CLIENT: **CMS Cameron McKenna Nabarro Olswang LLP**

FILE NAME: **CMS Cameron McKenna Nabarro Olswang LLP 03.12.21 11am**

DATE RECORDED: **03.12.21**

Present:

Judge Heather Williams	(JHW)
Robert Newton	(RN)
James Wynne	(JW)
James Laddie QC	(JL)

(Session begins at 10:55)

RN: For the benefits of all here, participants and observers, I am the Court Clerk. The Judge will be joining us remotely. It is a criminal offence to record any part of these proceedings, we are recording it here.

JHW: In the interests of time, when I refer to significant sections of documents in the bundle or the case authorities, I will cross refer rather than read it. If an official transcript is sought, full references will be included.

I will refer to the parties as they were known below. The Claimant appeals the decision of the London Central Employment Tribunal, Employment Judge Adkins made following a preliminary hearing to strike out the second and third alleged protected disclosures he relied upon on the ground there was no reasonable prospect of them meeting the applicable statutory definition. The hearing was on 28th April 2021 and the reserved judgment was to the parties sent on 9th June 2021.

Other five protected disclosures that were not struck out by the Employment Judge are the subject of a cross appeal by the Respondent in this matter contending that those 5 protected disclosures should also be struck out as having no reasonable prospects of success. Appeal was allowed to proceed to a full hearing by John Bowers QC as a High Court Judge following consideration of papers and the cross appeal was permitted to proceed to the hearing by Mr Justice Choudhury following consideration of the papers on 3rd May 2021. Those dates must be around the wrong way there. That should be clarified.

On 8th June 2021, Employment Judge Adkin made deposit orders of £50 each as a condition of the Claimant proceeding with protected disclosures 4 and 7. I understand those sums were paid. The timing of this appeal is unusual, the full merits hearing will commence on Monday and has been listed for 10 days. In a case management order made on 25th September 2021, the Employment Tribunal decided it would be inappropriate to vacate the trial listing. The parties were keen for the cross appeal to be heard and to have my decision before the commencement of the substantive hearing. However, the hearing only took place on Wednesday 1st December, and counsels' submissions took the whole court day. I was then involved in hearing a different case on the 2nd December and in the circumstances, the only solution in terms of delivering a decision before the substantive merits hearing commences, was for me to give a read-out judgment on Friday 3rd December as I am now duly doing.

The Claimant's case

As the employment tribunal was considering a strike-out application, it is common grounds that the Claimant's case should be taken at its highest so far as factual allegations are concerned. The Claimant is a journalist and was employed by the Respondent from 2000 until his dismissal on 21st May 2020. His role was reporter, natural gas, carbon and power, and worked in the London office as part of Bloomberg News. The Respondent has around 20,000 employees and over 50 offices globally. On 28th May he started proceedings for automatic unfair dismissal pursuant to section 103a of the Employment Rights Act 1996, asserting he was dismissed for making protected disclosures. He also claimed pursuant to section 7b ERA he had been subject to detriment for making protected disclosures and he also claimed ordinary unfair

dismissal. By the hearing in front of the employment judge, the strikeout application was only concerned with whether the 7 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. In his particulars of claim, the Claimant described the concerns that gave rise to making the alleged protected disclosures as follows.

Paragraph 8 he said, 'Around the time of the Paris climate conference the Claimant became concerned about the Respondent's coverage of climate change and related issues'. He fleshed this out in paragraph 10, which is to be incorporated into this judgment. He said after these disclosures he faced retribution in that he was placed on a performance improvement plan and ultimately dismissed. The Claimant's case in relation to each of the alleged qualifying disclosures were set out in the particulars of claim but were subject of a schedule giving further and better particulars.

As well as considering the pleadings I have read in full each of the disclosures that are relied upon. In relation to the first six which are in writing, the seventh (inaudible), the Claimant alleged that in all seven instances his discs were discs of information which in his reasonable belief tended to show that the environment has been or is likely to be damaged within the meaning of limb e of section 43(b)(i) and that the information showed that this would be deliberately concealed in the meaning of limb F, the concealment relating to limb E matters.

In relation to protected disclosures 5 and 6 the Claimant also relied on limb B, saying that they tended to show a person is failing or likely to fail to comply with a legal obligation to which he is subject.

It was agreed at the hearing before me after some submissions on this point by counsel that the Claimant's case under limb 1e was essentially put on two bases, firstly that his references to the climate crisis of aspects of it, itself satisfied the 1e statutory criteria, I will call that the wider basis. Secondly, he expressed concerns that the Respondent itself was causing or was likely to cause environmental damage by the way it was reporting or not reporting energy-related stories. We will call that the narrower basis. In limb F, the Claimant relied on the proposition that his communications indicated the Respondent was deliberately concealing, by the nature and/or focus of their reporting certain energy related stories, damage to the environment.

I will turn to the specifics of each of the alleged protected disclosures. The six written disclosures comprise 38 pages of the bundle and therefore I do not intend to refer to their entire contents. However, I have taken it into account in full.

PD1

This alleged protected disclosure was contained in an email from the Claimant to Lucy Mills, HR officer and was sent on 20th May 2016. The Claimant was appealing his first written warning which had been given to him by his team leader. He said the warning was based on unfair performance targets and the procedure leading up to it had been unfair. The email in its entirety comprises 2 pages of singly spaced text. The further and better particulars which I will refer to hereafter as the schedule identified the text. The Claimant was asked to identify the words 'relied upon as constituting the qualified disclosure'. There is a caveat at the start of the relevant column in relation to this and subsequent disclosures, there are the words, 'parts relied on include' or the equivalent.

However, I have also taken into account other passages Mr Wynne took me to in the context of submissions on Wednesday.

The contents of the email that were relied upon were set out in the schedule in a column headed 'relevant information.' It was three relatively short passages of the longer email. I will not read them out now but in any official judgment they will be included.

The Claimant was also required to set out in this document 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.' Again, I have considered that in full and it will be set out in full in any official judgment. I have also borne in mind what is said in the particulars of claim insofar as it might add to what is in the schedule.

In terms of the document itself, in addition to the passages identified by the Claimant in the schedule, the Respondent in particular emphasises a sentence towards the beginning of when the Claimant starts to deal with why the performance targets were unfair and he says, 'I want to accept there are areas that I could improve, my writing is not engaging editors and readers quickly enough on stories such as how to infuse economies' market prices that deter damaging greenhouse gases.' He acknowledged that he needed to widen his scope beyond climate and carbon and that he was doing that already. In addition to the passages which were set out in the schedule, Mr Wynne on behalf of the Claimant emphasised a passage which refers to whichever news company properly covers in a regular way the damage that each new fossil fuel project will cause, as he said a reference to environmental damage.

PD2

This communication was contained in an email from the Claimant on 18th January 2017 to John Micklethwaite, editor in chief. The Claimant had spoken to him and was now contacting him again with his thoughts regarding the coverage on climate talks. The subject was how better climate reporting will raise profits and cut risk. The email comprises two pages of the bundle. The passages the Claimant relies on as constituting a qualifying disclosure are to be found in his schedule under the heading, 'relevant information.' Again, I do not read it out, which is down to a question of practicality and the timing today.

He indicated in the column headed 'breach' of the schedule his belief that he had communicated information that tended to show damage to the environment and deliberate concealment of this which he set out in the column 'breach'. I have also taken into account para 15 of particulars of claim. In addition to the passages that are there set out, Mr Wynne on behalf of Mr Carr also emphasised a passage where he said, 'I am blowing this whistle because we are at risk of missing out on millions of dollars of revenue. We can extend our lead versus our rivals and the opportunity cost is more difficult to measure than (inaudible). History will show it.'

Again, by way of other aspects of content, I am not referring to every single passage I was taken to, but I am referring to the most significant ones, my attention was drawn to the opening, the second paragraph of the email by the Respondent which says, 'After covering carbon markets for 15 years, I might be picking up on an undercurrent that others at Bloomberg News are not feeling.'

The Respondent also emphasises that the Claimant included within the email reference to the fact that Bloomberg was being beaten to stories and analyses by other companies.

PD3
The particulars of claim indicated that Mr Micklethwaite told the Claimant that he should raise these issues with editors and the Claimant did so in this email, sent on 20th January 2017 to several people. The content largely replicated the email that is PD2. Insofar as additional text is relied on, it is the last two paragraphs in the relevant information column in the schedule, page 80 of the bundle. As regards the Claimant's belief that it showed damage to environment and/or deliberate concealment of this, the Claimant's case is set out in the breach column of the schedule at page 80.

PD4
This was an email sent by the Claimant on 13th March 2019 to (inaudible) copied to Ken Cooper, both senior HR executives. The printed email comprised five pages with 10 pages of appendices. In general, the Claimant is saying in the email that he is seeking advice as to how to improve his team dynamics and how to handle his managers better, and he would like help addressing the issues he raised, and he set out a number of issues. Some of those headings were respectfulness in leadership, not responding to emails/concerns, templated emails in evaluation.

All of the text that was relied upon by the Claimant in the schedule appears under the heading 'Unconscious bias?' It is set out in the relevant information column of the schedule, pages 80 to 85 of the bundle. In Mr Wynne's oral submissions, emphasis was given in addition to, in particular although not exclusively, the second page within the first hollow bullet point, 'So I suggest to my leaders we need to do market structure stories because they will determine how investors make money during the energy transition over time. I am a bit shocked that my managers till argue against this…to the extent of suggesting limits on the number of these stories.'

In the third hollow bullet point, it says, 'There is a recurring theme where my managers say I am not neutral enough on climate stories. I say I am neutral, and they are not neutral.' For different reasons, both counsels drew my attention to the penultimate paragraph of the email, 'I am not meaning to downplay the high quality of our coverage, but I am writing because I think it is the right thing to do because making my arguments and blowing the whistle might not have been good enough and I am pretty sure it has not yielded the best outcomes from our customers. I want fresh perspectives on it. There are so many opportunity costs.'

In one of the appendices which was an earlier email the Claimant had sent to Will Kennedy was over 4 pages of text and Mr Wynne on behalf of Mr Carr emphasised a passage where the text was, 'Do you think there is no link to 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, 'I am worried there is a US bias in our coverage. We are quick to demonize countries like Brazil when other countries are more villainous, are they not given the history of fossil fuel revenue.'

And then, 'Focusing mainly on oil and gas is taking a stance, it is pro status quo.'

It is also indicated in the email that one of the Claimant's concerns was a lukewarm performance review he had received for 2008 and that is attached to the email. As regards to the beliefs that the Claimant relied on, they were set out in the 'breach' column in the schedule at page 80.

PD5
This comprised three reports filed on 8th June, 19th June and 8th July 2019 with the Respondent's Navex hotline. It is agreed that their content can be considered cumulatively. The second report contained much of the first and an attachment. They comprised 9 pages. The primary issue identified by way of heading is 'retaliation' whereas the third heading is 'violation of policy.' The text the Claimant relied upon is set out in the relevant information column of the schedule at pages 86 to 93 of the bundle. As regards his belief that it tended to show damage to the environment and/or deliberate concealment, the schedule indicated the Claimant's position that was as he had set out in relation to protected disclosures 1 to 4 above, and as regards here was the first disclosure where he relied on a belief that it showed a breach of a legal obligation and that was set out in pages 86 to 87 of the bundle, which will be incorporated into any official judgment.

The contents of the Claimant's three Navex reports were investigated by the Respondent as a grievance. By a letter dated August 2019 and he was told his grievance was not upheld.

There are two other paragraphs I should have mentioned in relation to PD5 so this should appear slightly earlier in the transcript. The Respondent relies on the passage, 'I acknowledge I have been listened to to some extent, and sometimes managers are brilliant, but problems keep repeating and the subject gets changed when I bring up tricky issues.'

And then at the beginning of the attachment, both parties relied for different reasons on the first paragraph of that which reads, 'The possible retaliatory behaviour I experienced might be because I am pushing my managers to report the climate action in a better way and the behaviour follows my assertion to managers that the financial times has overtaken us and is doing a better job than us.'

PD6
This was contained in the Claimant's appeal against the grievance outcome. It was sent to the grievance investigators on 29th August 2019. It is 5 pages and at the outset the Claimant said, 'I have quite a few questions, there seem to be some fundamental confusion/inaccuracies I would like to ask about.' He said he would raise them in order of the outcome document's contents and he raised a series of questions.

The text on which the Claimant indicated he relied on is in the relevant information column of the schedule, pages 93 to 95 in the bundle. In the breach column he indicated that so far as the limb 1 e and 1f allegations were concerned, he relied on matters he had set out in relation to the earlier PDs. He set out his case in the breach column as the text appears at pages 93 to 94 of the bundle. In addition to that text, relied on by the Claimant, the Respondent emphasised a few passages in PD6 as follows on the first page. 'I don't think I have provided a confident motivation for the possible retaliatory behaviour, this needs to be adjusted. It might not be just related to my pushing for better

coverage. It might be the managers feel threatened by me. They should not if they are doing the right thing. They have not done the work to understand the climate transition, they may be acting out of ignorance.'

Further, a passage on the fourth page of the email, 'I'm not saying we are doing a worse job than others, maybe we are worse than the Financial Times, but I am saying we could do a lot better.'

In addition to the passage in the schedule, Mr Wynne drew my attention to a passage on the first page above the paragraph that the Respondent places reliance on and he said that it needs to be investigated properly, 'whether it's an effort to slow our coverage down.' On 30th August 2019 the Claimant was placed on a performance improvement plan.

PD7

The oral disclosure took place on 21st October 2019, and these were words spoken by the Claimant to John Frayher (ph), a senior executive editor. The relevant part of the schedule on 95 to 96 in the bundle was confusing in terms of what it was that the Claimant was alleging he actually said to Mr Frayher. However, as clarified at the hearing my understanding is that the paragraphs that begin, 'The Claimant said to Mr Frayher', and the next paragraph which begins, 'Boiling it down', contain the text that was said by the Claimant and those will appear in full in any official record of this judgment.

The next paragraph which begins, 'Frayher told', that is the what Mr Frayher said, then the last paragraph, the news policies affecting concealing the political problem, the Claimant accepted that he did not say that but that was his thought process at the time, In terms of the breach column, the 1e and 1f limb, claims the schedule indicates that the Claimant relies on the matter that he set out in relation to protected disclosures 1 to 4.

The Respondent's case

By way of outline at this stage, the Respondent disputes that any of the 7 communications relied on by the Claimant are capable of meeting the definition of a qualifying disclosure. As it did below, the Respondent accepts that the challenge on a strikeout can only be to the objective elements of the statutory criteria and that the Claimant's case on the subjective elements must be accepted.

The Employment Judge judgment

Between paragraphs 11 to 17 of the judgment, the Employment Judge gave self-directions on the approach he should take relying largely on the summary of principles helpfully given by Mr Justice Linden in Twist DX v Armes, a case I will return to.

At paragraphs 18 to 21 he summarised the legal framework. At 22, he identified the elements of the statutory criteria which I will return to but there is no suggestion that he identified thus far any of those principles incorrectly. At paragraph 24 he indicated he did not consider a strikeout application was the place to develop a new point of law relied on by Mr Laddie that for a qualifying disclosure to satisfy the 1e limb, it was required to have an element of novelty, so it could not be raised in public interest if it was already well known or widely believed. The Employment Judge went on to observe, 'I see the force of the novelty submission as an aspect to consider when deciding what might be thought to be reasonable although I will not'.

As regards PD1, the Employment Judge said that the second of the three paragraphs in the communication that the Claimant relied on seemed to be statements of the Claimant's opinions. As regards the case on the 1f limb the Employment Judge made reference to the part of the document where the Claimant referred to being told by Lars Paulsen to write fewer carbon stories. At paragraph 31, the Employment Judge said, 'It might suggest that in the reasonable belief of the Claimant, information showing the environment being damaged was being deliberately concealed-, which the Claimant might be able to establish, this might success as an argument'.

As regards the claim under limb 1e, the Employment Judge said that he had found it harder to identify information tending to show that the environment was being damaged and he continued at paragraph 32, 'this might succeed at an argument, but I shall say the prospects of success-, and will not strike it out'.

In relation to protected disclosure 2, the Judge's conclusions are set out at paragraphs 37 to 43 which should be incorporated in full in any official transcript of this judgment. But in short, the Employment Judge concluded that the alleged PD was not capable of satisfying the 1st element of the statutory test regarding information in relation to either the 1e or the 1f limb.

In relation to PD 3, the judge's conclusion was set out at paragraphs 48 to 50 which should be included in any official record.

In relation to PD4, the employment judge observed at paragraph 58, 'The passage relied on-, I have struggled to identify specific information that was being disclosed'. Nevertheless, he concluded, and this is at paragraph 60, 'Whilst I have doubts as to whether this protected disclosure does satisfy the statutory requirement, there does seem to be a clear thread that the Claimant's reporting has been restricted in relation to the climate and carbon.' There is specific reference to the Claimant's review that refers to him being bogged down, he is focusing on environmental damage when his manager was trying to dissuade. There may be enough to satisfy the statute although I think it is somewhat doubtful.'

In relation to 43b1e the Employment Judge said, 'I am more doubtful that this contains any qualifying disclosure,' however he said it would not be struck out for two reasons, they were first the length of it and the number of matters which might give it some background or context might give it some meaning which brings it within section 43b1e. Secondly-, legal argument'.

In relation to PD 5, the Employment Judge's conclusion is out in paragraph 63 to 66 which should be included in full. The Employment Judge went on to say he was doubtful that the material relied on, but he would not strike it out and the reasons he gave were the same as PD4.

In relation to PD6, I need to read paragraph 70. 'I consider that viewed in context-, showed retribution-, a breach of a reasonable obligation. I make no order in respect of this allegation'.

Then at paragraph 71 in relation to the 1e limb, 'I cannot identify-, there is a discretion as to whether to strike out a claim-, I am not going to strikeout this aspect of it-, the tribunal is going to be hearing evidence on this in any event'.

In relation to PD7, the Judge's conclusion is set out in paragraph 74 and 75 which should be contained in full.

Grounds of Appeal and Cross Appeal
The Claimant raises five grounds of appeal in relation to the employment tribunal's decision to strike out PD2 and PD3.

Grounds one to five are at pages 37 to 38 and should be included in full.

In relation to the Respondent's cross appeal, reliance is placed on general grounds, grounds one and two and to each of the protected disclosures that were not struck out. As formulated in the cross appeal, ground one in essence asserted, seen in paragraph 6.4, in order for a disclosure to be a qualifying disclosure in limb 1e, 'The information disclosed-, specific damage-, rather than environmental damage in general, and/or in order or the maker of the disclosure-, it must have a specific novelty'. Then it said the Employment Tribunal had erred in law by not applying that approach.

The Respondent was identifying those matters as requirements but in his submissions Mr Laddie substantially revised this ground. He was no longer contending he indicated that establishing these matters were prerequisites of meeting the statutory definition, rather he submitted that when a disclosure is made in the public interest the when the 1e limb is relied on then certain factors should be borne in mind, set out at paragraph 32 of his skeleton.

He accepted that in relation to those factors, only the first which concerns novelty was raised with the Employment Judge. When I asked what error of law the judge had made, as paragraph 24 agreed with this more moderate submission as to relevant factors, Mr Laddie clarified that the Employment Judge had failed to ask whether the element of this statutory definition was capable of being satisfied, when he decided not to strikeout the 5 protected disclosures that remained.

Ground 2 relates to limb 1f and what I have described as the narrower basis on which limb 1e is relied on in this case. The Respondent contends the Claimant had no reasonable prospects of showing that this assumed believe regarding deliberate concealment or that the Respondent was damaging the environment itself could be reasonable and the Employment Judge failed to address that and to address the factors he sets out.

Ground 3 relates to the decision not to strike out PD1 and contends the Kilraine test was not applied, and/or its decision was perverse.

Ground 4 raises an equivalent contention in relation to PD4. Ground 5 raises equivalent contentions but with the additional contention that in respect of the 1b limb, the employment tribunal erred in law in failing to apply the Chesterton Global test.

Ground 6 raises equivalent contentions to ground 5 and ground 7 says that having recognised the Kilraine test could not be satisfied in relation to protected disclosure 7, the Employment Judge erred in declining to strike it out.

The legal framework

Rule 37 of the Employment Tribunal rules of procedure, schedule 1 to the Employment Tribunal rules 2013 provides as relevant quotes, 1 'At any stage of the proceedings either on its own initiative-, has no reasonable prospect of success'.

The importance of not striking out discrimination claims except in the most obvious cases was emphasised by the House of Lords in Anyanwu ICR391, see in particular well-known speeches from Lord Steyn in para 34 and Lord Hope in para 37.

In Ezsias v North Glamorgan NHS Trust 2007 ICT 1126, the Court of Appeal held that a comparable approach should be applied in protected disclosure cases as they had much in common with discrimination cases.

At para 39 Lord Justice Morris (inaudible) 'It would only be an exceptional case-, no reasonable prospects of success when the central facts are in dispute'.

Mr Laddie submits that the well-known statements are generally made in relation to disputed issues of causation where it is inevitably a nuanced and fact sensitive question as to the reasons why the alleged wrongdoer acted as they did, whether it be a discrimination or whistleblowing case. Mr Wynne on the other hand submits that a parallel is to be drawn between the issues to be resolved in determining whether the statutory criteria for a qualifying disclosure is made and the line of inquiry I have just referred to. It will always depend on the context but there is a distinction as Mr Laddie said in submissions in relation to the objective limbs of the statutory test and taking all facts assumed to be in the Claimant's favour, then it is a more technical exercise applying the statutory criteria as opposed to working out at that stage whether a certain state of affairs can be shown in relation to the alleged wrongdoers' motivation.

Subject to one point, the parties agreed that the relevant principles were set out by Mr Justice Linden in Twist, subparagraphs A to G. I adopt that summary in gratitude, and it will appear in any official judgment.

Mr Laddie takes issue with subparagraph E only to the extent that it might be understood as a hard and fast rule. I do not interpret it in that way.

During his oral submissions, I clarified with Mr Wynne that in relation to ground 5 of his appeal, he submitted that the Employment Judge had erred in not applying paragraphs B, C and/or G of Mr Justice Linden's paragraph 43. He also drew my attention to other passages in the judgment, one in particular at paragraph 59 where having reviewed the authorities Mr Justice Linden said, 'It also follows from these passages-, a mixed question of fact and law-, will meet with this difficulty'. I have already touched on the statutory definition, but it is to be found in full in section 43(b)(i) and the opening words of that along with limbs b, e and f will appear in any official record of this judgment along with section 43 and 47(c)(i) and 47(b)(i) for context.

In Williams v Michelle Brown AM UK Employment Tribunal-, the Judge stated 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. He said in paragraph 9, 'First, there must be a disclosure of information-, secondly the worker must believe the-, reasonably held'. It is the first, third and fifth of those elements which are the objective elements, and which are therefore in play in relation to this strikeout application, particularly the 1st and the third. I will refer to them as element 1, element 3 and element 5.

Element 1

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. At paragraph 52 of his judgment in Twist Mr Justice Linden said, 'This is crucial, because section 43(b)(i) requires-, depending on whether the complaint is victimisation-, 103a'.

The leading case is the decision of the court of appeal in Kilraine v Wandsworth 2018 ICR 1850, hereafter Kilrane. LJ Sales as he then was said at paragraph 335, 'In order for a statement-, it has to have a sufficient factual content-, listed in subsection one'. The language LJ Sales was referring to was of course the statutory language of subsection 1. He emphasised that information' had to be read with 'which tends to show' one of the matters' listed in A to F.

In paragraph 36, he made the following points which I paraphrase, that it was a matter for the employment tribunal's evaluative judgment that the question was likely to be aligned with other section 43b(i) elements. Further, in paragraph 41, he noted that whether a particular disclosure satisfies the test in 43b(i) 'should be assessed in the light of the particular context in light of which it is made.' Mr Laddie emphasised that in paragraph 42 there wasn't any further relevant context in that case.

LJ Sales had also considered the Employment Appeal Tribunal's decision in Cavendish v Monroe-, and clarified that the concept of information is capable of covering statements which might also be categorised as allegations, see paragraph 30.

In Twist, Mr Justice Linden accepted the respondent's submission that on an application to strikeout an employment tribunal is entitled to look at the written communication in question which is said to satisfy the statutory test to consider whether the communication has a sufficient factual content and is sufficiently specific to satisfy the Kilraine test. The words themselves are not in dispute in this situation and while context will be relevant, this will be taken at its highest in terms of the claimant's pleaded cased.

Element 3

As I have indicated, the statutory elements involve asking whether the worker believed the disclosure was in the public interest and if so, whether that belief was reasonable. The leading case on this aspect is Nurmohamed 2018 ICR 731.

LJ Underhill emphasised that the tribunal must recognise there may be more than one reasonable view as to whether the disclosure is in the public interest. See paragraph 28. LJ Underhill also said that what matters was whether the worker's belief was objectively reasonable.

Acting in the public interest did not have to be his only motive (see paragraph 30). LJ Underhill also pointed out that the phrase 'in the public interest' was not defined and it must have been his intention to leave it to Employment Tribunal to apply it as a matter of-, paragraph 31. A belief may be reasonable even if it is wrong.

Chesterton was directly concerned with whether and in what circumstances a disclosure of a breach of a worker's own contract or other aspect of his employment could fall within limb 1b given the public interest criteria. LJ Underhill said he was not prepared to rule out the possibility that the disclosure may nevertheless be in the public interest or reasonably so regarded if sufficient numbers of other colleagues shared the same interest although he would expect tribunals to be cautious about reaching such a conclusion, see paragraph 36. He also said in paragraph 36, 'The larger the number of persons whose interests are engaged-, which will engage the public interest'. In paragraph 37, he said that the correct approach was as follows and the whole of paragraph 37 should be included in any official transcript.

The fourfold classification he proposed was referred to by Mr Laddie and is set out at paragraph 34 as follows, and then A to D should be included in any official record of this judgment.

Element 5

The general observations made by LJ Underhill in Chesterton as to the employment tribunal's tasks are applicable to the 5th element as well. As Mr Justice Linden noted in Twist at paragraph 77 are could a worker reasonably believe that a disclosure tended to show one or more specified matters, and Mr Wynne also emphasised the paragraph at 79, the passage at 79 where he refers to counsel accepting where there was no context and he then referred to emails in that case could be held by any properly directed Tribunal to disclose information to be reasonably believed to show the matters specified in 43(b)(1). Mr Wynne emphasises the no context part of that passage.

The Parties' Submissions

I will summarise these briefly.

Claimant

Mr Wynne emphasised that strikeout should only occur in most obvious cases and that the strikeout was inappropriate for evaluating issues of disputed fact. The employment tribunal embarked on a quasi factfinding exercise in striking out protected disclosures two and three, and that the text of the disclosures did not provide a basis for the Employment Tribunal to conclude that the no reasonable prospects test was met.

Further, he says that it was not enough for the Respondent or the Employment tribunal to take the pleaded case as its highest because the broader factual context was relevant to a determination of whether meeting the prospects of meeting the statutory definition were sufficient to survive the strikeout application. At the greater merits hearing there would be more facts available. By way of describing the broader context Mr Wynne said that the Claimant had been wrestling with the employer over his own writing and Bloomberg reporting more broadly about climate change for a significant period of time, the Claimant was concerned that environmental damage was being minimised by the reporting and he believed it was important to put the Paris agreement into effect and

reduce environmental damage and if this was not done, environmental damage would increase and that the respondents could improve the market to more rapidly reduce carbon emission and to enable financial institutions to be better informed and enable them to reorganise their capital investments and in so doing, take the steps required to reduce environmental damage.

Mr Wynne submitted that each of the protected disclosures had to be seen in the context of the larger communications between the parties and that sometimes a shorthand might be used in particular communications relied on as protected disclosures. He referred in general terms to there being additional material which would be available in a full merits hearing relating to the climate change matters. He also submitted that the Employment Judge judged decided not to strike out alleged protected disclosures in the exercise of his discretion, the basis of the tribunal hearing interfering was limited, and no proper basis was shown here.

In relation to ground two of the cross appeal, he submitted that the matters raised by the Respondent in support required determinations of fact that were only appropriate for a full hearing. In relation to grounds 3 and 7 he relied on the general points that I have already made about the approach taken.

Respondent's submissions

Mr Laddie submitted the employment tribunal judge was correct to strike out PD2 and 3, the Claimant had not identified the key facts which were said in the grounds and skeleton that were in dispute or which the Employment Judge had impermissibly resolved in the Respondent's favour. Rather, the disclosures were stuck out properly as they had no reasonable prospect of satisfying element 1. And this was to be determined by reference to the wording of the communications which provided the wording specifically relied on by the claimant but also provided the direct context in which they should be evaluated.

In terms of wider context, he said the Claimant's case was and should be taken at its highest, but the Claimant had not shared how the Employment Judge had not followed the Twist principles and that case did not show that an Employment Tribunal cannot strike out alleged protected disclosures. He pointed to the fact that in that case Mr Justice Linden allowed an appeal against a failure to strike out.

In terms of the cross appeal, Mr Laddie submits that the Employment Judge failed to apply the Kilraine test in that the Employment Judge did not identify sufficient factual content and specificity in the disclosures that were capable of tending to show limb 1f or the narrower basis on which the limb 1e case was put.

In his oral submissions, Mr Laddie accepted that the Employment Judge had not engaged with this, element 1 was sufficiently arguable to surmount the strikeout hurdle in relation to the 1e wider basis on which the Claimant's case was put, and he also accepts that was the position in relation to limb 1 b where that was relied on in the context of retaliation against the Claimant. But he submitted in these instances, the disclosures were not capable of satisfying element 3 and therefore should be struck out on that basis and the Employment Judge had failed to engage with that.

Mr Laddie also submitted that the reasons identified by the Employment Judge for not striking out the 1e limb allegations in relation to protected disclosures 4, 5 and/or 6 were where he appeared to be exercising a discretion where legally irrelevant and flawed and that the Employment Tribunal should substitute its own decision, accepting that this tribunal only has the power to do so when only one lawful conclusion is possible.

Conclusions

Cross Appeal ground 1

I will address this first as it has potential relevance to each of the protected disclosures, not least because the Respondent accepts that element 1 is made out for strikeout purposes in the limb 1e case.

I have been informed by both counsel that there are no authorities as yet on the interpretation of limb 1e. The Respondent acknowledges that the statutory wording is very wide and that it could encapsulate a huge range of communications about climate change, for example, and many of which would include something that would fall within the concept of information.

In terms of control mechanisms, I accept the Respondent's submission that it is important to appreciate from statutory wording that, focusing on element 3, the question is whether the worker believed that making this disclosure was in the public interest as opposed to whether the worker believed they were talking about a topic which in general terms was of public interest. Of course, the aspect I have just mentioned, the nature of the underlying topic may be relevant to the evaluation, but it is not the focus of the test which focuses on the making of the particular disclosure. Another mechanism is that the disclosure must be made in circumstances which satisfy situations 43c to 43h but that is not contentious in this case.

Mr Laddie invited me to identify a list of factors that might assist the Employment Judge with evaluating element 3 in a limb 1 e case. Mr Wynne submits it is not appropriate in a strikeout case and did not wish to add to the suggested list of factors. I agree that certainly it would not be appropriate for me to be too prescriptive or to identify anything that might be a list or include factors that are necessarily determinative, but I will analyse features of this case in order to address element 3 when I come onto the particular protected disclosures.

I therefore turn to the list of factors that I alluded to earlier that Mr Laddie set out in relation to his skeleton argument, in paragraph 31. He says that he suggested the following factors may be of assistance but firstly the extent to which the information has novelty, he says the more well-known the information, the less likely this disclosure will be in the public interest and secondly, the person to whom the disclosure is made is responsible for the damage and the person has the power to stop, reduce or reverse the damage.

In relation to Mr Laddie's 2nd and 3rd factors, they appear to be matters which are highly pertinent. To take an obvious example, an alleged disclosure made to a HR manager is less likely to satisfy the public interest test than a disclosure to a person or body that has powers in relation to environmental issues and some responsibility for acting or some ability to cause whatever concern is being raised to cease. Additionally, it appears to me

that the extent to which an act or omission is identified in the alleged disclosure and the nature of that act is also likely to be relevant. To take one obvious example, the test is more likely to be satisfied by a specific communication about a company dumping toxic waste in a river than it is a general observation that the polar ice caps are melting.

I don't consider it is necessary for me to reach a decision on Mr Laddie's novelty point. I understand the thrust of the idea behind it which is why I have quoted his explanation. However, I would sound some notes of caution. The statute does not require the disclosure to be something that the recipient is aware of, borne out by 33L. Further it is not necessarily something the worker would be likely to know, and I query whether it accords with the objectives of whistleblowing legislation where the focus is on protection from retaliatory action, whether it be one to 10 or however many workers make a disclosure on a particular topic.

I also have a potential concern that it could lead to an Employment Tribunal being distracted by lengthy material in order to see whether the matter in question is novel or not.

With those observations in mind, I turn to whether any error of law on the part of the Employment Judge was identified. As I indicated earlier, as reformulated Mr Laddie's real concern is that the Employment Judge didn't engage with element 3 when he determined to leave some of the protected disclosures intact. That does to me appear to be an error of law. Section 43(b)(i) sets out statutory hurdles and if an issue is raised by a Respondent in relation to those hurdles in a strikeout application, it seems necessary for me for the Employment Judge to engage with that at least.

Beyond that, and really to identify whether that error was material or not, I will return to that when I come to each of the protected disclosures that were not struck out. Before I turn to the individual enclosures, I deal with a general point Mr Wynne raised in relation to element 1. He said it followed that element 1 was satisfied to a degree necessary to survive a strikeout application given the concession that element 2 was met, i.e., the Claimant was assumed to have a belief which has a necessary degree of factual content and specificity. I do not accept they are sequential steps. If a reasonable prospect of element 1 is shown then the tribunal proceeds on the basis that element 2 is not an issue and proceeds to analyse element 3. In accepting that element 2 was not an issue, the respondents were not intending to suggest that the first subjective test was satisfied, and it is clear that the Employment Judge did not understand it in that way and focused on element 1 in relation to each of the protected disclosures. With due respect, I consider Mr Wynne's submission to be misconceived.

Brief adjournment

PD1

I will first consider in relation to limb 1 f, deliberate concealment. In relation to element 1, the question is to assess is whether the Employment Judge applied the Kilraine test and if not, whether the Claimant has a reasonable prospect to establish that the communication contained information with factual content and specificity that it tended to show environmental damage was deliberately concealed, in other words, is it capable of meeting the statutory test? In evaluating this and other issues, I have taken into account

the wider context as described by Mr Wynne and as set out in his pleadings and the other material made available to me.

I bear in mind a point which Mr Laddie made on a number of occasions that the text relied on is often a wider part of the communication and it is important to consider the wider communication, and this is known, it is not in dispute. We have that wider communication before us. As regards the broader context as described by Mr Wynne, I have assumed it in the Claimant's favour, it does not appear to me to add to what was pleaded and what was assumed in the Claimant's favour below. I have not sought to resolve disputes of fact in relation to this or other PDs, still less have I resolved them in the Respondent's favour. In terms of the specifics, as I have indicated from the Employment Judge's reasoning, he focused in particular on the sentence, 'as the climate crumbles, I was expressly told by Lars to write fewer carbon stories but no directions as to what I should otherwise do.'

It is important to see that in the context of the next sentences, 'they were unfairly rebuffed' is plain wrong, Lars acknowledged I didn't have much of a beat in Friday's meeting by giving me ENEL, the Italian utility, to cover.' In other words, the central thrust of that part of the text is concerned with whether the Claimant is being given a fair crack of the whip in stories he wanted to cover. There is no assertion I can see of deliberate concealment let alone factual specificity to that effect. Mr Wynne submits that insofar as this this sentence that the Employment Judge emphasised is ambiguous and might be taken to suggest that the restriction was the product of or stemmed from a plan or intent of deliberate concealment, firstly it doesn't say that and I do not accept that any ambiguity assists the Claimant. He has to establish that any thoughts (inaudible) that he disclosed information that did tend to show deliberate concealment, not that he said something ambiguous and that might be an interpretation a person might draw from it.

As I have indicated the Employment Judge said in paragraph 31, the words 'might meet the stat criteria', (inaudible) capable of meeting the test. Accordingly, I do consider that he erred in law in applying the Kilraine test and further for the reasons that I have just identified in relation to PD1, I conclude that it is not capable of meeting element 1 of the 1f limb.

I turn to the case on 1e on the narrower basis, that is to say that the text tended to show that the Respondent themselves 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 considered in relation to limb 1f and which the Employment Judge relied on. There is no statement therein that the respondent's coverage is damaging the environment or anything intending to show this. Mr Wynne submits insofar as this or other disclosures, assert or propose that the Respondent should be doing better in relation to coverage of stories related to carbon and related topics, this implied that its current coverage is damaging the environment. I do not accept it is arguable that this implication is conveyed from the material that I have referred to. If I am wrong about that and that implication was conveyed, it could only be in the most generalised way and would not meet the Kilraine requirement for factual content and specificity.

As regards this part of the case, as is apparent from paragraph 42, the Employment Judge was unable to identify any material in the email which met element 1 and nor did he give any reason to say the Claimant might succeed in establishing this at trial. Accordingly, there was an error in failing to apply the Kilrane test for the reasons that I

have given in relation to this, I consider as well that in relation to element 1, the test for strikeout is satisfied.

In relation to the 1e case on the wider basis, referring to environmental damage without suggesting it is caused by the Respondent, for the reasons that I have already described here, I focus on element 3 of the statutory definition. the only relevant reference in the claimant's communication was, 'as the climate crumbles.' While this is a reference to the climate damage it is of a highly generalised nature, as I have already noted, the Employment Judge erred in failing to address this element at all, bearing in mind the factors I have identified when I have identified when I discussed ground one of the cross appeal. it appears to me they point in the same direction here and I claim there is no reasonable prospect of the Claimant showing that this brief and general reference to the climate crumbling is itself capable of affording a basis on which a properly directed employment tribunal could conclude that he believed making this disclosure was in the public interest.

It was a comment aimed predominantly at editorial direction and stories the Claimant wished to write. As I have indicated before, I have to bear in mind it is a brief reference within a longer email focused on the matters I have identified.

I note Mr Laddie's emphasis in submissions that Mr Wynne did not address this on the wider basis, confirming that it was still in play and did not respond to submissions on this third element. I don't regard that as determinative I have set out my own reasons, but I note that it is a secondary way in which the Claimant's case was put. Mr Laddie indicated it wasn't advanced, but I know at that stage Mr Carr was representing himself.

Having arrived at those conclusions in relation to the cases put on limb 1f and 1e, I have also considered discretion. 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 there is any reason having arrived at the conclusion that no reasonable prospect of success is met, any reason not to take the course of striking out the allegations. I am conscious that trial is close at hand and preparation will have happened but there is a likelihood a saving of costs even though the hearing will proceed in relation to unfair dismissal claim and there will be some factual overlap. To me the most important factor is that I cannot see any prospect of the Claimant's position improving between now and trial. It is a not a situation, as Mr Justice Linden had in Twist, where he gave the Claimant time 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 and to amend if he wished to do so. In these circumstances, I don't see how the position could be improved between now and trial and in those circumstances I can see no reason why strikeout should not follow from the conclusions that I have already referred to. It follows that I will allow the cross appeal in relation to ground 3 and strike out PD1.

The framework that I have set out when considering PD1 will apply to PD4, PD5 and 6. I won't repeat in full the general material, save where it is necessary to explain the crux of my reasoning.

PD2.
The questions which I have to ask here are to some extent the same but also slightly different because I need to deal with the issues raised by the Claimant's appeal, and I

am dealing with this in a context where the Employment Judge did strikeout the disclosure. I begin on limb 1f, as with PD1 I have considered whether the Claimant has a reasonable prospect of establishing the communication contained information with factual content and specificity that it showed environmental damage had been deliberately concealed by the respondents and is it capable of showing that? I have already set out the passages relied on. I can detect no content to that effect in those passages. Further, far from disclosing information to show deliberate concealment, the words in the paragraph that I have quoted that Mr Laddie relied on appeared to say that the Claimant was picking up on an undercurrent that others weren't necessarily feeling. Further, the general focus of the email is towards reputational risk to Bloomberg if there is not a shift in coverage. He suggests Bloomberg may be beaten by their rivals. I appreciate the point that the Claimant would put his claims in language the respondent may respond to and be as persuasive as possible, but I cannot say the communication is saying something that it doesn't say. I agree with the Employment Judge's reasoning.

I turn then to the appeal specific grounds. The essence of ground 1 is that the Employment Judge's decision turned on disputed factual issues. I do not accept this. This reasoning did not involve any factual issues and there is no indication he failed to bear in mind the relevant context as described by the Claimant.

Ground two is specific to PD2 and is based on a phrase used by the Employment Judge in paragraph 41 of his judgment. To be clear, what is said there, 'This is not a situation-, key facts in dispute'. It is quite plain that the Employment Judge was referring to specific issues he was being asked to decide and therefore the passage relied on for grounds 2 does not disclose any error of law.

Ground 3 contends that when categorising the contents of what is relied on, the Employment Judge was using the opinion thought to have been identified by the Employment Appeal Tribunal in the Cavendish v Monroe case. I do not consider this is well founded. At paragraph 21 the Employment Judge had summarised the legal position and when considering PD2, as is apparent from paragraph 42, the Employment Judge applied the correct test and the Employment Judge made no reference to allegations. The reference to the Claimant's expressions of opinion were in the context of the Employment Judge holding that those expressions of opinion did not contain information capable of meeting the statutory test.

Ground 4 contends that the Employment Tribunal erred as the text of written disclosures did provide a sufficient basis to conclude that there was a reasonable prospect of success. I have already addressed this in setting out my conclusions in relation to the words used in this alleged disclosure, which need to be read in the more general observations I have already made.

Ground 5 contends that in three respects the guidance set out in Twist was not followed. However, subparagraph B is no more than any statement of the overall test. Subparagraph C refers to the judge not conducting a mini trial. I am satisfied that he did not conduct one and did not purport to resolve disputed facts. Subparagraph G, I see nothing to suggest that appropriate caution was not exercised by the Employment Judge, it is plain that he gave all allowance he felt he could to the Claimant as an unrepresented person and he considered points that were made in the Claimant's favour carefully and fully. The Claimant's appeals as far as limb 1f fails.

I turn to the case on limb 1 e, tending to show that the respondent themselves were causing or likely to cause environmental damage. Again, I consider this is not stated as a proposition at all in the email. I have already referred to it being focused on reputational risk and/or losing out to its competitors. I have tried to look for what might be the high points from the Claimant's point of view, the communication does say that Bloomberg needs to report the issues better or climate talks will struggle but this is a significant remove from showing that the Respondent is causing or likely to cause environment damage. Equally for the reasons I discussed in relation to limb 1f, I do not consider that any of grounds one to five of the appeal are well founded in relation to this limb.

In relation to the case on the wider basis, the Employment Judge did not address this and as I have observed it is not the way the case was put forward below. In fairness to the Claimant, I have considered the case in relation to those aspects of the claim that were not struck out, but I do not see how this can assist him in relation to PD2 and 3 and where there is no grounds of appeal that is predicated on an error in this respect.

PD3

The same grounds of appeal are relied on, the text is largely the same and where it is additional, I do not conclude it makes any difference and I cannot see any error in the Employment Judge's approach. Therefore, for the reasons given in relation to PD2, I do not accept that the grounds of appeal are well-founded. The Claimant's appeal will be dismissed.

PD4

I again begin with limb 1f. I pose the same questions as I set out when I dealt with PD1. As is apparent from the words which I set out earlier and the content of the email the context is that the Claimant is seeking advice on how to improve relationships with managers on a number of topics including being able to write what he wants to write. In terms of deliberate concealment and again seeking to examine what appear to be the highest points from the Claimant's perspective, I note there are references to biases, however the majority are to unconscious bias and appear under the heading 'unconscious bias?'

I accept the reference goes slightly further. On page 329 of the bundle where there is a refence, 'Are biases/unconscious biases damaging our service?' And there is a reference to HR needing to make sure there are 'no unconscious biases or worse'.

Nonetheless it appears to me that the Claimant is raising an issue to be investigated and the focus is on unconscious bias. These statements are not capable of showing the respondents are concealing environmental damage or are likely to do so. The fact that someone with a cynical perspective might form the conclusion from what is unsaid that might be what is going on here, that is not the test that I can apply here. I need to see what is stated and conveyed. I take the same view in relation to the passage which Mr Wynne referred to US bias and managers not being neutral.

The Employment Judge's reasons for not striking out PD4 1f limb were set out in paragraph 60 where he said, 'There seems to be a clear thread-, the release of carbon through fossil fuels.' That may be enough to satisfy limb 1f'. However, the Employment Judge did not identify in the communication the information that was capable of showing that environmental damage was being deliberately concealed and as I have indicated in my judgment it is not capable of being read in that way.

In the circumstances, the respondent's submission that the employment tribunal failed to apply the Kilraine test is well founded, and I conclude that a correct application to the Kilraine tests shows that there is no reasonable prospect of showing that element 1 of the statutory definition is met in relation to limb 1f in respect of PD4.

1e, the narrower basis. In paragraph 61 the Employment Judge said he was not able to identify information capable of meeting the statutory test in relation to this and I consider he was correct. PD4 showed the Claimant was concerned about restrictions writing stories he wanted to write, and he was also concerned about his recent performance evaluation and expressed concern about the focus of the respondent's coverage. In addition to the quotes to which I have already referred, the respondent drew my attention to a passage at the bottom of 333 of the documents bundle before me. 'It is in our customers' interest to have them benefit-, more than 15 years of covering this stuff'.

Again, I have to take the communication as stated and I say that in response to Mr Wynne's point that the Claimant was writing in a way that might receive a positive reaction from his employers. I can detect no statement or factual content or specificity capable of meeting element 1 in relation to limb 1e on the narrower basis. Accordingly, I conclude that the employment judge erred in not applying the Kilraine test and if he had done so it leads to a conclusion that the no reasonable prospect of success test has been met. Further, insofar as the Employment Judge viewed this as a matter of discretion. I agree with the respondent's submission that this is flawed. The length of a communication cannot be reason in itself not to strike out a communication that doesn't identify the relevant information. The Claimant had the opportunity to identify the passages on and he had done so, and the content was apparent from the communication itself. The second factor was that the limb 43(b)(i) would not be proceeding, plainly that is flawed in light of the view I have taken in respect of that limb.

Turning to the 1e case on the wider basis, for reasons I have already explained I will approach this by focusing on element 3 because Mr Laddie did not make a concession in relation to this PD that it did arguably have enough to meet element 1, but I am prepared to assume that for present purposes, the fact that nothing specific was pointed to does underscore the general nature of any references within the text.

The observations that I made in relation to PD1 when I was focusing on the 1e wider basis of the case are equally applicable here and I apply them without repeating them. This is an issue the Employment Judge did not address. I add in relation to this particular document that this email is about the Claimant's personal working relationship with his managers as I have described.

I conclude there is no reasonable prospect of the claimant establishing that he believed that making this disclosure was in the public interest in relation to actual or likely environmental damage.

Any references to carbon emissions and the like are in general terms and very brief in the context of the overall email.

None of the factors that I have identified when discussing cross appeal ground 1 could apply in a way to assist Mr Carr in this instance. They point in the opposite direction. So

far as discretionary considerations are concerned, I address those in relation to PD1 and do not repeat.

It therefore follows that I consider it appropriate to strikeout PD4.

PD5

I begin with limb 1b. In regard 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 v Korshunova at paragraph 46. I do not understand Mr Wynne to dispute this proposition, but it is clear authority on point.

Looking at the Navex reports collectively, the Claimant states of a culture of retribution including his recent performance evaluation, and links this to having pointed out the respondent was failing to tackle climate change issues adequately. In relation to the proposition that the Claimant had faced retribution for raising the issues he describes, Mr Laddie accepts that there are reasonable prospects of establishing element 1 of the statutory definition insofar as the breach of a legal obligation relied on is the claimant's contract, in relation to the implied breach of trust and confidence. The focus therefore shifts to element 3 and whether there are reasonable prospects of success there. I accept the respondent's submissions that the Employment Judge misapplied the Chesterton test at his paragraph 65. 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 there was a comparatively low threshold to establish (inaudible) and that shows that is not the test and to the contrary he said that employment tribunals would be cautious about finding the statutory test met but where the obligation related to the worker's own contractual relations with the employer, and he drew attention to the relevance of considering whether it was just the particular worker or other employees who were affected. Was this legal error material? I consider what the outcome is in terms of the strikeout test, if the test is correctly applied, bearing in mind the guidance given in Chesterton. The Claimant did not suggest that other workers were being similarly treated and it was solely about his treatment by his managers.

The focus of the lengthy reports generally were about his personal treatment. It is in my judgment important not to lose sight of the fact that the question was whether the Claimant believed the disclosure of the breach of the 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 the Claimant believed his reporting of that matter would affect positive change, does not render the disclosure of retribution to himself of itself a matter of public interest. I therefore conclude, given that and given the other circumstances I have referred to in relation to this communication, PD5 is not capable of meeting element 3 of the statutory test in relation to the limb 1b claim.

I turn to the 1f claim, again considering the highest it can be put on the Claimant's behalf. It appears to be from the content of the Navex reports as follows, firstly that the respondent was failing to adequately cover climate change and it could or would be an influential voice in this area, also in the third Navex report there is a more particular suggestion that the managers' editorial approach was to boost the value of oil and fossil fuel companies. None of this material seems to be the most favourable to the claimant out of more text, but none of this material states that the Respondent was deliberately

concealing environmental damage and that is not there in the text, nor is any factual content or specificity capable of satisfying the Kilraine test. The Claimant was trying to get his managers to report climate stories 'In a better way.'

I do not consider that as capable as being equated to information tending to show that his employers were damaging or likely to damage the environmental. In terms of the Employment Judge's reasoning on this point, at paragraph 66, he took a similar approach to that which I have discussed in relation to PD4, i.e., he thought it sufficient that the Claimant alleged that the reporting of climate change was being restricted and an allegation of retribution was being made. As with ground four, I accept this was a misapplication of the Kilraine test and no reasonable prospects have been shown.

Turning to the case on limb 1 e, there is nothing I can identify in the text that shows the respondent has or is likely to cause environmental damage. The Employment Judge was not able to identify anything specific either. Insofar as the Employment Judge exercised discretion to nonetheless permit the limb 1 e case to proceed, he relied on reasoning equivalent to that in relation to PD4 that I have explained I consider to be fatally flawed. In terms of the Claimant's secondary case, the wider 1e case, Mr Laddie acknowledges there are some generalised reference to the climate crisis and fossil fuel issues, but in light of the factors I have identified and discussed, it appears to me that the relevant actors point clearly in one direction, and it is not capable of satisfying element 3, the public interest test.

PD6

Again, I start with the 1b limb. The reasoning and conclusion I set out in relation to PD5 apply here but the position is more clear cut because the communication is about the Claimant's appeal about the rejection of his grievance, and he posed a series of questions about the adequacy of the investigators' investigation. As regards the Employment Judge's reasoning, unlike PD5 where the wrong test was applied, the Employment Judge didn't address the element 3 issue at all in relation to the 1b claim, and this approach was flawed, and I arrive at the same conclusions in relation to the 1b limb in respect of PD5.

To turn to the claim based on limb 1f, and again looking for the highest points in the Claimant's favour, at page 350 there was a reference to investigating whether it is an effort to slow our coverage down. Although that is not on the claimant's schedule I take it into account however I read that in the context of the next paragraph which the respondent relies on and which I have already read out. Expressing overt uncertainty on the part of the Claimant 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 supporting factual content or specificity. The Respondent also relies on the passage that I have earlier indicated where the Claimant says, 'I am not saying-, we could do it a lot better', which is inconsistent with an assertion of deliberate concealment.

In relation to the 1f claim, the EJ's reasoning at paragraph 70 did not address the Kilraine test and conflated the requirements of limb 1b and 1f. No information showing deliberate concealment by the respondent was identified by the Employment Judge and as I have indicated I can see none in the email. I conclude the claim has no reasonable prospect of the Claimant meeting element 1 of the statutory test in relation to this limb, 1f.

Turning to 1e, the narrow basis, and seeking to look at matters from the highest point of view from the Claimant, the thrust of what is being said is that the respondents are not doing as well as they could or as well as they should but that is in my judgment 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 and again, insofar it is suggested that that can somehow be implied from the text used there is no factual content or specificity. I arrive at the same conclusion as I have already indicated in relation to 1e.

The Employment Judge said he was unable to identify any information in the communication that tended to show that the statutory test was capable of being met. 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 for PD6 was proceeding in any event in relation to 1f and that was a flawed approach.

In relation to 1e, the Claimant's secondary case, my conclusion is as expressed in relation to the other protected disclosures that were permitted to proceed by the Employment Judge. In this issue I emphasise the context of this communication in addition to the factors I have already highlighted, that this was an appeal to human resources managers about a grievance outcome.

PD7

Here I am only considering limbs 1e and 1f. As I have already indicated, the words relied on are indeed limited. I proceed on the basis that what is set out is assumed what is said and the respondent has said that it doesn't put forward any positive case with an alternative version. I can detect in those two short paragraphs no statements that show the respondent is causing or is likely to cause environmental damage or that it is deliberately concealing environment damage or that it is likely to do so and accordingly the conclusions I have already arrived at apply.

As regards to the Employment Judge's reasoning, he said he struggled to identify a specific disclosure of information tending to show the requisite statutory matters but went on to say that because it was in the context of an oral discussion, it was more difficult for him to be categorical. The Claimant had an opportunity to identify the context, and nothing has been identified material to this below and nor has there been to me. I see no reason simply because it is an oral statement, given the words relied on had been clarified, why the Kilraine test could not be applied, and I already have indicated my view as to the outcome of that test.

Putting it plainly, the one reason identified by the Employment Judge for not striking out PD7 was flawed. It seems to me the suggestion that something might occur in the future to improve the Claimant's position was purely speculative and indeed the Employment Judge did not have to be categorical about the content of PD7. He had to assess whether there was a reasonable prospect of the statutory test being met, so for the reason I have already set out I consider the Employment Judge erred in relation to this PD as well and there is no reasonable prospect of the claimant succeeding in his case on PD7.

Insofar as the wider 1e case is pursued, my conclusions are as I have set out in relation to earlier protected disclosures, bearing in mind the context here, a discussion of editorial coverage.

Cross Appeal Ground Two
I have determined it is appropriate to strikeout each of the surviving protected disclosure claims. This ground of cross appeal relates to element 5 and therefore it is unnecessary to consider it.

Outcome

I dismiss the appeal. I will allow grounds one as amended at the oral hearing as set out in paragraph 31 of Mr Laddie's schedule, and grounds 3 to 7 of the cross appeal. It follows that the claims related to PD1 and protected disclosures 4 to 7 are struck out as having no reasonable prospects of success.

This has been a lengthy judgment because of the amount of text there is in relation to each of the protected disclosures and surrounding context. However, the issues when broken down and analysed in respect of the statutory criteria do appear to be relatively clear cut. I have not conducted a mini trial or made any findings of disputed fact.

Lastly I want to acknowledge that the timing of this appeal and this judgment just before the full merits hearing must make my decision particularly difficult for the Claimant and I have thought about that, but that is not reason in itself not to take the course I have indicated as to the prospects of success that I have made. That concludes the judgment subject to anything that counsel with to raise.

JL: On behalf of the Respondent, I hope on behalf of both parties, thank you for the enormous effort you have put into delivering a judgment that was so comprehensive and so prompt. We are deeply grateful for that. Having thanked you – a trivial correction of fact.

JHW: I should say before you do, if an official transcript is sought, if I notice factual errors or mangled grammar or repetition then I will amend it but not change the subject in any way at all. It might be tidied up.

JL: In the Chesterton case, I was not representing the intervenor, I was representing the Claimant. Please can we have an official transcript.

JHW: I am not going to direct one at public expense.

JL: I haven't taken instructions, but I will say we are happy to pay for that if it is required.

JHW: You won't have that for the hearing next week.

JL: The notes from today will be circulated to Mr Carr but I am sure Mr Carr appreciates the consequence of the judgment you have reached and the impact on the protected disclosures claims that he brings. I say no more about that, he will get it as soon as we do.

JHW: That is not something I can be involved in.

JL: Other than that, Madam, nothing further to add.

JW: I would also like to thank you for your speed and your thoroughness.

JHW: Thank you both also for your assistance and I do want to end on emphasising the point that the timing is not ideal at all, and it is beyond mine and your control, it is just the way things have happened, but it does make things difficult for Mr Carr.