Appeal No. UKEAT/0130/20/OO (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 December 2020
Judgement handed down on
11 February 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MR A DOBBIE — APPELLANT

PAULA FELTON T/A FELTONS SOLICITORS — RESPONDENT

Transcript of Proceedings

JUDGMENT

(FULL HEARING)

APPEARANCES

For the Appellant	MR EDWARD KEMP (Of Counsel) Instructed pursuant to the Direct Access Scheme
For the Respondent	MS SUSAN CHAN (Of Counsel) Instructed by: Feltons Solicitors 5Th Floor 1 Knightsbridge Green London SW1X 7RA

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The Tribunal held that two disclosures of information, that were otherwise qualifying disclosures, were not in the reasonable belief of the Claimant made in the public interest. The reasons of the Tribunal did not demonstrate that it applied the correct legal test, and had taken into account all relevant factors, in determining this issue. The Tribunal also failed to apply the correct legal test in concluding a detriment, the termination of a consultancy agreement, was not done on the ground that the Claimant had made the disclosures. The correct test requires an employment tribunal to determine whether the disclosure had a material influence on the decision to terminate the agreement.

HIS HONOUR JUDGE JAMES TAYLER

1 This is an appeal against the Judgment of Employment Judge Gordon, sitting with members, sent to the parties on 28 June 2019, after a hearing between 17-21 and 24-28 June 2019. The Claimant brought a complaint that he had been subject to detriments done on the ground that he had made protected disclosures. The Tribunal dismissed the claim on the basis that the disclosures had not in the reasonable belief of the Claimant been made in the public interest; and that, in respect of the key detriment relied upon by the Claimant, causation was not established.

2 The parties are referred to as the Claimant and Respondent as they were before the Employment Tribunal. The Respondent is a firm of solicitors. The Claimant commenced an engagement with the Respondent in 2010 as a consultant. During the engagement he qualified as a solicitor. The Claimant was substantially involved in work for Client A; one of the most important clients of the firm. The Claimant contended that he made three protected disclosures to the effect that Client A had been overcharged as a result of which he was subject to a number of detriments, the most significant of which was in the Tribunal's finding, the termination of his consultancy agreement. The Claimant no longer relies on the second disclosure. I shall continue to refer to the disclosures that are still relied on as the first and third disclosures, to be consistent with the judgment of the Tribunal.

3 There was no finding that the Respondent did, in fact, overcharge Client A. The Tribunal was not concerned with the truth of the allegation but with what the Claimant reasonably believed.

The statutory provisions

4 In **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] ICR 1226, Sir Patrick Elias noted the origin of the statutory protections:

> **"1 Ever since the introduction of the Public Interest Disclosure Act 1998, the law has sought to provide protection for workers (colloquially known as whistleblowers") *who raise concerns or make allegations about alleged malpractices in the workplace.* Too often the response of the employer has been to penalise the whistleblower by acts of victimisation rather than to investigate the concerns identified. The 1998 Act inserted a new Part IVA into the Employment Rights Act 1996 designed to prevent this. The long title to the Act describes its purpose as follows:**
>
> > **"An Act to protect individuals who make certain disclosures of information in the public interest: to allow such individuals to bring action in respect of victimisation; and for connected purposes."**
>
> **The law which gives effect to the simple principle enunciated in the long title is far from straightforward. The basic principle, set out in section 47B of the Employment Rights Act 1996, is that a worker has the right not to be subject to a detriment by any act of his employer on the grounds that he has made what is termed a "protected disclosure". [*emphasis added*]"**

5 The term "qualifying disclosure" is defined by section 43B **Employment Rights Act 1996 ("ERA")** as:

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

6 It is clear from consideration of the section that:

(1) there must be disclosure of information - the authorities now establish that a disclosure of information may be made in the course of making an allegation, and that there is no bright line distinction between information and allegations: **Kilraine v London Borough of Wandsworth** [2018] ICR 1850. As Sales LJ put it:

> **"In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)"**

(2) in the reasonable belief of the worker making the disclosure the information must tend to show one of the matters set out at paragraphs (a) to (f): in **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731, Underhill LJ referred to "wrongdoing" as a shorthand label for those matters

(3) in the reasonable belief of the worker making the disclosure, it must be "made in the public interest". The leading authority on the meaning of these words is **Chesterton**, to which I shall return

7 The term "protected disclosure" is defined by section 43A **ERA** as:

> **"43A Meaning of "protected disclosure"**
>
> **In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H**

8 In essence, a qualifying disclosure becomes a protected disclosure because of the identity of the person to whom it is made; this includes employers, other responsible persons, and prescribed persons, amongst others. There are specific provisions for disclosure of exceptionally serious failings.

9 Section 47B **ERA** provides that:

> **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.**

10 Accordingly, a worker is protected from being subject to a detriment done on the grounds that he has made a protected disclosure. The leading authority on what is meant by the term "done on the ground that" is **Fecitt and others v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 372, to which I shall also return.

The decision of the Tribunal on the issue of protected disclosures

11 The Tribunal did not quote the wording of the disclosures. They were provided in the bundle for this appeal. The first disclosure was made on 29 February 2016. It included the following wording:

> **"This brings us to the retainer. I first had sight of the invoices last week in a bulk email of the invoices on which the £250,000 has been spent. I can see that the monthly retainer has been agreed at £25,000. In more detail, 50 hours a month for five months and presumably also for February has been charged for the 'Team' with 50 hours for me listed as AD.**
>
> ***I do not think that on a detailed assessment of costs, as is highly likely to happen, a costs judge will award 250-300 hours of team costs outside the written work done by me, or in collaboration with Anthony and others. I think it leaves the firm highly vulnerable to a later disparity if the judge awards, say 50-100 hours for other fee earners, and thereby leaves the firm to explain why it has billed many more hours than are recovered.*** **I think the firm is somewhat protected by me billing you in fact for 100 hours in Jan and Feb as agreed on the day of service of the claim form with you in person in Richmond, but for October through December there may well later be a gap in the recovery.**
>
> **I do appreciate you have been copied in on all work as requested and gave valuable information to A especially on the rebuttal of the arbitration enquiry. However, the written work which will be costed in contentious assessment remains mainly the work I have done, along with various meeting attendances. Certainly, Claire and or E do not feature prominently in attendance or written work. This is an issue [MR] raised in the January Stuttgart meeting.**
>
> **Going forward I would suggest;**
> **(i)** ***an honest and frank discussion with [MR] be held imminently on costs*****;**
>
> **(ii) a budget be put forward for [MR] to put to the insurers;**

> **(iii)** ***the retainer be officially adjusted, if any retainer is agreed going forward, explicitly to show more of my worked hours and less of the 'team' hours to protect the position on detailed assessment.***
>
> **It should be very little effort on assessment to evidence the written work done through my email address as I continue to put in work on this matter on an almost daily basis.**
>
> ***Above all, I do endorse we give [MR] the frank discussion he is requesting,*** **assist him in reporting to his peers and be clear about procedural elements which come up from time to time as can be expected in a contentious litigation." [*emphasis added*]**

12 The Tribunal concluded that there was a disclosure of information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation in respect of overcharging Client A:

> **"31. So on our findings** ***the overall effect of these parts of the email is to suggest that the firm had overcharged the client for the work done*****.**
>
> **32.** ***Having heard from the Claimant we are satisfied that he held the belief that this overcharging was a breach of the firm's legal obligation to the client but also a possible breach of the Solicitors Accounts Rules*****, and therefore could be a breach of a legal obligation under section 43B(b).*** ***The possible breach of the Solicitors Accounts Rules would have arisen from the need to ensure that the amount charged on an interim bill corresponded with the amount of work that had actually been done.***
>
> **33.** ***And in our view this was a reasonable belief*** **because the Claimant was the solicitor with the conduct of the file over the period to which the bills applied, up to this alleged protected disclosure and beyond, and he had no reason to believe that other fee earners were doing any work on the case of which he was unaware. This is confirmed by the correspondence we have seen, showing he was heavily involved in the preparation of the claim to prepare for the next stage in the litigation, that is the proper service of the claim form and preparation of the particulars of claim with the assistance of leading counsel." [*emphasis added*]**

13 It is apparent that the Tribunal accepted and determined as facts that:

(1) the Claimant had disclosed information that he believed tended to show that the Respondent had overcharged Client A. That finding has not been challenged

(2) the Claimant believed this information tended to show a breach of a legal obligation to Client A; presumably a breach of the Respondent's contractual duties to its client; and also, a possible breach of the Solicitors Accounts Rules

(3) it was reasonable for the Claimant to hold these beliefs

14 However, the Tribunal concluded that the Claimant did not reasonably believe that the disclosure was in the public interest:

> **"36. We turn therefore to the question whether the Claimant reasonably believed that the disclosed information was in the public interest.** ***We do not think that the email demonstrates that the Claimant believed when he sent it, that the information disclosed in the email would enhance the protection of the public or a section of the public from solicitors who in their interim bills overstated the hours spent on working on cases.*** **Instead, the Claimant's belief as appears on the face of the email was that by disclosing the information the prospects of Client A in an assessment of Client A's costs following a successful court action and a costs order in Client A's favour, would be enhanced.** ***Also we note that there was nothing in the email showing that the Claimant was talking about a solicitor-client assessment of costs, that is to say an assessment of costs between Client A and the firm itself.*** **So there is nothing to show he had a reasonable belief that the disclosure of information in the email would affect such an assessment.** ***If that had appeared in the email it might have required us to take [a] slightly different approach.***
>
> **37.** ***Hence it is our finding that email did not disclose information which emonstrated that the Claimant held a reasonable belief that it was in the public interest. It demonstrates that he had a reasonable belief that it was a private matter only.***
>
> **38.** ***We have had regard to the Claimant's detailed discussion of this issue in his witness statement and in his oral evidence*** **and as submitted before us.** ***But this is all after the event.*** **Although case law does suggest this is not irrelevant and therefore we have taken it into account, we have also had to take into account the way he has prepared this case generally and the way he gave evidence. It is clear that he has applied considerable research and consideration into this and into other issues and** ***we think it was difficult for him as it for us, to separate the thoughts which emerged from that work from his reasonable belief when he wrote that email.*** **For this reason we get most help in assessing his reasonable belief at the time, from the wording of the email itself, taking it of course in its context as known at the time to the parties which includes the email to which he was responding (that is, the email of 26 February 2016 at 0440)." [*****emphasis added*****]**

15 The third disclosure was made on 4 March 2016 and included the following:

> ***"I have also raised with you important contentious issues around costs, and how the firm stands if there is a costs review. This is not to attack you or question your integrity, it is to protect you and the firm as well as the client and keep you informed of my professional opinion.*** **Although you are officially my supervising solicitor and I can see you have lost a great deal of confidence in me and my judgment,** ***I am qualified and have a right and duty to express my professional opinion internally within the firm.*** **It may be that by incorporating my feedback int future management of the firm you are able to create synergies that were not there before. I also know [MR] very well by now and have possibly seen more of him than you in the last three years. We have a very close working relationship and he is very happy with the depth of process I have applied to the work. So when I feed back to you as to why I think [MR] feels uncomfortable around costs, and we disagree, my feedback is based on my close communications with him and his detailed accounts of the position he holds within his firm and with his principals.**

> **Accordingly, *I am disturbed where in response to my feedback I am asked to hand over the entire file; locked out of my email account, no longer invited to attend witness interviews and remain unpaid for the work I have done*, plus receive the correspondence I have done about my parents being subject to your reserved rights on billing without first managing this with me or them. I even went so far, on this past Wednesday night when I found myself locked out of my email account during our email discussions on my parents, to research what protection I might have under the whistleblower legislation that prevents unfair treatment of workers who raise important issues to their superiors." [*emphasis added*]**

16 In respect of the third disclosure, in so far as is relevant to the grounds advanced in the appeal, it was also accepted by the Tribunal that the Claimant reasonably believed that the disclosure was of information that in his reasonable belief tended to show that the Respondent was overcharging Client A, and so breaching the legal obligations referred to above. However, the Tribunal again concluded that the Claimant did not have a reasonable belief that the disclosure was made in the public interest, holding:

> **"43. We accept that in paragraph 4 of this email there is a restatement of the allegation made in the first alleged protected disclosure but on our reading it does not enlarge on what was said in the first one and *there is nothing here enabling us to find that in this respect it was written in the reasonable belief that the disclosure was in the in the public interest*."**

17 Mr Kemp, for the Claimant stated that he was not advancing different arguments in respect of the Tribunal's consideration of the first and third disclosures.

The "public interest" appeal

18 The first ground of appeal is that the "ET misapplied the public interest test".

The relevant law

19 It is a little surprising that the Tribunal did not set out the statutory wording, although it is clear that the Tribunal had in mind that the Claimant had to hold a reasonable belief that the information disclosed tended to show wrongdoing and was made in the public interest. It is rather more surprising that the Tribunal did not refer to any of the authorities. While not wanting to encourage lengthy "boilerplate" citation of authority, and accepting that just because authorities

have not been referenced it does not necessarily follow that the relevant legal principles have not been applied; if there is no mention of the key authorities it is more difficult to be confident that the correct approach has been adopted, particularly if the statute law is also dealt with briefly. Mr Kemp and Ms Chan confirmed that **Chesterton** was referred to in the submissions of both the Claimant and the Respondent.

20 As Bean LJ put it in **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601:

> **"29. Failure by an ET to set out even a brief summary of the relevant law is a breach of Rule 62(5) of the ET Rules. But I do not think it is a profitable discussion to consider whether it is an error of law, nor whether there has been "substantial compliance" with Rule 62(5). It is an error, but the real question in my view is whether the error is material. That is surely what Morison P meant when he said in Kellaway that it does not "amount to an automatic ground of appeal".**
>
> **30. It has become conventional (and has been made much easier since the invention of word processing) for employment tribunals to include in their decisions the relevant statute law and a summary of what is established by the leading authorities on the relevant subject. But, just as a dutiful recital of the relevant law does not immunise the decision against arguments that the tribunal has erred in its application, so a failure to set out the relevant law does not necessarily mean that there is any substantive error in the tribunal's decision or in the reasoning which leads to that decision, although it does make it more likely that there will be a challenge to the judgment."**

21 **Chesterton** was of particular importance in this case because of Underhill LJ's detailed consideration from para. 9 onwards of the statutory history and purpose of the amendment to add the requirement that, in the reasonable belief of the worker making the disclosure, it is "made in the public interest":

> **"9 Section 43B was amended by section 17 of the 2013 Act, with effect from 25 June 2013, by the insertion of the words which I have italicised into the first part of subsection (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 . . ."**
>
> **10 It was common ground before us, and is in any event clear from the parliamentary materials to which I refer below, that the object of the amendment was to reverse the effect of the decision of the appeal tribunal in *Parkins v Sodexho Ltd* [2002] IRLR 109. In that case an employee was**

dismissed because he had complained of having to operate a particular machine without supervision, which he said was both a breach of his contract of employment and "a matter of health and safety". One issue was, as Judge Altman put it at para 14 of his judgment:

> **"Where . . . one of the possible qualifying disclosures, is described as being the reasonable belief that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, does that term 'legal obligation' refer to legal obligations arising out of the contract of employment?"**

The appeal tribunal held, at para 16:

> **"[We] can see no real basis for excluding a legal obligation which arises from a contract of employment from any other form of legal obligation. It seems to us that it falls within the terms of the Act. It is a very broadly drawn provision."**

The result was that, whenever an employee made a disclosure about what he reasonably believed was a breach of his contract of employment (and that would include the wide-ranging "trust and confidence" term- see *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606) the disclosure would, without more, "qualify" and accordingly be potentially protected

11 It was widely believed that Parkins v Sodexho Ltd extended the scope of whistleblower protection beyond what had been intended by Parliament when enacting the 1998 Act. Paragraphs 102—103 of the Explanatory Notes to the 2013 Act read:

> **"102. The Public Interest Disclosure Act 1998 . . . inserted a new Part IVA into the Employment Rights Act 1996 ('ERA 1996') to provide protection, in certain circumstances, for whistleblowers (i e those who expose evidence of wrongdoing by employers or third parties in the context of the workplace). The ERA 1996 defines the type of disclosures that are protected and also seeks to regulate to whom the disclosures can be made. The relevant provisions came into force on 2 July 1999.**
>
> **"103. The Employment Appeal Tribunal decision in Parkins v Sodexho Ltd [2002] IRLR 109 raised the possibility that any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure. This has led to claims being lodged at employment tribunals that would not otherwise have been brought and is contrary to the intention of the legislation."**

12 The inclusion in section 43B of a reference to the public interest was intended to restore the original intention of the Act. The thinking was explained by the responsible minister, Mr Norman Lamb (the Parliamentary Under-Secretary for Business, Innovation and Skills), while the Bill was in the committee stage. An amendment had been proposed to head (b) of section 43B(1), excluding from the legal obligations there referred to "a private contractual obligation which is owed solely to that worker". The minister opposed that amendment. I should quote the following passages from his speech in the Public Bill Committee, Hansard (HC Debates), 3 July 2012, cols 385—388, italicising certain key phrases:

> **"Setting out the issue that the Government seek to address might be helpful. The original aim of the public interest disclosure legislation was to provide protection to individuals who made a disclosure in the public interest - otherwise known as blowing the whistle. The clause seeks to make that public interest clear, and the hint is in the title of the original**

legislation, which was designed to deal with public interest disclosure - that is what we are talking about …

"The Bill's sponsor, Lord Borrie, said in the House of Lords that . . . 'As I hope I have made clear, this measure will encourage people to recognise and identify with the wider public interest and not just their own private position' . . .

". . . the decision in the case of Parkins v Sodexho Ltd has resulted in a fundamental change in how the Public Interest Disclosure Act operates and has widened its scope beyond what was originally intended. The ruling in that case stated that there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. The effect is that individuals make a disclosure about a breach of their employment contract, where this is *a matter of purely private rather than public interest*, and then claim protection, for example, for unfair dismissal."

"…by widening the scope of the Public Interest Disclosure Act to allow *claims of a personal nature*, the effectiveness and credibility of the legislation is, in my view, called into question…

"The clause will remove the opportunistic use of the legislation for private purposes. It is in the original spirit of the Public Interest Disclosure Act that those seeking its protection should reasonably believe that their raising an issue is in the public interest. Including a public interest test in the Bill deals with the *Parkins v Sodexho Ltd* case in its entirety. Therefore there is no need to disallow claims based on an individual's contract, as suggested in the amendment . . ."

He went on to say that the proposed amendment would in fact be contrary to the purpose of the Act since it was not intended to deny protection to workers who made disclosures relating to their own contractual rights which were also in the public interest. He said:

"although our aim is to prevent the opportunistic use of breaches of an individual's contract *that are of a personal nature*, there are also likely to be instances where a worker should be able to rely on breaches of his own contract where those engage wider public interest issues. In other words, in a worker's complaint about a breach of their contract, the breach in itself might have wider public interest implications."

He also observed that a focus purely on disclosures about contractual breaches was misconceived since

"the issue in [*Parkins v Sodexho Ltd*] could have been reframed as a health and safety issue, with similar issues then arising in relation to disclosures of minor breaches of health and safety legislation, which are of no interest to the wider public."

13It will be noted that the effect of *Parkins v Sodexho Ltd* [2002] IRLR 109 which it was intended to reverse was repeatedly stated by the minister as being the according of protection to disclosures made to pursue the worker's "private" or "personal" interest as opposed to the public interest. It was common ground that it was permissible for us to take note of those passages as confirming the mischief at which the amendment of section 43B was directed."

22 Underhill LJ went on to consider the rationale for the removal of the previous requirement that a disclosure should not have been made "in bad faith", in order to be a qualifying disclosure, at para. 16:

> **"16 The requirement of good faith was removed by section 18 of the 2013 Act, also with effect from 25 June 2013. However a new subsection (6A) was introduced into both section 49 and section 123 of the 1996 Act giving the employment tribunal power to reduce any compensatory award for unlawful detriment or unfair dismissal by up to 25% if it found that the disclosure in question was not made in good faith. In other words, the question of good faith is no longer relevant to liability in a whistleblowing case but it remains relevant to remedy.**
>
> **17 The purpose behind the changes effected by section 18 is not apparent from the Explanatory Notes or any other material that we were shown. It might at first sight be thought that the draftsman regarded the introduction of the public interest requirement as rendering the good faith requirement redundant, but counsel were unaware of any explicit indication to that effect (and Mr Linden's clients at least might be expected to know if there were). *It is, however, clear that the draftsman contemplated that a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith, since otherwise the new sections 49(6A) and 123(6A) would never bite: I return to this below.*" [*emphasis added*]**

23 The last sentence of para. 17 is particularly important. Provided that the worker making the disclosure reasonably believes that it is made in the public interest it does not matter that he might be making the disclosure for some other purpose; the protection can apply even where the disclosure is made in bad faith.

24 Underhill LJ went on to set out certain key principles as "preliminaries":

> **"26 The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B(1).**
>
> **27 First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula's* case [2007] ICR 1026 (see para 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
>
> **28 Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-**

textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking- that is indeed often difficult to avoid – but only that that view is not as such determinative.

29 Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

30 Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase *"in* the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

31 Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the *Reynolds* defence (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10—13 above. That 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. This seems to have been essentially the approach taken by the tribunal at para 147 of its reasons."

25 In **Chesterton** a number of matters that were likely to be relevant to the question of whether the disclosure was made in the public interest were advanced in argument on behalf of the Claimant, and were set out by Underhill LJ at para. 34:

> **"(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." [*emphasis added*]**

26 In his conclusions on the correct approach to the question of what amounts to a disclosure that in the reasonable belief of the worker making it is "made in the public interest", Underhill LJ stated from para. 36 onwards:

> **"The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that *workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers* - even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. 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.**
>
> **37 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."**

27 There are a number of key points I consider it is worth extracting from Underhill LJ's reasoning, and re-emphasising:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence

(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation

(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest

(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith

(5) there is not much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression

(6) the statutory criterion of what is "in the public interest" does not lend itself to absolute rules

(7) 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

(8) the broad statutory intention of introducing the public interest requirement was that "workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers"

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

iii. the nature of the wrongdoing disclosed

iv. the identity of the alleged wrongdoer

(10) 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

28 There are a few general observations I consider it worth adding:

(1) a matter that is of "public interest" is not necessarily the same as one that interests the public. As members of the public we are interested in many things, such as music or sport; information about which often raises no issue of public interest

(2) while "the public" will generally be interested in disclosures that are made in the "public interest", that does not necessarily follow. There may be subjects that most people would rather not know about, that are, nonetheless, matters of public interest

(3) a disclosure could be made in the public interest although the public will never know that the disclosure was made. Most disclosures are made initially to the employer, as the statute encourages. Hopefully, they will be acted on. So, for example, were a nurse to disclose a failure in the proper administration of drugs to a patient, and that disclosure is immediately acted on, with the consequence that he does not feel the need to take the matter any further, that would not prevent the disclosure from having been made in the public interest – the proper care of patients is a matter of obvious public interest

(4) a disclosure could be made in the public interest even if it is about a specific incident without any likelihood of repetition. If the nurse in the example above disclosed a one off error in administration of a drug to a specific patient, the fact that the mistake was unlikely to recur would not necessarily stop the disclosure being made in the public interest because proper patient care will generally be a matter of public interest

(5) while it is correct that as Underhill LJ held there is "not much value in trying to provide any general gloss on the phrase "in the public interest" – noting that "Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression" – that does not mean that it is not to be determined by a principled analysis. This requires consideration of what it is about the particular information disclosed that does, or does not, make the disclosing of it, in the reasonable belief of the worker so doing, "in the public interest". The factors suggested by Mr Laddie in **Chesterton** may often be of assistance. While it certainly will not be an error of law not to refer to those factors specifically, where they have been referred to it will be easier to ascertain how the analysis was conducted. It will always be important that written

reasons set out what factors were of importance in the analysis; which may include factors that were not suggested by Mr Laddie in **Chesterton**. As Underhill LJ held "The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case". It follows that if no account is taken of factors that are relevant; or relevant factors are ignored, there may be an error of law

(6) for the disclosure to be a qualifying disclosure it must in the reasonable belief of the employee making the disclosure tend to show one or more of the types of "wrongdoing" set out in section 43B (a)-(f) **ERA**. Parliament must have considered that disclosures about these types of "wrongdoing" will often be about matters of public interest. The importance of understanding the legislative history of the introduction of the requirement for the worker to hold a reasonable belief that the disclosure is "made in the public interest" is that it explains that the purpose was to exclude only those disclosures about "wrong doing" in circumstance such as where the making of the disclosure serves "the private or personal interest of the worker making the disclosure" as opposed to those that "serve a wider interest"

(7) while the specific legislative intent was to exclude disclosures made that serve the private or personal interest of the worker making the disclosure, that is not the only possible example of disclosures that do not serve a wider interest, and so are not "made in the public interest". There might be a disclosure about a matter that is only of private or personal interest to the person to whom the disclosure is made and does not raise anything of "public interest".

(8) while motivation is not the issue; so that a disclosure that is made with no wish to serve the public can still be a qualifying disclosure; the person making the

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> disclosure must hold the reasonable belief that the disclosure is "made" in the public interest. If the aim of making the disclosure is to damage the public interest, it is hard to see how it could be protected. Were a worker to disclose information to his employer, that demonstrates that it is discharging waste that is damaging the environment, with the aim of assisting in a coverup, or to recommend ways in which more waste could be discharged without being found out; while the disclosure would otherwise be a qualifying disclosure, it is hard to see how the disclosure could be "made" in the public interest. The fact that a disclosure can be made in "bad faith" does not alter this analysis. A worker might make public the fact that the employer is discharging waste because he dislikes the MD, and so is acting in bad faith, but nonetheless hold the reasonable belief that making the disclosure is in the public interest because the discharge of waste is likely to be halted. Generally, workers blow the whistle to draw attention to wrongdoing. That is often an important component of why in making the disclosure they are acting in the public interest.

29 Disclosures about certain subjects are likely to be "made in the public interest". This point was made by HHJ Eady QC, as she then was, in **Okwu v Rise Community Action** UKEAT/0082/19/OO, when considering a disclosure by a worker who raised "concerns that the Respondent was acting in breach of the Data Protection Act by failing to provide the Claimant with her own mobile and with secure storage, when she was dealing with sensitive and confidential personal information", at para. 47:

> **"The ET apparently considered that the Claimant was primarily raising those matters as relevant to her assessment of her own performance. However, as is made clear in Chesterton Global, that would not necessarily mean that she did not reasonably believe that her disclosure was in the public interest. *Indeed, considering the nature of the interest in question it would be hard to see how it would not - in the Claimant's reasonable belief - be a disclosure made in the public interest*, even if (as the ET seems to suggest, see the penultimate sentence of paragraph 31 and the reasoning at page 32) the Claimant also had in mind the impact upon her in terms of her work**

> **performance; after all, the public interest need not be her only motivation for making the disclosure (again, see Chesterton Global)." [*emphasis added*]**

30 In **Simpson** Bean LJ, in rejecting an appeal against a decision that a banker primarily concerned with his own commission had not made protected disclosures, distinguished his situation from that of a person who made a disclosure that tended to show malpractice, held at para. 63:

> **"The present case is a long way from one of a doctor complaining of excessively long working hours. The ET repeatedly found that Mr Simpson's real complaint was about being deprived of the commission which he thought was rightfully his. *If they had accepted that the disclosures, or some of them, constituted information which in the actual and reasonable belief of the claimant tended to show malpractice, then the public interest test would no doubt have been quite easily satisfied.* But that is not what happened." [*emphasis added*]**

31 However, the fact that a disclosure is about a subject that could be in the public interest does not necessarily lead to the conclusion that the worker believed that she or he was making the disclosure in the public interest: **Parsons v Airplus International Ltd** UKEAT/0111/17/JOJ. It is the belief that the worker held when making the disclosure that must be determined.

The Tribunal's analysis of why it held that the Claimant did not reasonably believe that the disclosure was "made in the public interest"

32 Having concluded that the Claimant held a reasonable belief that the information he disclosed tended to show that the Respondent was overcharging Client A, which in his reasonable belief constituted "wrongdoing" in that it tended to show a breach of the Respondent's legal obligations to Client A and of regulatory requirements, the Tribunal concluded that the did not have a reasonable belief that disclosures 1 and 3 were made in the public interest.

33 The Tribunal's reasoning had the following components:

(1) the Tribunal had regard to the *Claimant's detailed discussion of this issue in his witness statement and in his oral evidence* but noted that it was "*all after the event*". The Tribunal noted that the case law did suggest that this is not irrelevant and so it had taken it into account (in an unspecified manner). The Tribunal considered that the Claimant clearly "applied considerable research and consideration this and into other issues and we think it was difficult for him as it for us, to separate the thoughts which emerged from that work from his reasonable belief when he wrote that email". The Tribunal stated that they got the *"most help in assessing his reasonable belief at the time, from the wording of the email itself, taking it of course in its context"*

(2) the Tribunal considered it was apparent "on the face of the email" that by disclosing the information the prospects of Client A in *an assessment of Client A's costs following a successful court action and a costs order in Client A's favour, would be enhanced*"

(3) the Tribunal did not consider that the email demonstrated that "the Claimant *believed when he sent it, that the information disclosed in the email would enhance the protection of the public or a section of the public* from *solicitors* who in their interim bills overstated the hours spent on working on cases"

(4) the Tribunal considered that it appeared that "there was *nothing in the email showing that the Claimant was talking about a solicitor-client assessment of costs*, that is to say an assessment of costs between Client A and the firm itself. So there is nothing to show he had a reasonable belief that the disclosure of information in the email would affect such an assessment"

(5) The Tribunal concluded "Hence it is our finding that email did not disclose information which demonstrated that the Claimant held a reasonable belief that it was in the public interest. *It demonstrates that he had a reasonable belief that it was a private matter only*."

(6) In respect of the third disclosure, the Tribunal concluded that "there is a *restatement of the allegation made in the first alleged protected disclosure* but on our reading it *does not enlarge on what was said* in the first one and there is *nothing here enabling us to find that in this respect it was written in the reasonable belief that the disclosure was in the in the public interest*."

34 The core of the Tribunal's reasoning was that the Claimant was disclosing information that would assist the Respondent in ensuring that, following a successful court action, and a costs order in Client A's favour, the prospects of a beneficial assessment of Client A's costs would be enhanced. Therefore this was not a disclosure that would enhance the protection of the public or a section of it; it would not affect a solicitor client assessment of cost and so was purely a matter of "private interest". The third disclosure added nothing to the first.

35 It is worth noting that the Tribunal did not place any weight on the Respondent's submission that the Claimant, particularly in the first disclosure, was suggesting that the solution to the problem was to increase the hours ascribed to him, in the future at least, with the consequence that he would be paid for those extra hours under the terms of the consultancy agreement. While this is a matter the Respondent refers to in its submissions, it was not relied upon by the Employment Tribunal.

The first ground of appeal

36 The first ground of appeal is that the Tribunal "misapplied the public interest test". The word "misapplication" is something of a coverall – it appears to be used in this appeal to encompass both erring in law by applying the wrong legal test (misdirection as to the law) and/or incorrectly applying the correct test to the facts – which is akin to perversity - to make such an argument good it will often have to be established that either the Tribunal reached a decision in respect of the relevant issue that no reasonable tribunal could have reached when applying the correct legal test; or demonstrate that the Tribunal failed to take into account a relevant factor, or took into account an irrelevant factor. The word "misapplication" is sometimes used to avoid use of the dread word "perversity".

37 I have reminded myself of the approach of Lord Fraser of Tullybelton in **Melon v Hector Powe Ltd** [1980] ICR 43, at 48C:

> **"It is common ground that the appeal from the industrial tribunal to the Employment Appeal Tribunal and thence to the courts is open only on a question of law. The appellate tribunals are therefore only entitled to interfere with the decision of the industrial tribunal if the appellants can succeed in showing, as they seek to do, that it has *either misdirected itself in law or reached a decision which no reasonable tribunal, directing itself properly on the law, could. have reached* (or that it has gone fundamentally wrong in certain other respects· none of· which is here alleged). The fact that the appellate tribunal would have reached a different conclusion on the facts is not a sufficient ground for allowing an appeal." [*emphasis added*]**

38 I have also once again reminded myself of Mummery LJs direction in **Brent LBC v Fuller** [2011] ICR 806, at para. 30:

> **"The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

39 The core components of the Claimant's argument are:

(1) the Tribunal erred in requiring that the information disclosed "would enhance the protection of the public or a section of the public"

(2) the Tribunal applied the public interest test to the emails as a whole rather than to the disclosure of information, i.e. that Client A was being overcharged

(3) the Tribunal decided that the disclosure served a private interest of "enhancing its recoverable costs from the other party in litigation in a detailed assessment" whereas "the enacting history to the public interest test and Chesterton make clear a "private" interest in the statutory context is one which is private or personal to the worker making the disclosure

(4) there was no finding of fact by the ET that the Claimant believed that the disclosure of information did serve his own personal or private interest

(5) the Tribunal was wrong to conclude that there must be a further disclosure of information about a solicitor-client assessment of costs, in order for a worker to have a reasonable belief that information disclosed, to the effect that a client is being overcharged, is in the public interest

(6) the Tribunal failed to ask itself whether the Claimant reasonably believed that regulatory breaches were in the public interest nor whether, objectively, it was in the public interest that these standards of the solicitors' profession should be complied with

40 The Respondent contends that:

(1) even if not quoted, the Tribunal understood the statutory test and adopted the correct legal test as set out in **Chesterton**; namely, "whether the worker had a reasonable belief that the disclosure was in the public interest"

(2) the Tribunal was entitled to conclude that the Claimant's "reasonable belief pertained to a "private matter only""

(3) the Tribunal made a factual determination that was open to it after "having considered all the evidence, including many hundreds of pages of witness statements, 16 bundles comprising over 3,500 pages and having heard evidence from the Appellant, Respondent and other witnesses" and saw the disclosures properly in context

(4) the Tribunal was entitled to take into account the fact that the Claimant had given the matter much thought after making the disclosure, and that what he later concluded did not necessarily reflect the belief he held when making the disclosure

(5) there was no dilution of the "public interest" test in concluding that "the Appellant's concern was to maximise recovery of Client A's costs"

(6) "The Appellant's complaint was essentially that too large a proportion of the monthly fees charged to Client A had been allocated to fee-earners other than himself in the past. Because he did not consider that those 'team hours' were justified, he was pointing out that this could result in a costs judge taxing down Client A's recoverable costs (for the "team" hours claimed, whereas in his view, his own hours were more than justified) in an inter-partes cost assessment at the conclusion of the litigation."

(7) the Claimant was asserting that "that "*going forward*", a greater proportion of the overall hours charged to Client A should be attributed to him, as opposed to the team

(8) "Crucially, at no point did the Appellant propose that the overall fees charged to Client A should be reduced (whether on past or future charges) to reflect a

potential overcharging of hours by Feltons. This negates any suggestion that the Claimant reasonably believed this to be in the "public" interest - which could include Client A as part of the public. Instead the Appellant proposed doubling his future hours from 50 hours to 100 hours"

(9) the Tribunal considered that "Client A could be part of the "public", but in this case, did not believe that the Appellant had any interest in protecting Client A's purse."

(10) "The ET was therefore correct to conclude as it did at paragraph 37 that the first alleged qualifying disclosure about the billing of Client A concerned a "private matter only," the said private interest being Client A's interests in enhancing its recoverable costs from the other party to litigation during detailed costs assessment. Internal advice given in the process of litigation to enhance a client's interests cannot properly be regarded as a matter which enhances the public protection; it is simply tactical advice given as part of litigation strategy."

(11) the Claimant was not challenging that the third disclosure was a restatement of the first disclosure

Conclusion

41 I consider that the Tribunal erred in law, in its analysis of whether the Claimant reasonably believed, at the time he made them, that he made the disclosures in the public interest. In analysing this matter, the Tribunal failed to focus on the nature of the information the disclosure of which it had held was otherwise a qualifying disclosure (the Claimant's second argument – in my summary above). The Tribunal had found that the Claimant held a reasonable belief that a solicitor was overcharging a client in breach of its contractual obligations to the client and, more importantly, in breach of regulatory requirements. Solicitors, as officers of the Court,

A are held to high standards of conduct. That is why overcharging is not only a matter that can give rise to a contractual dispute between the solicitor and client; but could raise regulatory issues that might result in disciplinary proceedings.

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42 The Tribunal does not make any reference to overcharging, or the regulations applicable to solicitors, in the sections of the judgement in which it considered whether the Claimant held a reasonable belief that the disclosures were made in the public interest (the Claimant's sixth argument). While the failure to refer to **Chesterton** was not of itself an error of law, it is not possible to discern that the guidance in that case was taken into account. If the Claimant held a reasonable belief that he was disclosing information to the Respondent that tended to show that it was overcharging Client A, in breach of regulatory requirements, and that this disclosure was made in the public interest, the disclosure did not cease to be protected because it was done in the context of him arguing that this issue was important because of the effect it might have on the taxation of Client A's costs, should it be successful in the claim.

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43 The Tribunal did not set out the criteria that Underhill LJ suggested in **Chesterton** might be of assistance in gauging whether a matter was of public interest. While not mentioning them was not an error of law of itself, it is not possible to discern that they were, at least, considered. Dealing with them in reverse order.

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(1) the Tribunal did not analyse whether the public interest was affected by the identity of the alleged wrongdoer; one would have expected the Tribunal to take into account the fact that the Respondent is a firm of solicitors, and so is, in the public interest, subject to high requirements of honesty and integrity

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(2) the Tribunal did not refer, in analysing the public interest test, to the nature of the wrongdoing, which included potential regulatory breaches. Such a disclosure

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would be expected to raise matters of public interest because the regulations are there to protect the public. If the Tribunal felt there was some particular reason why disclosure of a regulatory breach in this case was not believed by the Claimant to be a matter of public interest, it did not say so

(3) the tribunal did not consider when analysing the public interest issue the nature of the interests affected and the extent that they are affected by the wrongdoing

44 In the circumstances of this case, these were factors that the Tribunal needed to consider, to analyse the matter properly.

45 It is only the first of the factors listed in **Chesterton** that received analysis in the section dealing with public interest; the numbers in the group whose interests the disclosure served. The Tribunal stated: *"We do not think that the email demonstrates that the Claimant believed when he sent it, that the information disclosed in the email would enhance the protection of the public or a section of the public from solicitors who in their interim bills overstated the hours spent on working on cases."* This seems to have been key to the Tribunal's determination that the Claimant "had a reasonable belief that it was a "private matter only". The Tribunal introduced a requirement for a worker to believe that the disclosure would enhance the protection of the public or a section of the public (the Claimant's first argument). I do not accept that the Tribunal's reasons included a determination that the protection of the interests of Client A alone was the protection of "a section of the public". If that was what it meant the Tribunal could have said so. Furthermore, the Tribunal referred to the protection of a section of the public from solicitors (plural) which suggests it was not including the protection of Client A from overcharging by the Respondent as constituting the protection of a section of the public. The Tribunal required that there be a group that is likely to be protected for there to be a reasonable belief that a disclosure

is made in the public interest. I do not consider there is such a requirement as a matter of law. The more people that are likely to be affected, the more likely there will be a matter of public interest. But, as in the example I gave above, as the scheme of the act is for disclosures to be made to the employer first, the public may never get to know about the disclosure, and so there may be no protection for a section of the public. A disclosure of information relevant only to one person could nonetheless be a matter of public interest, such as in the case of a one off error in treatment of a patient, I suggested above. Even if only Client A might have received some protection, that does not mean that a disclosure could not, in the reasonable belief of the Claimant, be made in the public interest, because the disclosure could advance the general public interest in solicitors' clients not being overcharged, and solicitors complying with their regulatory requirements, albeit on this occasion that the only person that might be affected was Client A.

46 The Tribunal went on to state that "*we note that there was nothing in the email showing that the Claimant was talking about a solicitor-client assessment of costs, that is to say an assessment of costs between Client A and the firm itself. So there is nothing to show he had a reasonable belief that the disclosure of information in the email would affect such an assessment. If that had appeared in the email it might have required us to take [a] slightly different approach*." As I understand it, the Respondent contends that the fact that the Tribunal refers to the possibility that, had the disclosure been likely to affect the solicitor-client assessment of costs between Client A and the Respondent, it "*might have required us to take [a] slightly different approach*", shows that the Tribunal did consider that Client A could be a section of the public. I do not consider that this tentative statement is sufficient to demonstrate that the previous section does not mean what it says, on a natural reading, that for a disclosure to affect a section of the public it needs to be relevant to the interests of more than one solicitor and a single client.

47 As the Respondent notes, this section of the judgment suggest that the Tribunal concluded that the Claimant was not trying to ensure that Client A would recover some of the costs it had paid to the Respondent. That appears to have been, in part, because he felt that his hours were under-recorded, so the error was, in effect, misallocating work. That might have provided an argument for contending that there was no reasonable belief in "wrongdoing", if the issue was misallocation of work rather than overcharging. But that was not the finding of the Tribunal. The Tribunal concluded that the Claimant reasonably believed there was overcharging of Client A, in breach of the Respondent's legal obligations and regulatory requirements. The Tribunal needed to, and did not, explain why, because the disclosure of information was not going to effect "a solicitor-client assessment of costs", it could not, in the reasonable belief of the Claimant, be made in the public interest (the Claimant's fifth ground)

48 I do not accept the full extent of the Claimant's third argument that "a "private" interest in the statutory context is one which is private or personal to the worker making the disclosure." I accept that was the principal reason for the introduction of the provision, but consider that there could be situations in which there is some other type of private interest, such as that of the person to whom the disclosure is made, that has no element of public interest. However, generally the amended provision excludes those who are acting only in their own interest. Because it did not refer to or analyse **Chesterton**, the Tribunal did not demonstrate that it had taken account of the history and the main purpose of the introduction of the public interest requirement, and/or explain why in this case, despite not finding that the Claimant made the disclosure in his own interest (Claimant's fourth argument), that this was a purely a private matter that did not gain protection.

49 I do not accept the Respondent's primary contention (the Respondent's first argument in my analysis above) that the Tribunal "understood the statutory test and adopted the correct legal test as set out in **Chesterton**; namely, "whether the worker had a reasonable belief that the

A disclosure was in the public interest". This argument conflates the statutory test with the analysis in **Chesterton**, and suggests that **Chesterton** does nothing more than repeat the statutory wording.

B 50 For the reasons set out above, I do not accept that the analysis of the Tribunal was consistent with that required by the authorities or that it took account of all key factors that were relevant in this case. That error of law of itself means that the appeal must succeed.

C 51 None of the Respondent's other arguments can save the decision. I will therefore deal with them briefly.

(1) I do not accept that the Tribunal conducted sufficient analysis to conclude that the Claimant's "reasonable belief pertained to a "private matter only" (the Respondent's second argument)

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(2) while the tribunal did consider a great deal of evidence (the Respondent's third argument) that does not justify the shortcomings of the analysis of the public interest issue

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(3) similarly, while it is correct that the Tribunal was entitle to conclude that the Claimant "had given the matter much thought after making the disclosure" and to discount matters that were not in his mind at the time he made the disclosures (the Respondent's fourth argument), this does not mean that the Tribunal did not need to more fully analyse what was the Claimant's belief at the time he made the disclosure

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(4) the Respondent contends that there was no dilution of the "public interest" test in the Tribunal deciding that "the Appellant's concern was to maximise recovery of Client A's costs". However, that comes close to accepting that the Tribunal was making the error of focusing on the motivation of the Claimant

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for making the disclosure, rather than focusing on whether, whatever his motivation, he reasonably believed the disclosure was made in the public interest

(5) the Respondent's sixths to tenth arguments similarly relate to the contention that the Tribunal was entitled conclude that the Claimant was only pursuing private interests, either those of the Respondent, Client A, or himself. These arguments again focus on the motivation for the Claimant making the disclosure, rather than whether he reasonably believed that the disclosure was made in the public interest

(6) in respect of the Respondent's ninth argument, I do not accept that the Tribunal considered that Client A could be a "part of the public" as suggested in the skeleton argument. The wording the Tribunal used in the judgement was a "section of the public" which I consider was meant to be a reference to more than just one person, particularly because if the Tribunal meant to say that the interests of Client A alone could be sufficient, they could have said so

52 Accordingly, the first ground of appeal succeeds.

Causation

53 Again, somewhat surprisingly, the Tribunal limited its consideration of the issue of causation to what it considered to be the main detriment; the termination of the Claimant's consultancy agreement. The Tribunal held that the main reasons for the Respondent's decision to terminate the contract were (1) the Claimant's insistence on being paid double his usual monthly fee for work on Client A's account, (2) the disagreement about the handling of the Claimant's parent's claim and (3) concerns about the Claimant's competence.

54 The Tribunal went on to conclude:

> **"59. It follows that on our finding the disclosure of the information alleged to be the protected disclosures in the issues, ***had little influence*** on the decision to terminate the consultancy agreement". [*emphasis added*]**

The law

55 In **Fecitt and others v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 372 the Court of Appeal stated, although the matter did not require determination in the appeal, that:

> **"liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. I agree with Mr Linden that *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931 is not strictly applicable since it has a European Union context. However, the reasoning which has informed the European Union analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in nsuring that they are not discouraged from coming forward to highlight potential wrongdoing."**

56 The Appellant argues that the language used by the Tribunal does not paraphrase the test but sets a higher threshold to establish causation.

57 The Respondent contends that the Tribunal was expressing the test in **Fecitt** in only slightly differing wording and that "The ET's finding at paragraph 60 that the Appellant's consultancy agreement "*would have been terminated at the same time*" had the alleged protected disclosures been omitted from his emails, reiterates that its finding on the facts was that the disclosures had no **material** effect on the Respondent's decision to terminate the Appellant's consultancy." The Respondent contends that if there was an error in the legal test it was immaterial as the detriment would have been suffered in any event.

Conclusion

58 The judgment of the Tribunal on this issue also suffers from the fact that it made no reference to the relevant authorities and did not set out what test it was applying to causation. This, again, makes it more difficult to conclude that nonetheless it applied the correct test. The rather odd approach adopted, in only considering the most important detriment, the termination of the consultancy agreement, may have led the Tribunal into analysing the matter rather as it would have an unfair dismissal case, had the Claimant been an employee rather than a worker; and so thinking in terms of reason or principal reason for treatment. In any event, I cannot read the determination that the disclosures "had little influence" as being the same as having had no material effect on the decision. I can only conclude that the Tribunal applied the wrong legal test and therefore erred in law in considering causation.

59 If the making of one or both of the protected disclosures was an effective cause of the termination of the consultancy agreement, a detriment will be made out, even if the agreement would have been terminated, in any event, absent the making of the disclosure. The possibility of the agreement being terminated absent the protected disclosure would be a matter that goes to remedy.

60 Accordingly, the appeal is allowed on both grounds.

61 I have concluded that there was a failure to properly apply the correct legal test and analyse all the relevant factors in determining the issue of whether the disclosures were in the reasonable belief of the Claimant made in the public interest. I consider it is clear that this is a question to which there is more than one possible answer, and it would not be appropriate for me to substitute a decision that the disclosures were, in the reasonable belief of the Claimant, made in the public interest. The factual analysis is for the employment tribunal. Similarly, it will be for

A the employment tribunal to determine whether any protected disclosures that are made out were an effective cause of any of the detriments, including the termination of the consultancy agreement.

B 62 I consider it is appropriate for the matter to be remitted for consideration by a different Employment Tribunal, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

C (1) it is not proportionate to await the availability of the same Employment Tribunal before this case can progress

(2) the errors of law were fundamental to the decision reached

D 63 Within 14 days of the handing down of this Judgement, the parties are to send concise written submissions on the question of whether it will be open for the tribunal on remission, if it determines that that the Claimant made protected disclosures, and that one or both were effective

E causes of the decision to terminate the consultancy agreement, to determine anew the issue of whether the Claimant's consultancy agreement would have been terminated at the same time absent the making of any disclosures that are established to be protected. I consider it is important

F that the tribunal that hears the matter on remission should have guidance on this issue. I will give a brief supplementary judgement dealing with this issue after consideration of the written submissions.

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