Neutral Citation Number: [2022] EAT 49

Case No: EA-2021-000784-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 December 2021

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MR M CARR	**Appellant**
- and -	
BLOOMBERG LP	**Respondent**

- -
- -

James Wynne (Instructed under the auspices of Advocate) for the **Appellant**
James Laddie QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Respondent**

APPEAL & CROSS APPEAL
Hearing date: 1 December 2021

- -

JUDGMENT

SUMMARY

WHISTLEBLOWING & PROTECTED DISCLOSURES

The claimant appealed from the decision of the Employment Tribunal ("ET") to strike out two of the protected disclosures upon which he relied as having no reasonable prospects of success. The respondent cross-appealed the ET's decision not to strike out the remaining five protected disclosures.

The claimant was employed by the respondent as a reporter on Natural Gas, Carbon & Power. He took issue with the respondent's coverage of climate change issues. He relied on six written communications and one oral discussion with his employer. He said that these contained qualifying disclosures capable of meeting the criteria prescribed by s.43B, limbs (1)(e) and /or (1)(f), in terms of tending to show environmental damage (whether by the respondent or more generally) and/or deliberate concealment of such damage by the respondent. In relation to two of the disclosures he also relied on s.43B(1)(b), for present purposes on the basis that his employer had taken retaliatory action against him.

The appeal was dismissed, and the cross-appeal allowed. The first and third elements of the statutory criteria involved the application of objective tests and could be assessed at the strike out stage on the basis of the undisputed contents of the communications relied upon and assuming the claimant's pleaded case and the context he relied on in his favour.

The ET had erred in failing to apply the test identified in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 when considering the first element of the statutory criteria in relation to the limb (1)(e) and (1)(f) claims, namely whether the disclosures were capable of containing 'information' within the meaning of s.43B(1).

Further the ET had erred in failing to apply the test identified in **Chesterton Global v Nurmohamed** [2018] ICR 731 and/or in failing to consider the third element of the statutory criteria, namely whether there was any reasonable prospect of the claimant showing that he reasonably believed the disclosure was in the public interest, in relation to the claims based on limb (1)(b) and the secondary way the

case was put in respect of limb (1)(e) (the more general allegation concerning environmental damage). In each instance, when the correct test was applied it was apparent that the claimant had no reasonable prospects of success as the words he relied upon were not capable of meeting the third element of the statutory criteria.

There was no realistic prospect of the claimant being able to improve his claims in these respects before the full merits hearing. The five remaining protected disclosures were therefore struck out.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE:

1. The claimant appeals the decision of the London Central Employment Tribunal, Employment Judge Adkin sitting alone ("ET") to strike out his second and third alleged protected disclosures on the ground that there was no reasonable prospect of them meeting the applicable statutory definition. The Preliminary Hearing was on 28 April 2021 and the reserved judgment was sent to the parties on 9 June 2021.

2. The other five alleged protected disclosures that were not struck out by the ET are the subject of a cross-appeal by the respondent, who contends that these should also be struck out by this tribunal, as having no reasonable prospects of success.

3. The appeal was permitted to proceed to a full hearing by John Bowers QC sitting as a Deputy High Court Judge following consideration of the papers on 21 September 2021 and the cross-appeal was permitted to proceed to a hearing by Choudhury J, President, following consideration of the papers on 2 November 2021.

4. On 8 June 2021 the ET also made deposit orders in the sum of £50 each as a condition of the claimant proceeding with Protected Disclosures 4 and 7. I understand that those sums were paid.

5. The timing of this appeal is unusual, the full merits hearing is due to commence next Monday, 6 December, and has been listed for 10 days. In a case management order made on 25 September 2021, following a case management hearing the previous day, the Employment Tribunal decided it would be inappropriate to vacate the trial listing pending resolution of this appeal. The parties were understandably keen for the appeal to be heard and to have my decision before the commencement of the substantive hearing. The hearing before me took place on Wednesday, 1 December. Given the

breadth of the issues involved, the parties' submissions took the whole court day. I was then involved in hearing a different case on 2 December and in the circumstances the only practical solution in terms of delivering a decision before the commencement of the substantive merits hearing was for me to give a read-out judgment on Friday, 3 December 2021.

The Claimant's Case

6. As the ET was determining a strike out application it is common ground that the claimant's pleaded case should be taken at its highest so far as factual allegations are concerned.

7. The claimant is a journalist. He was employed by the respondent from 2000 until his dismissal on 21 May 2020. From 2002 his role was reporter, Natural Gas, Carbon and Power. He worked at the respondent's London offices as part of Bloomberg News. The respondent has around 20,000 employees and over 150 offices globally.

8. On 28 May 2020, he instituted proceedings for automatic unfair dismissal pursuant to section 103A of the **Employment Rights Act 1996 ("ERA")**; in other words, asserting that he was dismissed for making protected disclosures. He also claimed, pursuant to section 47B **ERA**, that he had been subject to detriments for making protected disclosures and ordinary unfair dismissal.

9. By the time of the hearing before the ET, the strike out application was only concerned with whether the seven protected disclosures relied on by the claimant met the section 43B **ERA** definition of qualifying disclosures. Each of the alleged qualifying disclosures was made to the respondent.

10. In his particulars of claim, the claimant described the circumstances that gave rise to him making his alleged protected disclosures. At paragraph eight he said: "Around the time of the Paris Climate Conference in 2015, the Claimant became increasingly concerned about the Respondent's

coverage of climate change and related issues".

11. He then fleshed this out in paragraph 10:

> **"The essence of the Claimant's concerns leading up to and following the Paris Agreement was that the Respondent's reporting of climate change issues was biased and the Respondent sought to suppress news stories relating to the carbon emissions and how to limit them. The Claimant says that the Respondent sought to limit the amount of coverage of climate change policy and carbon pricing in the news that it disseminated. It limited coverage of market-based solutions that might have spurred climate action and limited the damage to the environment. The Respondent, as a significant global news organisation with influence of policy and markets, sought to conceal the damage done by nations and corporate carbon emitters as they failed to meet the guidelines and obligations agreed in the Paris Agreement."**

12. The claimant alleged that after he began making protected disclosures, he faced retribution in that he was placed on a performance improvement plan, subjected to warnings and ultimately dismissed.

13. The claimant's case in relation to each of the alleged qualifying disclosures was originally set out in his particulars of claim and then was the subject of a schedule giving further and better particulars ("the Schedule"). As well as considering the pleadings, I have read in full each of the six written disclosures (Protected Disclosure 7 was made orally).

14. The claimant alleged that in all seven instances, his disclosures were disclosures of information, which in his reasonable belief tended to show that the "environment has been, is being, or is likely to be damaged" within the meaning of limb (1)(e) of section 43B, and/or that the information tended to show that this has been, or is likely to be, deliberately concealed within the meaning of limb (1)(f), that concealment relating to the limb (e) matters. In relation to Protected Disclosures 5 and 6 the claimant also relied on limb (1)(b), in other words he said that these disclosures tended to show that a person has failed, is failing, or is likely to fail to comply with a legal

obligation to which he is subject.

15. It was agreed at the hearing before me, after some discussion with counsel, that the claimant's case under limb (1)(e) was essentially put on two bases. Firstly, that his references to the climate crisis, or aspects of it, itself satisfied the limb (1)(e) criteria; I will call this "the wider basis". Secondly, that he had expressed concerns that the respondent itself was causing or was likely to cause environmental damage by the way it was not reporting or had reported certain energy related stories so as to meet the limb (1)(e) criteria; I will call this "the narrower basis".

16. As regards limb (1)(f), the claimant relied on the proposition that his communications indicated the respondent was deliberately concealing damage to the environment, by the nature and/or focus of its reporting of certain energy-related stories.

17. I will turn to the specifics of each of the alleged protected disclosures. The six written disclosures comprised 38 pages of the bundle before me and therefore I do not propose to refer to their entire contents. However, I have taken it all into account.

Protected Disclosure 1

18. This alleged protected disclosure was contained in an email from the claimant to Lucy Mills, Human Relations Officer, and was sent on 20 May 2016. The claimant was appealing a first written warning that had been given to him by his then team leader, Lars Paulsson on 13 May of that year. He said in the email that the warning was based on unfair performance targets and the procedure leading up to it had been unfair; he developed both those points in the course of the email. The email in its entirety comprises just over two pages of single spaced text.

19. The Schedule identified the text that the claimant relied upon as constituting each of the

qualified disclosures in a column headed "Relevant Information". There was a slight caveat entered by the claimant at the start of the relevant column in each instance, in as much as the text then set out was said to "include" the parts that were relied upon (or the equivalent). However, as I will indicate, I have also taken into account other passages that Mr Wynne took me to during his submissions on Wednesday.

20. The "Relevant information" column set out three relatively short passages from the longer email as follows.

> **"As the climate crumbles, I was expressly told by Lars (Paulsson, team leader at the time) to write fewer carbon stories, but there was no clear direction about what I should otherwise do."**
>
> **The media companies that understand the wastefulness of spending $200 a ton to cut emissions via offshore wind farms now when today that sum will probably cut 10 tons via a coal-to-gas switch… will become rich.**
>
> **Our coverage is too focused on fossil fuels without the important climate context and I believe we should be writing more about climate protection when pretty much all the governments and our clients are asking for carbon pricing... publicly anyway."**

21. The claimant was also required to identify via the Schedule the details of the specific legal obligation and/or damage to the environment and/or concealment of information that he relied upon and this was set out in the column headed, "Breach" as follows.

> **"Section 43B(1)(e) – damage to the environment; section 43B(1)(f) – deliberate concealment of damage to the environment.**
>
> **The Claimant's disclosure referred to a specific instruction by his team leader at the time to write fewer stories related to carbon emissions.**
>
> **The Claimant's reasonable belief was that the environment was being damaged by the failure of emitters to adhere to the legally binding standards enshrined in the 2016 Paris Agreement. This resulted in, *inter alia,* temperatures rising, polar ice melting, rising sea levels, increasingly damaging wildfires, deadly foods, tropical cyclones, devastating droughts, and more natural disasters generally.**

> **Bloomberg News has a global reach and provides news and data for hundreds of important energy markets across the world.**
> **Bloomberg LP also has a crucial role in debt and equity markets globally.**
>
> **In the Claimant's reasonable belief, the editorial constraints imposed by Bloomberg, which restricted the publication of stories on climate change and the carbon budget, led to clients, including corporate clients, being uninformed about the dangers posed to the environment by ongoing carbon emissions. This, in turn, led to damage to the environment because major corporate entities, investors, energy markets and the public at large were not informed about the carbon balance and global warming in a proper and balanced way.**
>
> **Further, the information disclosed tended to show that damage to the climate was being deliberately concealed by Bloomberg's editorial guidelines and control over the content produced by journalists, which restricted the manner in which, and the extent to which, journalists such as the Claimant could report on carbon and climate change issues."**

22. I have also borne in mind what is said in the particulars of claim, particularly paragraph 13 insofar as it might be thought to add to what is in the Schedule.

23. In terms of the document itself, in addition to the passages identified by the claimant in the Schedule, the respondent emphasised a sentence that appears when the claimant started to explain why he says the performance targets were unfair:

> **"I want to start by accepting there are areas in which my performance could improve. I accept that at times my writing isn't engaging editors and readers quickly enough on complicated stories, such as how to infuse economies with market prices that deter damaging greenhouse gases."**

24. Later in the email the claimant acknowledged that he needed to further widen his scope beyond climate and carbon and that he was doing that already.

25. Mr Wynne also emphasised a passage that referred to, "…whichever news company that properly covers in a regular, systematic way the damage that each new fossil fuel project will cause…" as a reference to environmental damage.

Protected Disclosure 2

26. This communication was contained in an email sent by the claimant on 18 January 2017 to John Micklethwait, the editor in chief. The claimant had spoken to him the previous Friday and was now contacting him with his thoughts regarding the focus of news coverage on climates talks and related matters. The subject of the email was, "John - how better climate reporting will lift profits, cut risk". The email comprises two pages of the hard-copy bundle. The passages that the claimant relied on as constituting a qualifying disclosure were identified in his Schedule under the heading, "Relevant information" as follows:

> "**The Paris climate deal effectively sets a global carbon budget for the world because of its 2 degree C target. That emissions cap means the world effectively already has a global carbon market.**
>
> **When companies, such as the big miners in Australia, propose new fossil-fuel projects, we at Bloomberg News should insist reporters consider including the impact of those plans on the global carbon budget. It's like putting warning labels on cigarette packets.**
>
> **Unless we do this, we'll be open to criticism and reputational risk in the future because the information investors relied on when spending their money omitted the relevant context. However woolly, this climate agreement now exists. We shouldn't ignore it…**
>
> **We need to cover the climate talks more comprehensively to help focus politicians' and envoys' minds. When progress isn't made, we need to better report why. Otherwise, these talks will continue to struggle.**"

27. In the column of the Schedule headed, "Breach" the claimant indicated he relied upon limb (1)(e) – damage to the environment and limb (1)(f) – concealment of damage to the environment and the text he had set out in this column in respect of Protected Disclosure 1. He added:

> "**The information tended to show that if Bloomberg failed to cover the climate talks comprehensively there was a risk that climate talks would fail leading to further environment damage**."

28. I have also taken into account paragraph 15 of the particulars of claim. In addition to the passages that are set out in the schedule, Mr Wynne emphasised a passage on the second page of the email where the claimant said:

> **"I'm blowing this whistle because I reckon we're at risk of missing out on scores of millions of dollars in new revenue. We can extend our lead vs our rivals. That opportunity cost is much more difficult to measure than web hits, of course. Missing out is still messing up. History will show it".**

29. For the avoidance of doubt, I emphasise that I am not setting out every single passage that I was taken to in submissions, but rather those which, one way or the other, appear to be the most significant.

30. My attention was also drawn to the first sentence of the second paragraph of the email by Mr Laddie. It said: "After covering carbon markets for 15 years, I might be picking up on an undercurrent that others at Bloomberg News are not feeling". He also emphasised that the claimant included within the email reference to the fact that Bloomberg was being beaten on stories and advisory analysis by other companies.

Protected Disclosure 3

31. The particulars of claim plead that Mr Micklethwait told the claimant that he should raise the issues in his 18 January 2017 email with his editors. The claimant duly did so by an email sent on 20 January 2017 to Heather Harris, Stuart Wallis, Will Kennedy, Lars Paulsson and Andy Reierson. The content largely replicated the email that is Protected Disclosure 2. Insofar as additional text is relied on, it is set out in the "Relevant Information" column of the Schedule, as follows:

> **"BNEF is far from the entire solution to our climate coverage. BNEF isn't as enmeshed in real-world markets as we are. Are we giving enough information to terminal and BNEF subscribers and making them fully aware of the ground shifting beneath them?**
>
> **When we write about countries' energy policy strategies, we should better include analysis about the direct carbon prices."**

32. As regards his belief that the words tended to show damage to the environment and/or deliberate concealment of this, the claimant's case was set out in the "Breach" column of the Schedule

as follows:

> **"The information also tended to show that Bloomberg's newsroom practices and editorial direction risked damaging the environment because they were favouring fossil- fuel news and creating environmental damage. Clean energy solutions were not given a fair airing."**

Protected Disclosure 4

33. This was an email from the claimant sent on 13 March 2019 to Jignesh Ramji and copied to Ken Cooper, both senior Human Resources Executives. The subject was, "Call for office politics assistance". The printed email comprises five pages with a further 10 pages of appendices.

34. The claimant said in the email that he is seeking advice from the recipients as to how to improve his team dynamics and to handle his managers better so they do not get in the way of his news output. He said he would like help addressing the issues he raised. He then set out a number of issues under a series of headings. To give a flavour; some of those headings were, "Respectfulness in leadership", "Not responding to emails/concerns" and "Templated elements in evaluation".

35. All of the text that appears in the claimant's schedule in the "Relevant Information" column is from the text of the email that appeared under the heading, 'Unconscious bias?' It is set out over six pages (pages 80 to 85 of the bundle). Given its length I will not refer to it all, but will give a flavour:

> "**For years I've been questioning whether Bloomberg News is too focused on the short term status quo re energy news. I realize BloombergNEF might have been too long-term focused in recent years, but now it's lifting its game and providing more analysis our customers can trade on in the frame of the next few months. I think someone from outside our management structure needs to assess whether we are now pivoting too much to the short term – why did we shift away from carbon markets just as they came back/ Are we moving away from energy market structure stories just as market structure becomes crucial? Why are we setting limits on market structure stories when we know the existing market structure is not working well for anyone (except the status quo maybe)? Why are we focused so much on the RESISTANCE to climate protection rather than what's happening with new climate measures? Are**

> **biases / unconscious biases damaging our service?**
> **I think someone outside our management structure needs to check whether my managers have unconscious biases against some people on our team and against certain stories and themes; do we have biases against certain countries / for certain countries.**
>
> **…HR may need to be MORE involved to make sure there are no unconscious biases or worse…and partly given Mike Bloomberg's roles as well as Bloomberg Philanthropies activities…**
>
> **I recognize that some of the words in my evaluation were helpful and there's still plenty of scope for improvement on my part, even after almost 20 years with the company. But I think 'steady at the low end of what's expected' would shock many of our customers trading on my news almost daily. Is it appropriate that my managers declined to reassess my 2018 evaluation after hearing my arguments? Do they have a bias against me, unconscious or otherwise? Are they maybe threatened."**

36. In Mr Wynne's oral submissions he also emphasised a passage on the second page of the document within the first hollow bullet point which said:

> **"So I suggest to my leaders we need to do market structure stories because it is the structure of energy markets that will determine how investors make money during the energy transition over time. I'm a bit shocked that my managers still argue against this … to the extent of suggesting specific limits on the number of these stories in my evaluation last month – one market structure story every six months was one suggestion."**

37. Mr Wynne also drew my attention to a passage in the third hollow bullet point on the same page that began: "There is a recurring theme where my managers say I am not neutral enough on climate protection stories, well I say I am neutral and they are not neutral enough on status-quo fossil-fuel coverage".

38. For different reasons both counsel drew my attention to the penultimate paragraph of the email, which said:

> **"I'm not meaning to downplay the high quality of our news coverage. I'm writing this email because I think it is the right thing to do -- because making my arguments and blowing the whistle mainly within my team structure as I have the past few years might not have been good enough. And I am pretty sure it still hasn't yielded the best outcome for our customers … Im [sic] wanting fresh perspective on it. There are so many opportunity costs."**

39. One of the appendices to this email was an earlier email that the claimant had sent to Will Kennedy, which itself comprised over four pages of text. Within this Mr Wynne emphasised the following text: "Do you seriously think there's no link between the world's 'most influential news organisation' not getting to grips with this and the world not getting to grips with it?" On the next page of that appended email, the claimant said:

> **"I'm worried there's a US bias in our coverage. We are quick to demonize countries like Brazil, when countries like mine (Australia) or the US are more credible villains in this stuff are they not given the history of emissions and fossil fuel revenue?"**

40. Then on the page that followed, the claimant said: "Focussing mainly on oil and gas is taking a stance – it's pro status quo.".

41. The claimant also attached the performance review he had received for 2018 and which he expressed concerns about as appendix two.

42. As regards the "Breach" column of the Schedule, the claimant indicated that he relied on the material under Protected Disclosures 1 – 3 and added:

> **The information also tended to show specifically that the Respondent was deliberately concealing the extent of environmental damage by focusing on short-term fossil fuel stories at the expense of stories dealing with carbon budget."**

Protected Disclosure 5

43. This comprised three reports that the claimant filed on 8 June, 19 June and 8 July 2019 with the respondent's Navex ethics hotline. It is agreed that for present purposes their content can be considered cumulatively.

44. The second report included much of the first report and also an attachment. The reports, including the attachment, comprised nine pages. The primary issue is described in the first two reports

as "Retaliation", whereas in the third report it is "Violation of Policy".

45. The text the claimant relied upon is set out in the "Relevant Information" column at pages 86 to 93 of the bundle. The text set out in respect of the 19 June report was as follows:

> **"19 June 2019**
>
> **I'd like to highlight possible problems in the culture, including behaviour by managers that potentially contradicts company policies, including rules to prevent retaliatory conduct.**
>
> **Behaviour of some managers that needs to be investigated:**
>
> ***Culture of retribution; I've attempted to do the right thing and point out flaws in our news sense and focus to higher-up managers**
>
> ***After doing so I receive unfair performance evaluations that downplay key metrics. In follow-up meetings with managers I find managers evasive and unwilling to engage properly; address key issues (they are helpful to some extent)**
>
> ***Needs to be looked into whether there's a culture of bad news story management that's retaliatory… potentially designed to frustrate reporters and lower their work satisfaction, potentially even prod them to move teams or resign**
>
> ***Yes man culture; people who speak out are potentially hounded to dissuade them from speaking out"**
>
> **19 June 2019**
>
> **Big picture is I've been blowing the whistle on Bloomberg's failure to tackle the climate change story properly for years. It needs to be investigated whether my higher ups don't like it and are continuing to retaliate against me.**
>
> **Last week, I challenged a senior manager about the inadequate quality of our climate coverage. A few hours later a group email was sent by Reed to our team about a new team member, who will perhaps be focusing on green issues. That is a good thing. But it also occurs to me that I was never asked if I'd like to do that job. I'd like someone completely neutral to look into how clever this communication was, and whether it's a part of a retaliatory pattern. It might be incompetence, too, which perhaps I've put up with for too long."**

46. Reference was then made to text in the attachment to the report. By way of summary, the

claimant referred to possible retaliatory behaviour he had been experiencing which he said "might be related to the fact that I'm pushing my managers to report the client action story in a better way…" He went on to say that the retaliatory behaviour seemed to be "ramping up".

47. As regards his 9 July 2019 report, the claimant quoted the following in his schedule:

> "**It's against Bloomberg News – Journalistic Code of Conduct policy to cause Bloomberg to disseminate news for the sole purpose of affecting securities prices.**
>
> **It needs to be investigated whether certain managers…are doing this to boost the value of oil companies and other fossil fuel companies, against the interests of the customers that do not benefit from fossil fuel money / profits and against the interests of the company founder's philanthropic efforts.**
>
> **It is also against the code to campaign on behalf of a particular issue in a way that could give rise to the appearance of partiality.**
>
> **It needs to be investigated whether Bloomberg managers have campaigned for fossil fuels and delayed climate action even though they knew the world struck a deal in 2015 to limit greenhouse gas emissions.**
>
> **It needs to be investigated whether those who spoke out against the apparent campaign and its potential to harm customers…have been harassed and retaliated against.**
>
> **Also it needs to be investigated whether – instead of rationally listening and responding to fair suggestions and criticisms – the managers sought to distract from their failings by inventing performance problems in those calling out their bad behaviour.**"

48. The claimant then set out text from the 9 July 2019 report which he said gave examples of the retaliation that he had experienced.

49. In addition to the text included on the Schedule, in submissions to me, the respondent emphasised a passage where the claimant said: "I acknowledge I have been listened to -- to some extent. And sometimes my managers are brilliant at their jobs… and even charming. But problems keep repeating after about five years… and the subject gets changed when I bring up tricky issues."

And both parties relied, for different reasons on the following passage in the attachment:

> **"The possible retaliatory behaviour I am experiencing might be related to the fact that I am pushing my managers to report the climate action story in a better way … and the retaliatory behaviour follows my assertion to senior managers that the Financial Times seems to have overtaken us on this front and is doing a better job than us".**

50. In the "Breach" column the claimant indicated that he relied on the text under Protected Disclosures 1 – 4 in relation to his case on limb (1)(e) – damage to the environment and limb (1)(f) – concealment of damage to the environment. He indicated that in relation to the present disclosure his case was also:

> **"Section 43B(1)(b) - breach of a legal obligation under s47B Employment Rights Act 1996. The information disclosed tended to show that the Respondent was in breach of s.47B ERA because the Claimant was being subjected to retaliation due to prior protected disclosures regarding damage to the environment and/or deliberate concealment of damage to the environment and this represented a cultural issue at the Respondent.**
>
> **Section 43B(1)(b) - breach of a legal obligation. Bloomberg Journalistic Code of Conduct. Specifically that disseminating news for the sole purpose of affecting securities prices was a breach of that code and may breach rules designed to prevent market manipulation. Also that the way in which climate and carbon issues were covered was a breach of the requirement for impartiality in the code."**

51. The contents of the claimant's three Navex reports were investigated by the respondent as a grievance; by a letter dated 23 August 2019, the claimant was informed that his grievance was not upheld. The investigators were Lesley Paul and Sam Fazeli.

Protected Disclosure 6

52. Alleged Protected Disclosure 6 is contained in the claimant's appeal against the grievance outcome; it was emailed to the grievance investigators on 29 August 2019. It comprised five pages. At the outset the claimant said: "I have quite a few questions, as there seems to be some fundamental confusion/inaccuracies I'd like to ask about". He said he would raise them in the order of the outcome document's contents. He then posed a series of questions.

53. The text on which the claimant indicated he placed particular reliance in the "Relevant Information" column of the Schedule was as follows:

> "**Did you investigate the motive for the 'verbal warning' I got for `insubordination – July 23? Who was behind that? Was it retaliatory? It happened after I was denied whistleblower protection.**
>
> **The better stories I write the more retaliatory my management seems to get.**
>
> **Even though I submitted information via Navex, my concerns don't just amount to ethical breaches. I was seeking an investigation that would look into whether the management behaviour is against customer interests…**
> **Global cooperation under the credibility of the UN is the only way the world has got a chance to meet the targets implied in the Paris Climate deal, economists say…**
>
> **My view on Bloomberg's climate coverage is not that we don't do it, it's that we don't do it as well as we know we should. For instance, we don't cover the market structure element of the story properly that's crucial to adjusting capital allocation in the global economy.**
>
> **So did you read the comments in my 2018 evaluation on limiting coverage of UN climate negotiations…and using your clear eyes and gut…do you agree these topics are too weedy for the world's leading (?) media company to cover?"**

54. In the "Breach" column the claimant indicated that so far as the limb (1)(e) and (1)(f) allegations were concerned he relied on the matters he had set out in relation to Protected Disclosures 1 – 4. In relation to the limb (1)(b) contention he set out his case as follows:

> **"The information disclosed tended to show that the Respondent was in breach of s.47B ERA because the Claimant was being subjected to retaliation due to prior protected disclosures regarding damage to the environment and/or deliberate concealment of damage to the environment and this represented a cultural issue at the Respondent."**

55. In addition to that text relied on by the claimant, the respondent emphasised certain passages, in particular:

> **"1. I don't think I provided a confident motivation for the possible retaliatory behavior, so this needs to be adjusted. Ie it might not just be related to my pushing for better climate and power coverage. As discussed on July 22 with Sam, the motivation could be that managers feel threatened by me (they should not if they are doing the right thing). They may simply be trying to**

> **protect their patch? Because they have not done the work to understood [sic] the climate transition, they may be acting out of ignorance …"**

56. And this passage on the fourth page of the email:

> **"I'm not saying we are doing a worse job than other news organizations (well maybe we are worse than the FT)… but I am saying we could do a lot better, especially since we claim on our website to be a/the world-leading news outlet".**

57. In addition to those in the Schedule, Mr Wynne drew my attention to a passage on the first page of the email where the claimant said he found it difficult to believe that treatment he had experienced was "genuine editor prevarication… It needs to be investigated properly whether it's an effort to slow our coverage down and whether it's against customer interest.".

58. On 30 August 2019, the claimant was placed on a performance improvement plan.

Protected Disclosure 7

59. This oral disclosure took place on 21 October 2019. The claimant relies upon words spoken by him to John Fraher, Senior Executive Editor.

60. The relevant part of the Schedule is slightly confusing in terms of what it was that the claimant alleged he actually said to Mr Fraher at the time, as opposed to what Mr Fraher said to him or what constituted comment that the claimant has added.

61. However, as clarified at the hearing, my understanding is that the following paragraphs contain the text that was said by the claimant:

> **"The Claimant said to Mr Fraher that in order to get final agreement on the rules of the Paris climate deal, there would need to be reporting on how to settle the crucial dispute between rich and poor nations.**
>
> **Boiling it down, the essential reason why the world has not agreed a biting**

> **climate deal is because 1 billion of the world's population have gotten rich ruining the climate of world's remaining 7 billion people. The USA is the nation with the most responsibility for climate change, yet has only 4% of the world's population. Bloomberg is based in New York."**

62. The next paragraph, which begins, "Fraher told the meeting" is what Mr Fraher said to the claimant. Then the last paragraph which begins, "The news policy is effectively concealing the political problem" contains words which the claimant accepted that he did not say, rather this was his thought process at the time.

63. In terms of the "Breach" column, the limb (1)(e) and (1)(f) claims rely on the matters that the claimant set out in relation to Protected Disclosures 1 - 4.

The Respondent's Case

64. By way of very brief outline at this stage, the respondent disputed that any of the seven communications relied on by the claimant were capable of meeting the definition of a qualifying disclosure.

65. As it did below, the respondent accepted that the challenge on a strike out can only be to the objective elements of the statutory criteria, as the claimant's factual case on the subjective elements must be accepted at this juncture.

The ET's Judgment

66. Between paragraphs 11 to 17 of the judgment, the Employment Judge gave self-directions on the approach he should take to a strike out application, relying largely on the summary of the applicable principles helpfully given by Linden J in **Twist DX Ltd v Armes** UKEAT/0030/20/JOJ ("**Twist DX**") (a case I will return to). Then at paragraphs 18 to 21, he set out the legal framework in relation to qualifying disclosures; and at paragraph 22, he listed the applicable elements of the

statutory criteria (which I will return to). There is no suggestion that he identified any of those legal principles incorrectly.

67. At paragraph 24, the Employment Judge indicated that he did not consider that a strike out application was the place to develop a new point of law that Mr Laddie had advanced, namely that for a qualifying disclosure to satisfy limb (1)(e), it was required to have an element of, "novelty" as it could not reasonably be thought that something was being raised in the public interest if it was already well known or widely believed. The Employment Judge observed, "I see the force of the novelty submission as an aspect to consider when deciding [if it] might be thought to be reasonably in the public interest, although I would not elevate this to an additional requirement for a claim to succeed".

68. As regards Protected Disclosure 1, the ET said that the second of the three paragraphs that the claimant relied on seemed to be simply statements of his opinions (paragraph 29).

69. As regards the case on limb (1)(f), the Employment Judge noted the part of the document where the claimant referred to being told by Lars Paulsson to write fewer carbon stories. At paragraph 31, he said:

> **"… it might suggest that in the reasonable belief of the Claimant information tending to show that the environment was being damaged was being deliberately concealed."**

70. As regards the claim under limb (1)(e), the Employment Judge said he had, "Found it harder to identify information tending to show" that the environment was being damaged (paragraph 32). He continued:

> **"Considering the claim at its highest and taking account of the background context which the Claimant might conceivably be able to establish in evidence, this might succeed as an argument, but I should say the prospects are poorer than for section 43(1)(f). I cannot say there is no reasonable prospect of this**

> **succeeding, and accordingly will not strike it out".**

71. In relation to Protected Disclosure 2, the judge's conclusions were set out at paragraphs 37 to 43. In short, the ET concluded that the alleged protected disclosure was not capable of satisfying the first element of the statutory test regarding information in relation to either the case on the (1)(e) or the (1)(f) limb.

> **"(37) Notwithstanding the reference to blowing a whistle, this is plainly a statement of the Claimant's opinion and suggestion for an editorial approach.**
>
> **(38) It is plain from the wording that the Claimant was expressing an opinion that the Paris climate agreement created a global carbon market. That is his analysis of a political situation and the economic consequences of it.**
>
> **(39) The suggestion about putting warning labels on reports on fossil fuels is his initiative. It is an idea rather than a disclosure of information. The suggestion that failing to do this would leave the Respondent open to criticism, is in my view likely to be found to be an opinion, rather than the disclosure of information.**
>
> **(40) The Claimant's suggestion that there should be more comprehensive coverage of climate talks again is simply a statement of opinion.**
>
> **(41) This is not a situation as described in appellate authorities where key facts are in dispute, as might be the case where there is a dispute over causation of detriment or dismissal for example. The exact wording relied upon by the Claimant was contained in an email and was sent.**
>
> **(42) I cannot identify particular any *specific* factual content with "information" about damage to the environment or the fact that this was being deliberately concealed.**
>
> **(43) I consider there is no reasonable prospect of this alleged disclosure amounting to a qualifying disclosure in respect of either relevant failure (section 43(1)(e) or (f)).**"

72. In relation to Protected Disclosure 3, the judge's conclusion was set out at paragraphs 48 to 50. He said:

> **"48. Much of the content of this disclosure contains identical wordings as alleged protected disclosure 2. The addition, regarding BNEF simply contains questions and suggestions about the Respondent's offering to its readership. In my assessment this adds nothing to the likelihood of it amounting to a qualifying disclosure.**

> **49. Again I cannot identify particular any *specific* factual content with "information" about a relevant failure.**
> **50. For the same reasons given above in respect of alleged protected disclosures 2, I consider that there is no reasonable prospect of this amounting to a qualifying disclosure within the meaning of section 43B(1)"**

73. In relation to Protected Disclosure 4, the Employment Judge observed at paragraph 58: "The passage relied on contains a series of opinions and a few questions. I have struggled to identify specific information that is being disclosed which tends to show the relevant failures alleged…".

74. Nonetheless, he concluded at paragraph 60:

> **"While I have significant doubts about whether this alleged protected disclosure does satisfy the statutory requirement, there seems to be a clear thread in this passage that the Claimant's reporting has been restricted with regard to environmental damage and specifically the release of carbon through the use of fossil fuels. There is specific reference to the content of the Claimant's 2018 review. That reference to him being, 'bogged down" might be seen as a reference to him focussing on environmental damage which his manager was trying to dissuade him. There may be, when viewed properly in context, enough to satisfy the statute under section 43B(1)(f), although I think it is somewhat doubtful…"**

75. In relation to the case on limb (1)(e), the Judge said: "…I am even more doubtful that this contains any qualifying disclosure…" (paragraph 61). However, he said he would not strike it out for two reasons. They were:

> **"First, the sheer length of it and the number of matters to which [it] refers in my mind raises the possibility that some background or context might give it some meaning which brings it within section 43B(1)(e). Secondly, the Tribunal will in any event [be] hearing evidence of this disclosure and the causation alleged by the Claimant by reference to section 43B(1)(f). It may be the two alleged failures are intertwined. In that context I cannot see that arguments about section 43B(1)(e) will significantly add much other than a few questions in cross-examination and some legal argument".**

76. The Employment Judge's conclusion in relation to Protected Disclosure 5 was set out in paragraphs 63 to 66. He said that he was doubtful that the material relied on contained any qualifying disclosure falling under limb (1)(e), but that he would not strike it out for two reasons; essentially the

reasons he then gave were the same as those he had identified in relation to the previous disclosure.

> **"63. Much of this alleged protected disclosure is a combination of statement of opinion and questions, rather than containing disclosures of information tending to show relevant failures.**
>
> **64. There is clear allegation of retribution as a result of the emphasis in the Claimant's reporting on coverage of climate change, i.e. that the environment is being damaged. He specifically references his 2018 review. It seems to be that this allegation potentially engages sections 43B(1)(b) and (f).**
> **65. Starting with section 43B(1)(b), I acknowledge the Respondent's point that if this related to the Claimant's treatment by the Respondent, this is personal to him and not in the public interest. There is however a comparatively low threshold to establish reasonably in public interest set out in *Chesterton Global Ltd v Nurmohamed [2017]* EWCA Civ 979. In that decision Underhill LJ did not rule out the possibility that even a disclosure of a breach of a particular worker's contract could be in the public interest. The Claimant plainly sees himself as a campaigner for environmental coverage. Any attempt to silence or disadvantage him as a result might be reasonably believed by the Claimant to be in the public interest.**
>
> **66. There is a continuation of the thread in this passage that the Claimant's reporting has been restricted with regard to environmental damage. There may be, when viewed properly in context, enough to satisfy the statue under section 43B(1)(f)."**

77. In relation to Protected Disclosure 6, the Employment Judge said at paragraph 70:

> **"I consider that, viewed in context, it might be seen that the Claimant is disclosing information which might tend to show 'retribution' of himself, which a Tribunal might find in the context amount in the Claimant's reasonable belief, to a breach of a legal obligation and deliberate concealment of damage to the environment. I make no order in respect of this allegation under section 43B(1)(b) and section 43B(1)(f)…".**

78. Then, at paragraph 71, in relation to the case on limb (1)(e), he said:

> **"… I cannot identify any disclosure of specific information tending to show the environment has been, is being or is likely to be damaged. There is a discretion as to whether to strike out of a claim or part of a claim. Given that protected disclosure 6 is proceeding in respect of the other elements; I am not going to strike out this aspect of it, given that it is unlikely to add very much to the hearing evidence and submissions. The Tribunal is going to be hearing evidence on this point in any event".**

79. In relation to Protected Disclosure 7, the judge's short conclusion at paragraphs 74 and 75 was as follows:

> **" 74. Even taken at its highest, I have struggled to identify a *specific* disclosure of information tending to show that the environment has been, is being or is likely to be damaged or concealment thereof. There are merely opinions offered in respect of this.**
>
> **75. Bearing however that this took place in the context of an oral discussion, it is somewhat more difficult for me to be categorical about the context and the content. To the extent that this suggests a degree of doubt, I give the benefit of the doubt to the Claimant and accordingly do not strike out this allegation." (Emphasis in original)**

Grounds Of Appeal And Cross-appeal

80. The claimant raises five grounds of appeal in relation to the ET's decision to strike out Protected Disclosure 2 and Protected Disclosure 3. They are as follows:

> **"Ground 1**
>
> **5. The Tribunal erred because an assessment of whether the alleged protected disclosures met the statutory tests was a matter of fact, for a Tribunal to decide considering evidence.**
>
> **5.1. The supposed deficiencies identified by the Tribunal were not sufficient to bring these disclosures into the category of case where, even with special care, it's appropriate to them strike out.**
>
> **5.2. The judgment reached by the Tribunal turned on factual issues that were disputed, without the Tribunal identifying sufficient valid reasons for taking this exceptional approach.**
>
> **Ground 2**
>
> **6. The Tribunal erred at paragraph 41 of the Judgment when it concluded that this was not a case where key facts are in dispute, and further, the Tribunal has undertaken an exercise in resolving disputed facts. The Tribunal has undertaken the detailed factual analysis and exercise of the judgment that a Tribunal would be expected to undertake at a full hearing, when that was not an exercise that was appropriate in the strike-out hearing.**
>
> **Ground 3**
>
> **7. The Tribunal erred at paragraphs 37 – 40 and 50, when it concluded that what the Claimant has disclosed could only be characterised as an 'opinion'. This appears to adopt the approach in Cavendish rather than the approach in Kilraine, where the Court of Appeal held that the correct assessment was whether there was 'sufficient' information to show what statute required. In any event, such an assessment is in this case properly a matter of the resolution of disputed fact, and not appropriate for strike out,**

> **except in the most exceptional of circumstances.**
> **Ground 4**
>
> **8. The Tribunal erred because the text of the written disclosures analysed by the Tribunal does provide a sufficient basis for the tribunal to conclude there was a reasonable prospect of success. It erred in law to conclude otherwise.**
>
> **Ground 5**
>
> **The Tribunal erred in its interpretation of the 'relevant principles' set out at paragraph 17 from the authority *Twist v Armes*. The principles a-g should have prevented the Tribunal from striking out the two protected disclosures."**

81. In its cross-appeal, the respondent, firstly, advances two general grounds (Ground 1 and 2) and then a specific ground in relation to each of the protected disclosures that were not struck out.

82. As formulated in the cross-appeal, the essence of Ground 1 appears from paragraph 6.4, where it is said that in order for a disclosure to be a qualifying disclosure within limb (1)(e):

> **"…**
> **6.4.1 the information disclosed must be of specific damage to a specific environment rather than environmental damage in general, and/or**
>
> **6.4.2 in order for the maker of the disclosure to have a reasonable belief that the disclosure is in the public interest, the information must:**
>
> **6.4.2.1 have an element of novelty; or**
>
> **6.4.2.2 relate to specific damage to a specific environment.**
> **…"**

83. It was said that the ET had erred in law in not applying that approach. Thus, as formulated in this document, the respondent was submitting that this was criteria that must be met in order for the statutory definition to be satisfied.

84. However, in the course of his oral submissions, Mr Laddie substantially revised this ground. He no longer contended that these were specific prerequisites; rather he submitted that in deciding

whether a disclosure is made in the public interest when limb (1)(e) is relied upon, certain factors have to be borne in mind. He set these out at paragraph 32 of his skeleton argument. I will come back to that paragraph when I address Ground 1. Mr Laddie accepted that of those factors, only the first of them, the element of novelty, was explicitly raised with the Employment Judge. When I asked what error of law the Employment Judge had made in these circumstances, Mr Laddie clarified that the central complaint was that the Employment Judge had failed to ask whether this element of the statutory definition was capable of being satisfied, in other words, whether there was a realistic prospect of the claimant showing that he reasonably believed that the disclosure was in the public interest in respect of each of the five alleged protected disclosures that he did not strike out in respect of the limb (1)(e) case.

85. The respondent's Ground 2 relates to limb (1)(f) and the narrower basis upon which limb (1)(e) is relied on in this case. In summary, the respondent contends the claimant had no reasonable prospects of showing that his assumed beliefs regarding deliberate concealment / that the respondent was itself damaging the environment, were reasonable. Mr Laddie asserts that the ET simply failed to address this.

86. Ground 3 relates to the decision not to strike out Protected Disclosure 1. It contends that the ET failed to apply the test identified by the Court of Appeal in **Kilraine v Wandsworth London Borough Council** [2018] ICR 1850 ("**Kilraine**") or to do so properly and/or that its decision was perverse. Ground 4 advances an equivalent contention in relation to Protected Disclosure 4.

87. Ground 5 raises an equivalent point in respect of Protected Disclosure 5, but with the additional contention that as regards the limb (1)(b) claim, the ET erred in law in failing to properly apply the **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 ("**Chesterton**") test relating to reasonable belief that the disclosure was made in the public interest.

88. Ground 6 raises the equivalent contentions to Ground 5 in respect of Protected Disclosure 6. Ground 7 contends that having recognised that the **Kilraine** test could not be satisfied in relation to Protected Disclosure 7, the ET erred in declining to strike it out.

The Legal Framework

Strike out applications

89. Rule 37 of **The Employment Tribunal Rules of Procedure 2013** (schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) provides (as relevant):

> **"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-**
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success;"**

90. The importance of not striking out discrimination claims except in the most obvious cases, as they are generally fact-sensitive was emphasised by the House of Lords in **Anyanwu v The South Bank Student Union** [2001] ICR 391, in particular in the very well-known passages from the speeches of Lord Steyn at paragraph 24 and Lord Hope at paragraph 37.

91. In **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126, the Court of Appeal held that a comparable approach should be applied in protected disclosure cases as they have much in common with discrimination cases. At paragraph 29, Maurice Kay LJ said:

> **"It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation…"**

92. Mr Laddie submits that the well-known statements in this line of authorities were generally made in relation to disputed issues of causation, where it is inevitably a nuanced and fact sensitive

question as to the reason(s) why the alleged wrongdoer acted as they did, whether it be a discrimination or a whistleblowing case. Mr Wynne, on the other hand, submits that a parallel is to be drawn between those circumstances and the issues to be resolved on a strike-out application in terms of whether the statutory criteria for a qualifying disclosure can be satisfied.

93. Whilst it will always depend on the particular context, I accept that there is a distinction that can properly be drawn (as Mr Laddie said) between a causation question and the present instance, where the issues under consideration are limited to the prospects of establishing the objective limbs of the statutory test and where, of course, the facts are to be assumed in the claimant's favour. What is involved is a more technical exercise in applying the statutory criteria, as opposed to assessing whether the factual circumstances can lead to a particular conclusion as to the alleged wrongdoer's reasons for acting.

94. Subject to one point, the parties are agreed that the relevant principles were set out by Linden J in **Twist DX** at paragraph 43 (a) to (g). I adopt that summary with gratitude. Mr Justice Linden said:

> **"a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30.**
>
> **b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "*has a realistic as opposed to a fanciful prospect of success*": see, for example, paragraph 26 of the Judgment of the Court of Appeal in the Ezsias case (supra).**
>
> **c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of**

Ezsias.

d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, *even on that basis*, it cannot succeed in law.

e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, Campbell v Frisbee [2003] ICR 141 CA.

f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "*may*" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see Soo Kim v Yong [2011] EWHC 1781.

g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in Hassan v Tesco Stores Limited UKEAT/0098/16 and Mbuisa v Cygnet Healthcare Limited UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal."

95. Mr Laddie takes issue with sub paragraph (e) only to the extent that it might be understood as laying down a hard and fast rule; I do not interpret it in that way, as indicated by Linden J's use of the qualification, "generally".

96. During his oral submissions I clarified with Mr Wynne that in terms of Ground 5 of his appeal, the contention advanced was that the ET had erred in not applying sub-paragraphs (b), (c) and/or (g) of Linden J's paragraph 43 summary. He also drew my attention to certain other passages in the judgment, in particular at paragraph 59 where, having reviewed the authorities, Linden J said:

> **"It also follows from these passages the question whether a written communication discloses information which is capable of satisfying section 43B(1) will often require the determination of issues of facts as to context, and consideration of all the relevant facts in the case. In such cases the issue will, therefore, be a mixed question of fact and law. There may be clear-cut cases where the factual context is not in dispute and the issue is therefore one of pure law. But, otherwise, an application to strike out on the no reasonable prospect ground will meet with this difficulty".**

The section 43B definition

97. I have already touched on the statutory definition. The material provisions are as follows:

> **"43B Disclosures qualifying for protection**
>
> **(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—**
>
> **…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **…**
>
> **(e) that the environment has been, is being or is likely to be damaged, or**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**
>
> **43C Disclosure to employer or other responsible person.**
>
> **(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—**
>
> **(a) to his employer, or**
>
> **(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—**
>
> **(i) the conduct of a person other than his employer, or**
>
> **(ii) any other matter for which a person other than his employer has legal responsibility,**
>
> **to that other person.**
>
> **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.**
>
> **(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—**
>
> **(a) by another worker of W's employer in the course of that other worker's employment, or**
>
> **(b) by an agent of W's employer with the employer's authority,**
> **on the ground that W has made a protected disclosure.**
>
> **(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.**
>
> **(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer."**

98. In **Williams v Michelle Brown AM** UKEAT/0044/19/OO at paragraph 9, HHJ Auerbach restated the five elements that must be satisfied for there to be a qualifying disclosure. It is common ground that the onus of proof is on the claimant in relation to each of these elements:

> **"First, there must be a disclosure of information. Secondly, the worker must believe the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held".**

99. It is the first, third and fifth of those elements, which are the objective elements, that are in play in relation to this strike out application, particularly the first and the third, as I will come on to. As a shorthand, for the purposes of this judgment, I will refer to these as "Element One", "Element Three" and "Element Five".

Element One

100. Accordingly, the first stage of the enquiry is to identify the information disclosed by the worker, which is said to amount to the qualifying disclosure. In paragraph 52 of his judgment in

Twist DX, Linden J said:

> **"This is crucial because section 43B(1) requires the tribunal to go on to consider whether the claimant's belief about that information fell within the section and, if the conclusion is that there was a qualifying disclosure, whether the disclosure of that information was a, or the, reason for the treatment complained of, depending on whether the complaint is victimisation contrary to section 47B of the 1996 Act, or automatic unfair dismissal contrary to section 103A".**

101. The leading case is the decision of the Court of Appeal in **Kilraine**. Lord Justice Sales (as he then was) said at paragraph 35: "…In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". The "language" that Sales LJ was referring to was the statutory language of section 43B(1). He emphasised that grammatically, the word "information" had to be read with the qualifying phrase, "which tends to show" one or more of the matters that were then listed.

102. In paragraph 36, Sales LJ said that the question of whether the statutory standard was met was a matter for the employment tribunal's evaluative judgment. He also emphasised that the question was likely to be closely aligned with the other section 43B(1) elements. In paragraph 41 he noted that whether a particular disclosure satisfies section 43B(1), "should be assessed in light of the particular context in which it is made". Mr Laddie emphasises that he went on to say (in paragraph 42) that there was no further relevant context in that particular case.

103. Lord Justice Sales also considered the Employment Appeal Tribunal's ("EAT") decision in **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] ICR 325 ("**Cavendish Munro**"). He clarified that the concept of "information" is capable of covering statements which might also be characterised as allegations and that there was no rigid dichotomy between information and allegations as that earlier authority had been thought to identify (paragraph 30).

104. In **Twist DX**, Linden J accepted the respondent's submission that on an application to strike out, an employment tribunal is entitled to look at the written communication that is said to satisfy the statutory test, and consider whether that communication has a sufficient factual content and is sufficiently specific to be capable of satisfying the paragraph 35 **Kilraine** test.

105. In the present case, the words used are not in dispute; and whilst context will likely be relevant (as Sales LJ identified), I will take this at its highest in terms of the claimant's pleaded case.

Element Three

106. As I have indicated, the statutory test involves asking whether the worker believed his disclosure was in the public interest (Element Two) and if so, whether that belief was reasonable (Element Three). The leading case on these aspects of the statutory definition is **Chesterton**.

107. Lord Justice Underhill emphasised that there may be more than one reasonable view as to whether a particular disclosure is in the public interest and that the tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker (paragraph 28). He also stressed that what matters is whether the worker's subjective belief was objectively reasonable; acting in the public interest did not have to be his only or predominant motive (paragraph 30).

108. In paragraph 31, Underhill LJ pointed out that the phrase, "in the public interest" was not defined and that the legislator's intention must have been to leave it to employment tribunals to apply it, "as a matter of educated impression". He continued that the legislative history: "… clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest". He had earlier confirmed that a belief may be a reasonable one even if it is wrong (paragraph 8(2)).

109. **Chesterton** was directly concerned with whether and, if so, in what circumstances a disclosure concerned with a breach of a worker's own contract with his employer or other aspects of his working arrangements could fall within limb (1)(b) following the introduction of the public interest criteria. Lord Justice Underhill said he was not prepared to rule out the possibility that the disclosure of a breach of a worker's contract could nevertheless be in the public interest or reasonably so regarded if a sufficiently large number of other employees shared the same interest, albeit he would expect employment tribunals to be, "cautious" about reaching such a conclusion, see paragraph 36. He also said in the same paragraph: "The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest".

110. In paragraph 37, he said that the correct approach was as follows:

> **"Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."**

111. The four-fold classification proposed by Mr Laddie was set out in paragraph 34 as follows:

> **"Mr Laddie, for the claimant, took a position between those two extremes. He accepted that the mere fact that the disclosure was in the interest of other workers besides the worker making it was not in itself enough to bring it within section 43B (1); but he did not accept that numbers were irrelevant, nor that the disclosure need always be in the interests of persons "outside the workplace" in Mr Reade's sense. He contended that a disclosure of pay**

> **irregularities affecting the entirety of the NHS workforce (over a million employees) would plainly be in the public interest; or, if that case were sought to be distinguished on the basis that the NHS is a public authority, that the same would be the case for Royal Mail (a plc) or indeed the John Lewis Partnership (a private company). The disclosure in such a case would be in the public interest simply because of the number of employees affected. He said that in any case the tribunal in deciding whether a disclosure was in the public interest would have to consider all the circumstances, but he suggested that the following factors would normally be relevant (I have paraphrased them slightly):**
>
> **(a) the numbers in the group whose interests the disclosure served – see above;**
>
> **(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;**
>
> **(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;**
>
> **(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."**

Element Five

112. The general observations made by Underhill LJ in **Chesterton** as to the nature of the employment tribunal's tasks are applicable to Element Five of the statutory definition as well. As Linden J noted in **Twist DX** at paragraph 77, the question at the strike out stage is could a worker reasonably believe that a disclosure tended to show one or more of the specified matters.

113. Mr Wynne also emphasises the passage at paragraph 79 in **Twist DX** where Linden J referred to counsel accepting that there had to be, "no context in which … [the material relied upon] could be held by any properly directed tribunal to disclose information with sufficient factual content and specificity to be capable of being reasonably believed to tend to show one of the matters specified in

section 43B(1)…".

The Parties' Submissions

114. I will summarise these relatively briefly as I will also refer to some specific aspects of the rival contentions when I consider the particular grounds of appeal and cross-appeal.

The claimant's submissions

115. Mr Wynne emphasised that a strike out should only occur in the most obvious of cases and that the strike out process was inappropriate for evaluating issues of disputed fact. He contended that the ET embarked on a "quasi fact-finding exercise" in striking out Protected Disclosures 2 and 3. He said that the text of the written disclosures did not provide a sufficient basis for the ET to conclude that the no reasonable prospects of success test was met.

116. Further, My Wynne said that it was not enough for the ET to take the claimant's pleaded case at its highest because the broader factual context was relevant to a determination of the prospects of meeting the statutory definition and that at the full merits hearing there would be a greater matrix of facts available.

117. When asked to identify the broader context that was relied upon, Mr Wynne said that the claimant had been wrestling with his employer over the content of his own writing and Bloomberg's reporting more broadly about climate change for a significant period of time and that there had been earlier communications. That the claimant was concerned that environmental damage was being minimalised by the reporting and he believed it was incumbent on States to put the Paris Climate Agreement into effect and thereby reduce environmental damage; that if this was not successfully done, environmental damage would increase. That the respondents were able to improve the market to make it more effective so as to reduce carbon emissions more rapidly and also to enable financial

institutions to be better informed and thereby enable them to re-organise their capital investments and in so doing to take the steps required to reduce environmental damage.

118. Mr Wynne submitted that each of the alleged protected disclosures had to be seen in the context of the larger and wide-ranging communications between the parties and that sometimes a shorthand might be used in the particular communications relied on as protected disclosures. He referred in general terms to there being additional documentary material that would be available at the full merits hearing relating to climate change matters, but did not identify any specific document.

119. He also submitted that insofar as the ET decided not to strike out the alleged protected disclosures in the exercise of its discretion, the basis for the EAT to interfere with the exercise of that discretion was very limited and that no proper basis had been shown in this case.

120. Mr Wynne said that the principles which the respondent sought to develop in relation to Ground 1 of the cross-appeal were inappropriate for summary determination. In relation to Ground 2 of the cross-appeal, he submitted that the matters raised by the respondent in support of that ground required determinations of fact that were only appropriate for a full hearing. In relation to Grounds 3 - 7 he relied on the general points I have already summarised as to the correct approach and he made specific points in relation to the particular alleged protected disclosures, which I have considered in relation to each of those disclosures.

The respondents' submissions

121. Mr Laddie submitted that the ET was correct to strike out Protected Disclosures 2 and 3; that the claimant had not identified what were the key facts, which he said were in dispute here or which the Employment Judge had purportedly impermissibly resolved in the respondent's favour. The disclosures were struck out properly on the basis that they had no reasonable prospect of satisfying

Element One. This was to be determined by reference to the wording of the communications, which in this instance not only provided the wording specifically relied on by the claimant, but also the most direct context in which they should be evaluated. In terms of the wider context, he emphasised that the claimant's case was taken at its highest. He submitted that the claimant had not shown how the Employment Judge had failed to follow the **Twist DX** principles and he emphasised that the case did not establish that an employment tribunal could not strike out alleged protected disclosures; he pointed out that Linden J had allowed an appeal against a failure to strike out.

122. In terms of the cross-appeal, Mr Laddie submitted that the ET had failed to apply the **Kilraine** test; the Employment Judge failed to identify information with a sufficient factual content and specificity in the disclosures that was capable of tending to establish limb (1)(f) or the narrower basis on which the limb (1)(e) case was put.

123. In his oral submissions Mr Laddie accepted that although the Employment Judge had not really engaged with this, Element One was sufficiently arguable to surmount the strike out hurdle in relation to the limb (1)(e) wider basis on which the claimant's case was put, save he did not concede this in relation to Protected Disclosure 4. He also accepted that this was the case in relation to those protected disclosures where limb (1)(b) was relied on in the context of retaliation against the claimant. However, he submitted that in these instances the disclosures were not capable of satisfying Element Three and thus should be struck out on that basis; and that this was something that the ET has simply failed to engage with.

124. Mr Laddie also submitted that the reasons identified by the Employment Judge for not striking out the limb (1)(e) allegations in relation to Protected Disclosures 4, 5 and/or 6, where he appeared to be exercising a discretion, were legally irrelevant so that the exercise of the discretion was flawed; and, accordingly, the EAT should substitute its own decision. He accepted that this tribunal can only

do so where just one lawful conclusion is possible.

Conclusions

Cross-appeal: Ground 1

125. I will address Ground 1 of the cross-appeal first as it has potential relevance to each of the alleged protected disclosures, not least because the respondent accepts that the strike out hurdle is met in relation to Element One in respect of the claimant's limb (1)(e) wider basis case. Counsel informed me that there are no authorities as yet on the correct interpretation of limb (1)(e).

126. The respondent acknowledges that the statutory wording is potentially very wide if one simply focuses on its literal reading and that it could encapsulate a huge range of communications about, for example, climate change, many of which would include something that would fall within the concept of information.

127. In terms of control mechanisms, however, I accept the respondent's submission that the statutory wording indicates that in respect of Element Three, the question is whether the worker reasonably believed that making this disclosure was in the public interest as opposed to whether the worker reasonably believed they were talking about a topic which in general terms was in the public interest. Of course, the nature of the underlying topic may well be relevant to that overall evaluation, but the focus of the test is on the making of the particular disclosure.

128. Another obvious control mechanism in the statutory scheme is that the disclosure must be made in circumstances that satisfy one of the situations in sections 43C to 43H, albeit that is not contentious in the present case.

129. Mr Laddie invited me to identify a list of factors that are likely to assist an employment

tribunal in evaluating Element Three in a limb (1)(e) case. Mr Wynne submitted it would be inappropriate to do so in a strike out case and indicated that he did not wish to add to the suggested list of factors.

130. I agree that it would be inappropriate for me to be too prescriptive or to try to identify an exhaustive list or to highlight certain factors as being necessarily determinative. However, I do need to analyse the features that will be of relevance in this case in order to address Element Three when I come on to the alleged protected disclosures. I therefore turn to the list of factors that I alluded to earlier that Mr Laddie set out in paragraph 32 of his skeleton argument.

131. He suggested that the following factors may be of assistance. Firstly, the extent to which the information has an element of novelty. He observed that the more well known the information is, the less likely it is that its disclosure will be in the public interest. Secondly, the extent to which the person to whom the disclosure is made is responsible for the damage. Thirdly, the extent to which the person to whom the disclosure is made has the power to stop, reduce or reverse the damage.

132. Mr Laddie's second and third factors appear to identify matters that are likely to be highly pertinent. To take a perhaps obvious example, an alleged limb (1)(e) disclosure made to a human resources manager in the context of a grievance appeal is less likely to satisfy the public interest test than a disclosure made to a person or body that has some powers in relation to environmental issues and/or some responsibility for acting or some ability to cause whatever concern is being raised to cease.

133. Additionally, it appears to me that the extent to which a quite specific act or omission is identified in the alleged disclosure as leading to or likely to lead to environmental damage and the nature of that act or omission, is likely to be relevant. To take another obvious example, the test is

more likely to be satisfied by a specific communication about a company that is dumping toxic waste in a particular river than it is by a general observation that the polar icecaps are melting.

134. I do not consider it is necessary for me to reach a final decision on Mr Laddie's novelty point. I understand the thrust of the idea behind it. However, I would also sound some notes of caution. It is clear that the statute does not require the disclosure to be something that the recipient is hitherto unaware of and that is borne out by the terms of section 43L. Furthermore, it is not necessarily something that the worker contemplating making a disclosure would be likely to know and thus I query whether it sufficiently accords with the objective of the whistleblowing legislation, where the focus is on affording protection from retaliatory action whether it be the first, second or tenth worker who has made a disclosure on the particular topic. I also have a concern that such an approach could lead to employment tribunals becoming distracted by lengthy consideration of extraneous material in order to see whether the matter in question really was "novel" or not.

135. With those observations in mind, I turn to whether any error of law on the part of the Employment Judge is identified by Ground 1 as reformulated in oral submissions. As I indicated earlier, Mr Laddie's real concern is that the Employment Judge did not engage with Element Three when he determined to leave some of the protected disclosures intact. On the face of it, this does appear to me to be an error of law. Section 43B(1) sets out a series of statutory hurdles and if an issue is raised by a respondent in relation to one or more of those hurdles on a strike out application, it is necessary, or at least it certainly was in this case, for the ET to engage with that.

136. Beyond that, and in order to identify whether that error was material or not, I will return to this when I come on to consider each of the protected disclosures that were not struck out.

Element One: a general point

137. Before I turn to the individual disclosures, I will deal with a general point that Mr Wynne raised in relation to Element One. He submitted that it inevitably followed that this was satisfied to a degree necessary to survive a strike out application given the concession that Element Two was met in that for present purposes the claimant is assumed to have a relevant belief, which has a necessary degree of factual content and specificity.

138. I do not accept that argument. The sequential steps here are as follows. If a reasonable prospect of establishing Element One is shown, then the tribunal is to proceed on the basis that Element Two is not in issue for the purposes of the strike out and go on to analyse Element Three. However, in accepting that Element Two was not in issue for present purposes, it is quite clear that the respondent was not intending to suggest that Element One (the first objective test) was not in issue. It is apparent that the Employment Judge did not understand the position in that way and indeed focussed on Element One in relation to each of the alleged protected disclosures. Therefore, with respect, I consider Mr Wynne's submission in this regard to be simply misconceived.

Protected Disclosure 1

139. I will first consider the case regarding limb (1)(f), deliberate concealment. In relation to Element One, the questions for me to assess are whether the Employment Judge properly applied the **Kilraine** test and, if not, whether the claimant has a reasonable prospect of establishing that the communication contained information with sufficient factual content and specificity that it tended to show environmental damage had been or was likely to be deliberately concealed by the respondent; in other words, is it capable of meeting the statutory test?

140. In evaluating this and the other issues before me, I have taken into account the wider context, as described on the claimant's behalf by Mr Wynne and as set out in his pleadings, along with the

other material available to me in the bundle. I also bear in mind a point, which Mr Laddie made on a number of occasions, namely that whilst it is important to consider context, the wider communication are known and they are before the EAT as they were below. As regards the broader context that was described by Mr Wynne, whilst I have assumed it in the claimant's favour, it does not appear to me to materially add to what was already pleaded and therefore what was assumed in the claimant's favour below.

141. In arriving at my conclusions, I have not sought to resolve any disputes of fact in relation to this or other protected disclosures, still less have I resolved such disputes in the respondent's favour.

142. In terms of the specifics, as I have indicated earlier, the Employment Judge focussed in particular on the sentence, "As the climate crumbles I was expressly told by Lars to write fewer carbon stories, but there was no clear direction about what I should otherwise do".

143. It is important to see that sentence in the context of the sentences that appear immediately afterwards:

> **"When I pitched some stories, in my view, they were unfairly rebuffed without it being fully explored how they can be written in a fresh way. For instance, a view that power-network stories aren't in demand is plain wrong. Other story ideas we pursued for too long. Lars acknowledged I didn't have much of a beat in Friday's meeting by giving me ENEL, the Italian utility, to cover".**

144. In other words, the central thrust of what is being raised here is a concern over whether the claimant has been given a fair crack of the whip in relation to stories that he was interested in covering. There is no assertion that I can see of deliberate concealment, let alone any factual specificity to that effect.

145. Mr Wynne submitted that insofar as the sentence which the Employment Judge emphasised is ambiguous, it might be taken to suggest in a reader's mind that this restriction upon the claimant

writing stories was in fact the product of or stemmed from a plan or intent of deliberate concealment. However, I reject that submission. Firstly, the wording used simply does not say this. Secondly, I do not accept that any ambiguity in this sense assists the claimant. He has to establish at a full merits hearing that he disclosed information that did tend to show deliberate concealment, not that he said something that was sufficiently ambiguous that this was one of a number of interpretations that a person might draw from it.

146. As I have indicated, the Employment Judge said in paragraph 31 that the words "might" meet the statutory criteria, but his reasoning then simply repeats the statutory criteria without identifying the information that was capable of meeting the test.

147. Accordingly, I consider that the ET did err in law in applying the **Kilraine** test and that for the reasons I have just identified Protected Disclosure 1 is not capable of meeting Element One in relation to the claimant's case on limb (1)(f).

148. I turn next to the case on limb (1)(e) put on the narrower basis, that is to say that the text tended to show that the respondent was damaging or likely to damage the environment. It seems to me that the highest point of the claimant's case is the sentence that I have specifically considered in relation to limb (1)(f), which, again, the Employment Judge relied on.

149. However, there is no statement there that the respondent's climate coverage is itself damaging the environment or anything I can identify as tending to show this. Mr Wynne submitted that insofar as this or other protected disclosures assert or propose that the respondent should be doing better in its coverage of stories concerning carbon emissions and the related topics, this of itself implies that its current coverage is damaging the environment.

150. However, I do not accept that it is arguable that this implication is conveyed from this material. In any event, even if I am wrong about that and that implication was conveyed, it could only be in the most generalised way and would not be capable of meeting the **Kilraine** requirement of factual content and specificity.

151. As regards this part of the case, it is apparent from paragraph 42 of his judgment that the Employment Judge was unable to identify any material in the email which met Element One. Nor did he give any reason as to why he then said that the claimant might nonetheless succeed in establishing this at trial.

152. Accordingly, in relation to the narrower basis of the claimant's case relying on limb (1)(e) there was, again, an error of law in that the ET failed to apply the **Kilraine** test. For the reasons that I have given, I also consider that in relation to Element One the test for strike out is satisfied.

153. In relation to the limb (1)(e) case put on the wider basis, namely referring to environmental damage without suggesting it had been caused by the respondent, for the reasons that I have already explained I focus here on Element Three of the statutory definition. The only relevant reference in the claimant's communication was, "as the climate crumbles". Whilst this is a reference to environmental damage, it is of a highly generalised nature.

154. As I have already noted, the ET erred in failing to address this. I have to consider whether the statutory test is capable of being met.

155. Bearing in mind the factors that I identified when I discussed Ground 1of the cross-appeal, it appears to me that they all point in the same direction here. I conclude that there is no reasonable prospect of the claimant showing that this very brief and very general reference to the climate

crumbling in this emailed communication is of itself capable of affording a basis upon which a properly directed employment tribunal could conclude that he reasonably believed that making this disclosure was in the public interest.

156. It was a comment aimed predominantly at the editorial direction that was being taken and the stories the claimant wished to write. I also bear in mind that it was a very brief reference within a longer email focussed on the matters I have identified when I described this email.

157. Mr Laddie's emphasised in his oral submissions that Mr Wynne did not in fact address the specific case on the limb (1)(e) wider basis, other than confirming that it was still in play; and in his reply he did not respond to the submissions that Mr Laddie had made on this issue. I certainly do not regard that as determinative; I have set out my own reasons for the conclusions I arrive at, but I do note that the wider basis seemed to be very much a secondary way in which the claimant's case was put. Mr Laddie also indicated it was not advanced in oral submissions below, although I bear in mind, of course, that at that stage Mr Carr was representing himself.

158. Having arrived at these conclusions in relation to the case as put on limbs (1)(f) and (1)(e), I have also considered discretion. In this instance the Employment Judge did not express his conclusions as a matter of discretion, but I have considered the position in the sense of seeking to ascertain whether having arrived at the conclusion that the no reasonable prospects of success test is met, there is nonetheless any reason why I should not take the course of striking out the allegations.

159. I am conscious that the trial is very close at hand and that substantial preparation will already have been undertaken. However, there is still likely to be a saving of costs, even though the hearing will proceed in relation to the ordinary unfair dismissal claim and there will be some underlying factual overlap.

160. The most important factor in my judgment, is that I cannot see any realistic prospect of the claimant's position improving between now and trial. It is not a situation, by way of example, as Linden J had before him in **Twist DX** where it was much earlier in the litigation and he gave the claimant the opportunity to amend his pleading before striking out. Here the case has been litigated almost to trial and the claimant has had the opportunity to fully set out his case in the pleadings, including to amend it had he wished to do so. In these circumstances, I do not see how, realistically, the position could be improved between now and trial and in those circumstances I can see no reason why strike out should not follow from the conclusions that I have already referred to.

161. It follows that I will allow the cross-appeal in relation to Ground 3 and strike out Protected Disclosure 1.

162. The framework, which I have set out when considering Protected Disclosure 1, will apply equally to Protected Disclosures 4, and 7; and also Protected Disclosures 5 and 6 insofar as they concern limb (1)(e) and (1)(f). I will still set out my specific conclusions in relation to each of them, but I will not repeat in full the more general points that I have addressed here, nor the tests I have applied, save where it is necessary to do so to explain the crux of my reasoning.

Protected Disclosure 2

163. The questions that I have to ask in relation to Protected Disclosure 2 are to some extent the same, but they are also slightly different because this is one of the disclosures that the ET struck out and so I need to deal with the specific issues raised by the claimant's appeal.

164. Again, I begin with the case on limb (1)(f). As with Protected Disclosure 1, I have considered whether the claimant has a reasonable prospect of establishing that the communication contained information with sufficient factual content and specificity that it tended to show that environmental

damage had been or was likely to be deliberately concealed by the respondents. In other words, whether the communication is capable of showing that. I have already set out the passages relied on.

165. I can detect no specific content to that effect in those passages. Far from disclosing information tending to show deliberate concealment by his employer, the words in the early paragraph that I have already quoted appear to be saying something quite different, namely that the claimant was picking up on an undercurrent that others at Bloomberg were not necessarily feeling.

166. Furthermore, the general focus of the email is towards the potential reputational risk for Bloomberg if there is no shift in its editorial coverage in relation to the subjects the claimant identifies. He also suggests that failing to do so may lead to Bloomberg being beaten by their rivals. I understand the point that the claimant would want to couch his communications in language which the respondent may find persuasive and respond to, but that does not mean I can properly conclude the communication is capable of being interpreted as tending to say something that it does not say.

167. Additionally, I agree with the Employment Judge's reasoning, which I have already set out and need not repeat.

168. I turn to the specific grounds of appeal. The essence of Ground 1 is that the Employment Judge's decision turned on disputed factual issues. I do not accept this; his reasoning did not involve deciding any disputed factual issues and there is no indication, in my view, that he failed to bear in mind the relevant assumed context, as described by the claimant.

169. Ground 2 is specific to Protected Disclosure 2 and is based on a particular phrase used by the Employment Judge in paragraph 41 of his judgment, where he said: "This is not a situation as described in appellate authorities where key facts are in dispute". It is quite plain that here he was

referring to the specific issues he was being asked to decide; he was not suggesting that in the litigation as a whole there was no significant factual dispute. Accordingly, this passage does not, in my judgment, disclose any error of law.

170. Ground 3 contends that in categorising the passages relied on in the claimant's communication as, "opinion", the ET was resurrecting the distinction thought to have been identified by the EAT in **Cavendish Munro** between allegations and information.

171. I do not consider that this criticism is well founded. At paragraph 21 the Employment Judge had correctly summarised the legal position as identified by Sales LJ in **Kilraine**, including referring to the fact that there was no rigid dichotomy between allegations and information.

172. Furthermore, it is apparent from the terms of his paragraph 42 that when considering Protected Disclosure 2, the Employment Judge applied the correct test. He made no reference to allegations and there is nothing to suggest that he thought this was a distinction he had to apply. The reference to the claimant's expressions of opinion were made in the context of him holding that those expressions of opinion did not contain any information capable of meeting the statutory test.

173. Ground 4 contends that the ET erred as the text of the written disclosures did not provide a sufficient basis for concluding that there was no reasonable prospect of success. I have already addressed this in setting out my own conclusions in relation to the words used in this alleged disclosure.

174. Ground 5, as clarified with Mr Wynne, contends that in three respects the guidance set out in paragraph 43 of **Twist DX** was not followed. However, paragraph 43 (b) is no more than a statement of the overall test. Paragraph 43(c) refers to the tribunal not conducting a mini trial; I am quite

satisfied that the Employment Judge did not conduct a mini trial on this occasion and did not purport to resolve disputed facts. As regards paragraph 43(g), I see nothing to suggest that appropriate caution was not exercised by the Employment Judge, indeed it is plain from the approach he took to the five protected disclosures that he did not strike out, that he made all the allowances that he felt he could give to the claimant as an unrepresented person. It is also clear that he considered the points that were made in the claimant's favour carefully and fully.

175. It therefore follows that the claimant fails in his grounds of appeal so far as limb (1)(f) is concerned.

176. I turn to the case on the limb (1)(e) narrower basis, that is to say, that the communication tended to show that the respondent was causing or likely to cause environmental damage. Again, this is not stated as a proposition at all in the email. I have already referred to it being focussed on reputational risk to the respondent and/or it losing out to its competitors.

177. I have tried to look for what might be said to be the high point from the claimant's point of view. The communication does say that Bloomberg needs to report the issues better or climate talks will struggle. However, this is still a significant remove from providing information tending to show that the respondent is causing or likely to cause environmental damage. Equally so the suggestion that the respondent has the potential to influence the markets.

178. For these and the reasons that I have already addressed in relation to limb (1)(f), I do not consider that any of Grounds 1 – 5 of the appeal are well founded in relation to this limb.

179. The Employment Judge did not address the case on limb (1)(e) on the wider basis; as I have already observed, it appears that this was not the way the case was put forward below. Whilst in

fairness to the claimant I have considered this way of putting the case in relation to those aspects of the claim that were not struck out, I do not see how this can assist him in relation to Protected Disclosures 2 and 3, which were struck out and where there is no ground of appeal that is predicated on an error of law being made in this respect.

Protected Disclosure 3

180. The grounds of appeal that I have discussed in relation to Protected Disclosure 2 are relied upon. I have already indicated that the text is largely the same. Further, the additional words relied upon here do not make any material difference in my judgment. Thus, I can see no error of law in the ET's approach.

181. Therefore, for the reasons given in relation to Protected Disclosure 2, I do not accept that any of the grounds of appeal are well founded. It therefore follows that the claimant's appeal will be dismissed.

Protected Disclosure 4

182. I again begin with limb (1)(f). I ask myself the same questions as I identified when I addressed Protected Disclosure 1. As is apparent from the words used and the context which I set out earlier, the claimant is seeking advice on how to improve relationships with his managers on a number of topics, including being able to write the stories that he wants to write.

183. In terms of deliberate concealment, I have again sought to examine the material from what appear to be the highest points from the claimant's perspective. I note that there are a number of references to biases. However, the majority of them are to unconscious bias (in the text appearing under the heading, 'Unconscious bias?'). I accept that the reference goes slightly further where there is the question (page 329 of the bundle) "Are biases/unconscious biases damaging our service?" Later

there is a reference to HR needing to make sure there are no, "unconscious biases or worse".

184. Nonetheless, it appears to me that the claimant is simply raising an issue that he proposes should be investigated and that his focus is upon unconscious bias. I do not consider these statements are capable of being read as tending to show that the respondents are deliberately concealing environmental damage or are likely to do so. The fact that someone with a cynical perspective might conclude that this is the position from what is unsaid is not the test that I am to apply; I need to look at the words used and the context to see what is stated and conveyed.

185. I take the same view in relation to the passages that Mr Wynne highlighted and I have already quoted, about the claimant's managers not being neutral enough and his reference to US bias in the coverage.

186. The Employment Judge's reason for deciding not to strike out the limb (1)(f) case was set out in paragraph 60 where he said, "there seems to be a clear thread … that the Claimant's reporting has being restricted with regard to environmental damage specifically the release of carbon through the use of fossil fuels". He considered that this may be enough to satisfy limb (1)(f).

187. However, the Employment Judge did not identify the information in the communication that was capable of tending to show that environmental damage was being deliberately concealed; and as I have indicated, in my judgment, the words used are not capable of being read in that way.

188. In the circumstances, the respondent's submission that the ET failed to apply the **Kilraine** test is well founded. For the reasons that I have identified, a correct application of the **Kilraine** test leads to the conclusion that there is no reasonable prospect of showing that Element One of the statutory definition is met in relation to the limb (1)(f) case in respect of Protected Disclosure 4.

189. I turn to the limb (1)(e) narrower basis case, that is to say, that the respondent is damaging or likely to do, environmental damage. In paragraph 61, the Employment Judge said that he was not able to identify information capable of meeting the statutory test in relation to this. I consider he was correct in this view.

190. Protected Disclosure 4, taken as a whole, indicates, as I have said, that the claimant expressed concerns about restrictions imposed on him writing the stories he wanted to write about carbon emissions and fossil fuels; about issues regarding his recent performance evaluation; and about the focus of the respondent's coverage.

191. In addition to the quotes that I have already referred to, the respondent also drew my attention to the following passage (at the bottom of page 333), "Isn't it in our customers' interests to have them benefit from our experience over more than 15 years of covering this stuff…"

192. Again, Mr Wynne emphasises that the claimant was trying to write in a way that might receive a positive reaction from his employers. However, I have to take the communication as it was expressed and in any event, I can detect no statement, let alone any sufficient factual content or specificity, capable of meeting Element One, that is to say information tending to show that the respondent was damaging or likely to damage the environment.

193. Accordingly, I conclude that in relation to the limb (1)(e) narrower basis case as well, the ET erred in law in not applying the **Kilraine** test. Furthermore, that application of this test leads to the conclusion that the no reasonable prospect of success strike out test has been met.

194. Further, insofar as the Employment Judge viewed the decision to retain the limb (1)(e) case as a matter of discretion, I agree with the respondent's submission that the reasons he identified are

legally irrelevant and flawed. The sheer length of the communication cannot be reason in itself, certainly not in this context anyway, not to strike out a communication that does not include the requisite "information". The claimant had had the opportunity to identify the passages that he relied on and he had done so and the context was apparent from the communication itself. The Employment Judge's second factor was that the limb (1)(f) case would, in any event, be proceeding; but plainly that conclusion is flawed in light of the view that I have taken in respect of that limb.

195. Turning then to the limb (1)(e) case on the wider basis where, for the reasons that I have earlier explained, I will again approach this aspect by focussing on Element Three. As I have already noted, Mr Laddie, did not make a concession in relation to this protected disclosure as to Element One, but I am prepared to assume for present purposes that that criterion could be satisfied (albeit the fact that nothing specific was pointed to does underscore the very general nature of any such references within the text).

196. The observations that I made in relation to the limb (1)(e) wider basis case in respect of Protected Disclosure 1 are equally apposite here; and I apply them without repeating them. In addition, the context here is that this is an email about the claimant's personal working relationship with his managers, as I described earlier. Again this is an issue which the Employment Judge did not address.

197. I conclude there is no reasonable prospect of the claimant establishing that he reasonably believed that making this disclosure was in the public interest in relation to actual or likely environmental damage. Any references to carbon emissions, fossil fuels and the like are in general terms and very brief within the context of the overall email. None of the factors that I have identified when discussing Ground 1 of the cross-appeal apply in a way that could assist Mr Carr; they point in the opposite direction.

198. So far as discretionary considerations are concerned, I addressed those in relation to Protected Disclosure 1 and so I do not repeat them here. It therefore follows that I consider it appropriate to also strike out Protected Disclosure 4.

Protected Disclosure 5

199. On this occasion I will begin with the claimant's case on limb (1)(b). Insofar as there are references to breaches of Bloomberg's journalistic code set out in the Schedule, I accept the respondent's submission that they are not capable of amounting to a legal obligation; see **Eiger Securities Ltd v Korshunova** [2017] ICR 561 at paragraph 46. I do not understand Mr Wynne to dispute this proposition, but in any event this is clear authority on the point.

200. Looking at the Navex reports collectively, the claimant speaks of a culture of retribution and cites specific instances of this, including his recent performance evaluation, and he links this to having pointed out that the respondent was failing to tackle climate change issues adequately.

201. In relation to the assertion that the claimant had faced retribution for raising the issues he described, Mr Laddie, accepted that there are reasonable prospects of establishing Element One of the statutory definition insofar as the breach of a legal obligation relied on is the claimant's own contract (most obviously in relation to the implied term of trust and confidence).

202. The focus therefore shifts to Element Three and whether there are reasonable prospects of success in relation thereto. I accept the respondent's submission that the Employment Judge misdirected himself and/or misapplied the **Chesterton** test at his paragraph 65.

203. Although the Employment Judge did not identify the specific legal obligation in question, it is evident from his reasoning that he regarded it as relating to the claimant's employment relationship

with the respondent. He then said that there was, "a comparatively low threshold" to establishing a reasonable belief that the disclosure was in the public interest.

204. As my earlier citations from Underhill LJ's judgment shows, that is simply not the test. To the contrary, it was said that employment tribunals should be cautious about finding the statutory test was met where the obligation related to the worker's own contractual relations with the employer, and attention was drawn to the relevance of considering whether it was just the particular worker or other employees who were affected.

205. In order to determine whether this error of law was material, I have considered what the outcome is in terms of the strike out test if the statutory requirement is correctly applied, bearing in mind the guidance given in **Chesterton** that I have already set out.

206. The claimant did not suggest at any stage that other workers were being similarly treated; his complaint was solely about his own treatment by his managers. The focus of the lengthy reports, taken together, was about his personal treatment.

207. It is important not to lose sight of the fact that the question for limb (1)(b) purposes is whether it can be shown that the claimant reasonably believed that this disclosure of a breach of a legal obligation, i.e. retribution towards him, was in the public interest. The sheer fact that the underlying topic of the disputed news coverage was in a general sense a matter of public interest, i.e. climate change, and/or that the claimant believed his reporting of that matter would affect positive change, does not render the disclosure of retribution towards himself of itself a matter of public interest.

208. I therefore conclude that Protected Disclosure 5 is not capable of meeting Element Three of the statutory test in relation to the limb (1)(b) claim.

209. I turn to the limb (1)(f) claim, again, considering the highest it can be put on the claimant's behalf. As regards the content of the Navex reports, the claimant was saying that the respondent was failing to adequately cover climate change and that it could or would be an influential voice in this area if it covered it more effectively. Also in the third Navex report there was the more particular suggestion that there should be an investigation into whether managers' editorial approach was to boost the value of oil and other fossil fuel companies.

210. However, none of this material states that the respondent was deliberately concealing environmental damage or was likely to do so. It is simply not there in the text, nor is there any factual content or specificity capable of satisfying the **Kilraine** test.

211. In essence, the claimant was trying to get his managers to report climate action stories, as he put it, "in a better way". I do not consider that this is capable of being equated to information tending to show that his employers were currently damaging or likely to damage the environment.

212. In terms of the ET's reasoning on this point, paragraph 66 indicates that the Employment Judge took a similar view to that which I have discussed in relation to Protected Disclosure 4, i.e., that he thought it was sufficient for present purposes that the claimant alleged that his reporting of climate change was being restricted and that an allegation of retribution was being made. As I have indicated in relation to that disclosure, I accept this was a misapplication of the **Kilraine** test and that no reasonable prospects of success have been shown.

213. Turning to the case on limb (1)(e) as put on the narrower basis, there is nothing I can identify in the text that is capable of tending to show the respondent is damaging or is likely to cause environmental damage. The Employment Judge was not able to identify anything specific either. Insofar as he exercised a discretion to nonetheless permit the limb (1)(e) case to proceed, the

Employment Judge relied on matters equivalent to his reasoning in relation to Protected Disclosure 4, which, as I have already explained, I consider to be fatally flawed.

214. In terms of the claimant's secondary position, the wider limb (1)(e) case, Mr Laddie acknowledges that there are some generalised references to the climate crisis and to fossil fuel issues within the communication, but in light of the factors that I have already identified and discussed in relation to Ground 1 of the cross-appeal, it appears to me that they point clearly in one direction and therefore I conclude that the disclosure is not capable of satisfying Element Three, the reasonable belief in the public interest test.

Protected Disclosure 6

215. I start again with the limb (1)(b) case. The reasoning and the conclusions that I have set out in relation to Protected Disclosure 5 and Element Three apply here with at least equal force, but, if anything, the position is all the more clear-cut here because the communication was plainly focussed on the claimant's own appeal from the rejection of his grievance; in that context he posed a series of questions relating to the adequacy of the investigator's investigation.

216. Unlike in relation to Protected Disclosure 5 where the wrong test was applied, the ET simply did not address the Element Three issue at all in relation to the limb (1)(b) claim. Plainly that approach was flawed. For the reasons that I have identified, I arrive at the same conclusion as I did in relation to the limb (1)(b) case in respect of Protected Disclosure 5.

217. I turn to the claim founded on limb (1)(f). Again I have looked at the highest way that matters can be put from the claimant's perspective. At page 350, as I have already mentioned, there was a reference to, "It needs to be investigated properly whether it's an effort to slow our coverage down …" Although that passage is not on the claimant's Schedule I take it into account. However it needs

to be read in the context of the next paragraph, which the respondent relies on and which I have already read out, where the claimant expresses uncertainty as to why the respondent is restricting his stories. There is no statement in this document of a deliberate concealment of environmental damage, let alone identification of supporting factual content or specificity.

218. The respondent also relies on the passage that I have earlier indicated where the claimant says, "I'm not saying we are doing a worse job than other news organizations…but I am saying we could do a lot better". Again, on the face of it, this is not consistent with an assertion of deliberate concealment.

219. In relation to the limb (1)(f) claim, the Employment Judge's reasoning at paragraph 70 did not address the **Kilraine** test and indeed conflated the requirements of limbs (1)(b) and (1)(f). No information capable of tending to show deliberate concealment on the part of the respondent was identified by the Employment Judge and, as I have indicated, I can see none in the email.

220. Accordingly, I conclude that the claimant does not have reasonable prospects of meeting Element One of the statutory test in relation to limb (1)(f).

221. Turning to the limb (1)(e) case on the narrow basis and again taking matters at their highest from the point of view of the claimant, the thrust of what is being said is that the respondent is not covering environmental issues as well as they could, or perhaps to put it as high as possible, as well as they should.

222. However, in my judgment, that is still several steps removed from stating that the respondent is causing or is likely to cause damage to the environment or saying anything that tends to show that. Again, if and insofar as it is suggested that this can somehow be implied from the text that was used,

then there is no requisite factual content or specificity. Accordingly, I arrive at the same conclusion here as I have already indicated in relation to limb (1)(f)

223. Looking at what the Employment Judge concluded in relation to this aspect of the claim, he also said that he was unable to identify any information in the communication that tended to show that the statutory test was capable of being met and I consider he was right in that respect. He went on to indicate at paragraph 71 that he was not going to strike it out because the claim in relation to Protected Disclosure 6 was in any event proceeding in relation to limb (1)(f). Obviously, in light of my earlier conclusion in respect of limb (1)(f), that was a flawed approach.

224. In relation to the case on limb (1)(e) put on the wider basis, my conclusion is the same as I have already expressed in relation to this limb in the earlier protected disclosures that the Employment Judge permitted to proceed. In relation to this disclosure I also emphasise the context of the communication, namely that it was an email to Human Resources managers about an appeal from a grievance outcome.

Protected Disclosure 7

225. In relation to Protected Disclosure 7 I am only considering limbs (1)(e) and (1)(f). As I have indicated earlier, the words relied upon that were spoken by the claimant are limited. I proceed on the assumption that what is set out in the Schedule is what was said; indeed the respondent has indicated that it does not put forward any positive case as to an alternative version.

226. I cannot detect any statement in the two short paragraphs that are relied upon that is capable of constituting information tending to show that the respondent is causing or is likely to cause environmental damage or that it is deliberately concealing environmental damage or that it is likely to do so. Accordingly the conclusions that I have already arrived at apply, perhaps all the more so in

relation to this very brief communication.

227. The Employment Judge said that he struggled to identify a specific disclosure of information tending to show the requisite statutory matters. However, he then went on to say that because this was an oral discussion, it was more difficult for him to be categorical about the context or content.

228. However, the content is undisputed (as I have explained) and the claimant, having had an opportunity to do so, has not identified anything specific about the context either in the proceedings below (so far as I am aware) or to me. I see no reason not to strike out this disclosure simply because it is an oral statement and given that the words relied on have been clarified. There was no reason why the ET could not have applied the **Kilraine** test and when that is done, as I have already indicated, in my view there is only one outcome.

229. Accordingly, the one reason identified by the Employment Judge for not striking out Protected Disclosure 7 was flawed. The suggestion that something might occur in the future to improve the claimant's position in relation to this was purely speculative.

230. The Employment Judge did not have to be "categorical" about the content of Protected Disclosure 7; he had to assess whether there was a reasonable prospect of the statutory test being met on the basis of the words the claimant relied on. Therefore, for the reasons I have already indicated, I consider that the ET erred in relation to this protected disclosure as well and that there is no reasonable prospect of the claimant succeeding in his case in respect of it.

231. Insofar as the wider limb (1)(e) case is pursued here, my conclusions is as I have set out in relation to the earlier protected disclosures, bearing in mind the reasoning I earlier identified and the context here, which was a discussion of editorial coverage.

Cross appeal: Ground 2

232. In the circumstances I do not propose to address Ground 2 of the cross-appeal given that I have in any event determined that it is appropriate to strike out each of the surviving protected disclosure claims. This ground relates to Element Five and it is unnecessary to decide it.

Outcome

233. I therefore dismiss the claimant's appeal. In relation to the cross appeal, I will allow Grounds 1 and 3 – 7. For clarity, I should say Ground 1 in the amended version set out in paragraph 32 of Mr Laddie's skeleton argument.

234. It follows that the claims relating to Protected Disclosures 1 and 4 - 7 are struck out as having no reasonable prospect of success.

235. This has been a lengthy judgment because of the number of issues I have had to address and the amount of relevant text that there is in relation to each of the alleged protected disclosures and their surrounding context. The issues, however, when broken down and analysed one by one in respect of the statutory criteria, appear to me to be relatively clear-cut; I have not conducted a mini trial nor made any findings of disputed fact.

236. Lastly, I want to acknowledge that the timing of the appeal hearing and consequently of the delivery of this judgment very shortly before the full merits hearing is due to start must make my decisions particularly difficult for the claimant. I am conscious of this and have thought about it. However, it does not appear to me to be reason in itself not to take the course that I have indicated in light of the assessments as to the prospects of success that I have made.