIP had not been linked to the Claimant's concerns over the Ken Bau 1x loss.

57. On 12 July 2021, Mr Burton wrote to the claimant and asked him to re-confirm his agreement to the original performance objectives or to propose alternative SMART objectives that were acceptable for performance measurement. If he did not propose agreeable alternative objectives by the end of that week, the respondent would continue the PIP using the objectives that they had agreed at the end of the previous year. The claimant asserted that the objectives had never been agreed. He had already said that some of those objectives were unreasonable and had proposed alternative objectives which he had felt were SMART. He had no other objectives to propose. He maintained that the PIP was a punishment for his disclosure of the fraud on the Ken Bau 1x loss.

58. On 19 July 2021, the claimant was invited to a disciplinary hearing. The disciplinary hearing was held on 30 July 2021 before Mr Beaton. On 9 August 2021, Mr Beaton sent the claimant his decision that his employment was to be terminated with immediate effect and that he would be paid three months' pay in lieu of notice. Mr Beaton concluded:

> I have considered the matter carefully and taking all the facts into account, **I have concluded that there is a complete breakdown of trust and confidence** between you, EB and PD, but also with Ark in general. You continue to maintain that both EB and PD have been complicit in an alleged fraud, and that Ark has supported this notwithstanding that the Company's investigation does not agree with your view that fraud occurred.
>
> **I see no way that the PIP can realistically proceed since you and EB have failed to reach an agreement on measurable objectives since November 2022. Furthermore, you continue to deny that there are any issues with your**

> **performance and maintain that the process is 'a punishment for Ken Bau'**. The fact that you failed to engage with the re-commencement of the PIP process until you were chased supports my view that you are not, and will never be, fully engaged with the process notwithstanding your suggestion in our meeting to the contrary which I found to be unconvincing. Accordingly, there is no reasonable prospects of you ever meeting the appropriate performance standards. [emphasis added]

59. The claimant appealed. The Employment Tribunal made the following findings of fact about the appeal:

> 92 On 16 August 2021 the Claimant appealed. He said that he considered his dismissal to be unfair and that it had come about because of his protected disclosures. He summarised what had occurred since November 2019. He said that before he had raised accusations of fraud his conduct or capability had never been questioned. He said,
>
> > "Throughout this process, I have always simply attempted to promote the best interest of the company. This is entirely consistent with my obligation to promote trust and confidence. It cannot be valid that I am being dismissed for a breach of trust and confidence when all I have done is attempted to highlight genuine concerns about fraud."
>
> 93 Prior to hearing the appeal Mr Atkin sought further information from Mr Burton and Mr Dawson about the ENI claim, concerns about the Claimant's performance and to comment on what the Claimant had said. They both provided information and documents on all these points. One of the points Mr Atkin raised with Mr Burton was when the Claimant had suggested fraudulent behaviour. In his response Mr Burton said,
>
> > "Re the timeline:
> > - I agree that Olivier raised major concerns over coverage for this loss in November 2019.
> > - Olivier did not label his concerns as "fraudulent" directly to me. Whilst he raised issues in November 2019 he did not explicitly suggest fraud, it was implicit, hence why I allocated so much resource to investigating the matter properly (100 hours with Mat dan + LWI peer review etc as you are aware)
> > - The majority of correspondence in team was verbal until mid-2020 when Olivier was querying with the loss adjustor."
>
> 94 The appeal hearing took place on 23 August 2021. Mr Atkin sent his decision to the Claimant on 27 August 2021. He dismissed the appeal. In the letter he dealt in detail with the points made by the Claimant in his appeal. In respect of the Claimant's allegation that the Ken Bau loss had been a fraud, he concluded,
>
> > "In my view, this is a complex claim and not at all simple, that was adjusted and reviewed by not just insurers but a series of experts and to suggest that a fraud has been committed is not credible."

In respect of the appropriateness of the three objectives, about which the Claimant complained, he accepted that they were "stretching" and "challenging" but considered them to be appropriate for a senior underwriter. He upheld the decision to dismiss the Claimant and added,

> "**I also agree with IB's view that there has been a fundamental breach of trust and confidence between you and the Company's management. Furthermore, I can see no way of you ever agreeing objectives with your manager as you fail to accept there are any issues with your performance and cannot accept that the PIP process has nothing to do with the Ken Bau loss**." [emphasis added]

60. The Employment Tribunal held that the reason, or principal reason, for the claimant's dismissal was not the making of the protected disclosures:

> 117 **There were two main reasons for the Claimant's dismissal on 9 August 2021 by Mr Beaton - the Claimant had failed to engage in the PIP and it was unlikely that he would ever do so and he had made allegations in his grievance appeal that his managers, Mr Burton and Mr Dawson, had been complicit in fraud and that the Respondent had supported them. Mr Beaton believed that the latter had led to a breakdown of trust and confidence between the Claimant and the Respondent.** Mr Beaton alluded to both of them at the disciplinary hearing and gave them as his reasons for dismissal in the outcome letter. The former is a reason relating to conduct, the latter could be either a reason relating to conduct or some other substantial reason of a kind such as to justify dismissal.
>
> 118 **The Claimant was not dismissed because he made protected disclosures on 27 November 2019 and 4 May 2020. The reasons for which Mr Beaton dismissed the Claimant were not fabricated or invented by his managers because they wanted him dismissed because he had made protected disclosures. As we have made clear above, they supported and encouraged him in raising the concerns that he had and did not subject him to any detriments because he had made protected disclosures.** [emphasis added]

61. The Employment Tribunal held that the dismissal was unfair:

> 119 **The Respondent having established potentially fair reasons for the dismissal, we then considered whether it acted reasonably in all the circumstances for dismissing him for those reasons.** We looked first at the Claimant's failure to engage in the PIP process. The Claimant had made it clear from the outset that he was not prepared to engage with the PIP if the three objectives set in November 2020 with those specific targets were going to be used in the PIP process. The objectives had been looked at in the grievance and the grievance appeal in the context of the Claimant alleging that they had been imposed because he had made protected disclosures. **Prior to the decision to dismiss the Claimant, there had been no investigation into whether it was appropriate or reasonable to set those objectives for the Claimant in a PIP**

> **process in all the circumstances.** If the matter had been investigated it would have revealed the Claimant had been an underwriter for that kind of business for nearly 17 years, he had not been given personal objectives like that before and he had not been told that he was underperforming, he had been an employee of the Respondent for 2.5 years, he had not had regular appraisals, he had not been set personal objectives, it had not been made clear to him what targets he was expected to achieve, it had not been drawn to his attention that what he was achieving in terms of risk and submission count and premium income was significantly below what was expected, the targets set expected him immediately to double his premium income every month and to increase his submission and risk count to figures that were 7.5 and 5.5 times higher than what he had produced before. **The Respondent failed to conduct such investigation as was reasonable and, had it done so, it might have come to a different conclusion.**
>
> 120 **When the Claimant was invited to the disciplinary hearing he was told that the purpose of the hearing was to consider whether he should be disciplined for failing to engage in the PIP process and to take it seriously. He was not told that it was going to consider whether there had been a breakdown of trust and confidence** because his solicitors had said in the grievance appeal that his manager had been complicit in the fraud. **That was raised for the first time by Mr Beaton towards the end of the hearing. The Claimant's response to it (see paragraph 90 above) does not indicate that he accepted that that was the case. The Claimant should have been given advance notice that that was going to be considered at the disciplinary hearing and that it might lead to his dismissal and he should have been given an opportunity to prepare his response to that allegation.**
>
> 121 For the reasons given above, we concluded that the dismissal was unfair. [emphasis added]

Summary of the conclusions of the Employment Tribunal

62. To summarise the conclusions of the Employment Tribunal:

62.1. D1 and D2 were protected disclosures; the claimant reasonably believed that the information he disclosed tended to show wrongdoing and reasonably believed that the disclosure was made in the public interest

62.2. D3 was a protected disclosure; the claimant reasonably believed that the information he disclosed tended to show wrongdoing. The Employment Tribunal did not expressly consider whether in the reasonable belief of the claimant the disclosure was made in the public interest.

62.3. D4 and D5 were not protected disclosures because the claimant did not reasonably believe that the information he disclosed tended to show wrongdoing

62.4. Det 1 was made out but was not done on the grounds of the claimant making protected disclosures D1, D2 or D3

62.5. D6 and D7 were not protected because the claimant did not reasonably believe that the information he disclosed tended to show wrongdoing or that the disclosures were made in the public interest

62.6. Det 2 was made out but was not done on the grounds of the claimant making protected disclosures D1, D2 or D3

62.7. The reason, or principal reason, for the claimant's dismissal was not the making of protected disclosures D1, D2 or D3

62.8. The dismissal was unfair

The reconsideration decision

63. The claimant made a very detailed 37-page application for reconsideration that was refused by Employment Judge Grewal on 22 December 2022:

> Employment Judge Grewal has considered your application for reconsideration dated 16 December 2022 under Rule 72(1) of the Employment Tribunals Rules of Procedure 2013. The application is refused because she considers that there is no reasonable prospect of the original decision being varied or revoked and it is not in the interests of justice to reconsider it.
>
> **Your grounds for applying for reconsideration, in essence, are that you do not agree with the findings of fact that the Tribunal made.** You are seeking to relitigate issues that have been determined and to persuade the Tribunal to come to different findings of fact. The Tribunal took into account and understood all the points that you made at the hearing in making its findings of fact and reaching its conclusions. **It is not in the interests of justice to relitigate the matter just because you do not agree with the Tribunal's findings of fact and conclusions.**

The appeal

64. The claimant appealed the liability judgment and refusal of reconsideration. The notice

of appeal challenging both the liability judgment and reconsideration judgment incorporated the lengthy reconsideration application:

> 1. I am therefore appealing her judgment because **no reasonable tribunal could have reached her decisions if they had reviewed the correct facts**. It would be in contradiction with the law and/or in contradiction with common sense and/or **in contradiction with the Legal Guidance from the Crown Prosecution Service about Expertise**, as **detailed in each of my 15 topics in my Reconsideration Request.**

65. This single ground of appeal challenges the findings of fact of the Employment Tribunal and raises issues about "expertise". As we will see the reference to "expertise" reflects the claimant's position that the loss adjusters and those consulted by them should have been treated as if they were expert witnesses in court proceedings. These challenges were set out in greater detail in the "topics" in the reconsideration application, albeit that many are hard to understand.

The sift

66. The appeal was considered at the sift stage by His Honour Judge Beard who was of the opinion that there were no reasonable grounds for bringing the appeals for the purposes of Rule 3(7) **EAT Rule 1993**:

> 4. The findings of fact from the ET arise out of the evidence that was led before them, the ET is uniquely placed, having heard from witnesses to resolve disputes between them and to reach conclusion as to the facts. The Appellant may disagree with those findings but that is not a basis of appeal which must be based on an error of law.
>
> 5. The key finding was that, despite the Appellant having made protected disclosures, those disclosures were not the cause of the treatment he complained about. That finding was open to the ET in the circumstances. The *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 point is only relevant if it was found that someone manipulated a process to lead to dismissal. The ET here found the opposite that the decisions on performance were unrelated to the disclosures.
>
> 6. The reconsideration request was treated by the EJ correctly. The EJ was to consider whether it was in the interests of justice to re-open proceedings. Given that this was a challenge to factual findings that could only be allowed in very limited circumstances. There was nothing in the material in the reconsideration request which would allow a Judge to consider a further hearing was necessary.

The Rule 3(10) decision

67. The claimant challenged the opinion of Judge Beard pursuant to Rule 3(10) **EAT Rules**. Mathew Gullick KC, Deputy Judge of the High Court, permitted the appeal to proceed. He concluded that this was not "at least arguably, a case in which he was raising a "disagreement" with factual findings on appeal". Judge Gullick stated that the essence of the claimant's case was that "very important aspects of his case were simply not dealt with by the Employment Tribunal". Judge Gullick identified four specific issues that merited consideration at a full hearing but also stated:

> These points were all, in my view, sufficiently arguable errors of law and made within the 15 grounds for reconsideration submitted to the ET, which are relied on in the notice of appeal and all of which I permit to proceed. I did not consider it necessary for the Appellant to re-formulate his grounds of appeal.

68. Mr Siddall contended that Judge Gullick only permitted the four specific points that he identified to proceed. We consider that Judge Gullick permitted all 15 "topics" raised in the reconsideration to proceed because no part of the appeal was dismissed in his order and the claimant was not required to reformulate the grounds of appeal which incorporated the reconsideration application.

Cross Appeal

69. Two grounds of cross appeal were permitted to proceed by Mrs Justice Eady. The first challenges the approach that the Employment Tribunal adopted to the question of whether the disclosures of information by the claimant were in his reasonable belief made in the public interest. This ground is contingent on the claimant succeeding in his appeal. The second ground challenges the finding of unfair dismissal, contending that the Employment Tribunal failed to analyse the appeal process in determining the fairness of the dismissal.

Appeals to the EAT

70. An appeal to the Employment Appeal Tribunal lies only on a question of law: section 21 **Employment Tribunals Act 1996**.

71. In **British Telecommunications Plc v Sheridan** [1990] IRLR 27, the Master of the Rolls held:

> 34. … Any court with the experience of the members of the Employment Appeal Tribunal, and in particular that of the industrial members, will in the nature of things from time to time find themselves disagreeing with or having grave doubts about the decisions of Industrial Tribunals. When that happens, they should proceed with great care. To start with, they do not have the benefit of seeing and hearing the witnesses, but, quite apart from that, Parliament has given the Employment Appeal Tribunal only a limited role. Its jurisdiction is limited to a consideration of questions of law.
>
> 35. On all questions of fact, the Industrial Tribunal is the final and only judge, and to that extent it is like an industrial jury. The Employment Appeal Tribunal can indeed interfere if it is satisfied that the Tribunal has misdirected itself as to the applicable law, or if there is no evidence to support a particular finding of fact, since the absence of evidence to support a finding of fact has always been regarded as a pure question of law. It can also interfere if the decision is perverse, in the sense explained by Lord Justice May in **Neale v Hereford & Worcester County Council** [1986] ICR 471 at 483.

72. The findings of fact of an Employment Tribunal can only be challenged in very limited circumstances as summarised by Lady Haldane in **Granger v Scottish Fire & Rescue Service** [2025] EAT 90:

> 29. As to the role of the EAT in appeals such as the present one, under section 21 of the Employment Tribunals Act 1996 an appeal to the Employment Appeal Tribunal lies only on a question of law. Useful guidance as to the proper approach is found in the judgment of the Court of Appeal in *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9], where examples of errors of law are given and include: i) making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters"); ii) failing to give reasons or any adequate reasons for findings on material matters; iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters; iv) giving weight to immaterial matters; and, v) making a material misdirection of law on any material matter.

73. The limited scope of any challenge to the findings of an Employment Tribunal was emphasised by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] IRLR 1016.

74. Where it is asserted that, on the basis of conflicting evidence, a perverse decision has been reached, the test to establish perversity is especially high, in that it must be concluded that no reasonable tribunal could have arrived at the decision reached: see **Yeboah v Crofton** [2002] IRLR 635 at [93]:

> Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal it must proceed with 'great care.

Analysis

75. We will analyse the 15 topics in the reconsideration application incorporated into the appeal, considering the specific issues identified by Judge Gullick with the applicable topic and the one issue identified by Judge Gullick that does not appear to be linked to a specific topic in the reconsideration application. We will then consider the cross-appeal.

Topic 1 - "my qualifications"

76. In this topic the claimant asserts that his views "should be taken seriously by the Tribunal" and that he was equally qualified to have an opinion about whether there had been a blowout at the Ken Bau-1x well and whether ENI's claim was fraudulent and that the respondent might have been involved in the fraud, or otherwise in breach of a legal obligation, in making a payment in respect of the claim. This does not fit well with his concession that he was not a "drilling expert" and that the loss adjusters and those they consulted "are the experts".

77. The relevance of the evidence about the opinion of the loss adjusters and those they consulted as against the evidence of the claimant primarily went to the question of whether the claimant could reasonably believe that the information he disclosed tended to show wrongdoing in respect of his disclosures that were not found to be protected. This was a matter about which

the Employment Tribunal had conflicting evidence. The Employment Tribunal was entitled to resolve the conflict as it did. There was no error of law in the assessment of the Employment Tribunal and its determination cannot be said to be perverse.

Topic 2 - "loss adjusters are not fully independent parties"

78. The claimant asserts that loss adjusters are not fully independent from insurers or reinsurers. This topic appears to be based on a misconception that their evidence had to have the status of an independent expert evidence in court proceedings. The claimant's argument is illogical in that it is premised on the suggestion that any lack of independence might have resulted in the loss adjusters advising that payment should be made by the respondent. One would have assumed that lack of independence would have resulted in advice against making payments.

79. The evidence about the reports of the loss adjusters was part of the factual matrix in assessing whether the claimant had a reasonable belief that the information he disclosed tended to show wrongdoing. The claimant asserts that the Employment Tribunal "should consider that my own scientific report is seriously questioning the content and the purpose of these loss adjusters[']reports, and that my qualifications give me the possibility to be a respected party in this discussion". The Employment Tribunal was entitled to assess the evidence about the opinion of the loss adjusters as against that of the claimant and to prefer the former. This topic does not give rise to a valid ground of appeal.

Topic 3 - "undocumented quotes should not be taken as facts"

80. The claimant asserts that the Employment Tribunal should not have accepted any evidence that was not documented. There is no such limitation on the evidence that the Employment Tribunal can take into account. The claimant asserts that the Employment Tribunal "relied on statements attributed to third parties, which are not confirmed by evidences, to make conclusions". To the extent that it did so this involved no error of law. There is no

requirement that evidence can only be accepted if documented. The claimant raises two specific points. He asserts that the Clyde & Co report about the blowout should not have been treated as conclusive. Clyde & Co did not assert that there had been a blowout but provided legal advice about the consequences on the assumption that there had been a blowout. The claimant also asserts that the evidence from the loss adjuster with drilling experience in Houston working for Matthews Daniel should not have been accepted as it was not documented. This was part of the factual matrix that the Employment Tribunal was fully entitled to take into account. There was evidence that the colleague from Houston had been contacted and supported the opinion that there had been a blowout. There is no error of law in the analysis of the Employment Tribunal.

Topic 4 - "a flawed argument from authority is not an acceptable evidence"

81. The claimant asserts that the report from Matthews Daniel was "accepted blindly" which contradicts the "Legal Guidance from the Crown Prosecution Service about Expertise". This again is an illustration of the fact that the claimant thought that the evidence about the advice given by Matthews Daniel should be treated as if they were independent experts in a court case. The relevance of the advice they gave primarily went to the question of whether, in the light of the advice available at the time, the claimant could reasonably have believed that the disclosures found not to be protected tended to show wrongdoing. There was no error of law in the analysis of the Employment Tribunal.

Topic 5 - "the LWI report is not an acceptable evidence"

82. This is the basis for the first of the issues that Judge Gullick identified:

> The Appellant argues that at paras.102-103 of the reasons, the ET failed to address his argument that because only the conclusions (and not the detailed reports / analysis) of the reviews had been provided to him at this point, his belief remained reasonably held (so affecting the decision on reasonableness of belief for disclosures 4 to 7).

83. The Employment Tribunal was well aware that the claimant had not been provided with the full presentation from Lloyd Warwick International and found that they "did not want it widely known in the market that they had been asked to review MD's work product. She asked him, therefore, not to share it with anyone, even internally". The conclusion reached by Lloyd Warwick International was only part of the material that the Employment Tribunal found was provided to the claimant that meant that it was not reasonable for him to believe that the information he disclosed, in the disclosures that were not found to be protected, tended to show wrongdoing. There is no error of law in the reasoning of the Employment Tribunal.

Topic 6 "no evidence that Ms Fenner was made aware of the fraud in November 2019"

84. The title is misleading. The claimant's real challenge is that he contends that there was no evidence that he was advised to contact Ms Fenner in November 2019. In dealing with this period in his witness statement Mr Dawson states "Upon hearing his concerns, I directed Olivier to talk to Ms Fenner". Thus, there was a proper evidential basis for the determination of the Employment Tribunal. There is no error of law in this regard.

Topic 7 - "the respondent concealed information"

85. The fourth issue identified by Judge Gullick is possibly linked to this ground:

> Also in relation to the detriments and automatically unfair dismissal, the ET arguably does not address the Appellant's argument that in light of later disclosure to him of the content of reports about which he had earlier only been told conclusions, his managers had (on his case) engaged in a "cover up" demonstrating that his purported dismissal for performance issues was in fact because of one or more disclosures.

86. The claimant asserts Mr Dawson and Mr Burton "were concealing information". In part this seems to be linked to the fact that the claimant was not initially provided with the full Lloyd Warwick International presentation. The Employment Tribunal accepted the respondent's explanation of why only the conclusion was provided. The Employment Tribunal did not consider that there was a cover up. That was a conclusion that was clearly open to the

Employment Tribunal on the evidence. There is no error of law in this regard.

Topic 8 - "prosecution of ENI in Italy"

87. The Employment Tribunal found that Mr Burton did not consider the fact that ENI was being prosecuted in Italy for allegedly bribing Nigerian officials was relevant to the question of whether the claim in respect of the Ken Bau-1x well was fraudulent. The claimant asserts that "it was my belief that Mr Burton wanted to conceal a fraud". The Employment Tribunal was fully entitled to reject the claimant's evidence. There is no error of law in the analysis of the Employment Tribunal.

Topic 9 - "save money to the company"

88. The Employment Tribunal noted, as part of the increasing concerns about the claimant's performance in the summer of 2020, that he had not written or reviewed any risks and that Mr Burton referred to his having "disappeared" over the summer". The claimant contends that in continuing to investigate the Ken Bau-1x well claim he could have saved the respondent money. The Employment Tribunal was entitled to hold that the respondent legitimately thought that the claimant was failing to undertake his key job duties and so required performance management. There is no error of law in the decision of the Employment Tribunal.

Topic 10 - "Team Energy 3902 objectives and achievements"

89. The claimant contends that "the Tribunal should reconsider if the performance issues claimed by the Respondent are legitimate". The Employment Tribunal held that the claimant had agreed to the performance targets set by the respondent but that they constituted a detriment. The Employment Tribunal held that this did not result from his protected disclosures. This was a factual finding that was open to the Employment Tribunal on the evidence and there is no error of law in its determination.

Topic 11 - "the annual objectives are in respect of new risks"

90. The Employment Tribunal found as fact that "The target of 10 risks a month included

new clients and renewals for existing clients. The Claimant misunderstood it and thought that he was expected to underwrite risks for 10 new clients each month". This was a factual determination that was open to the Employment Tribunal and involved no error of law.

Topic 12 - "risk count"

91. The Employment Tribunal held that the respondent "believed that the Claimant's risk and submission count and premium written were lower than they should be for someone in his position". The Employment Tribunal also held that even if lower targets had been set, that were not detrimental to the claimant, he would not have met them. There is no error of law in that factual determination on the basis of the evidence before the Employment Tribunal.

Topic 13 - "forged documents used as evidence contradict the timeline"

92. The Employment Tribunal did not accept that any documents were forged. That was a factual determination that was clearly open to the Employment Tribunal. There is no error of law in the decision of the Employment Tribunal.

Topic 14 - "personal interest"

93. This is linked to the second issue identified by Judge Gullick:

> The Appellant argues that at para. 105 of the reasons, the ET failed to address his argument that during the period referred to he had consulted criminal (and not employment) lawyers, on the basis he was concerned only about potential criminality rather than his own position, so affecting its decision on public interest on disclosures 6 and 7.

94. An Employment Tribunal is not required to refer to every piece of evidence. It gave more than adequate reasons as to why it considered that in respect of some disclosures the claimant did not have a reasonable belief that the disclosure was made in the public interest. There is no error of law in the decision of the Employment Tribunal.

Topic 15 - "disclosure to Brothers not made available to Beaton"

95. We do not consider that this was a matter about which the Employment Tribunal was required to make a determination. There is no error of law in the decision of the Employment

Tribunal.

Judge Gullick's third issue

96. Judge Gullick identified the following issue in his reasons for permitting the appeal to proceed:

> In relation to the alleged detriments, it appears that the ET's findings are predicated only on the first 3 disclosures and do not discuss whether any later disclosures (even if not protected) influenced them. Arguably, if those later disclosures were in fact protected then the findings on detriment and automatically unfair dismissal cannot stand

97. This issue is contingent on the claimant establishing that the Employment Tribunal should have found that some of his disclosures after D1-3 were protected. As he has not done so the point is moot. That said, it is correct that the Employment Tribunal found that Det 1 and 2 were not done on the grounds that the claimant had made protected disclosures D1-3 and that the making of protected disclosures D1-3 was not the reason, or principal reason, for the dismissal of the claimant. However, on a fair reading of the judgment, the Employment Tribunal also made factual findings about the reasons for the detrimental treatment and dismissal that would have meant that the complaints would have failed even if some or all of the other disclosures had been held to be protected.

Overall

98. Judge Gullick considered that "this was not, at least arguably, a case in which [the claimant] was raising a "disagreement" with factual findings on appeal". Accordingly, the appeal merited more detailed consideration at a full hearing. That is the purpose of the Rule 3(10) procedure – to ensure that appeals that appear sufficiently arguable to merit more detailed scrutiny than at a Rule 3(7) sift receive it. Having given the appeal that greater level of scrutiny, we conclude that there was no error of law in the decision of the Employment Tribunal.

The reconsideration appeal

99. There was no error of law in the rejection of the application for reconsideration which

was correctly held to be no more than a challenge to the findings of fact of the Employment Tribunal.

The Cross Appeal

Ground 1 – public interest

100. This challenge only arose if the appeal succeeded and so is moot.

Ground 2 – failure to consider the appeal

101. The Employment Tribunal analysed the fairness of the dismissal briefly and only by considering the initial decision to dismiss. The Employment Tribunal did not consider the appeal at all in its overall analysis despite having made relatively detailed findings of fact about the appeal. While the respondent did not specifically refer to **Taylor v OCS**, the respondent pleaded that the process including the appeal was fair. It is arguable that the appeal process could have remedied the failings at the initial stage, particularly the lack of advance notice that the respondent considered that there had been a breakdown in trust and confidence. The claimant was arguably able to address this point in the appeal. The appeal outcome included a finding that trust and confidence had broken down and it had become impossible to agree any alternative performance objectives for the claimant. The second ground of cross-appeal succeeds.

102. It cannot be said that there is only one answer to the question of whether the dismissal was fair once the appeal is taken into consideration. The Employment Judge has retired. If she is sitting in retirement, we consider that remission should be to the same Employment Tribunal, because the failure to consider the appeal in the analysis of whether the dismissal was fair appears to be an oversight and the vast majority of the findings of the Employment Tribunal have been upheld. However, if she is not sitting in retirement the remission should be to a panel chaired by a different Employment Judge. It will be for the Regional Employment Judge to decide whether it is practical for the original panel members to sit.