Neutral Citation Number: [2024] EAT 153

Case Nos: EA-2020-001097-BA

and EA-2022-000111-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 September 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR M DOWDING	**Appellant**
- and -	
THE CHARACTER GROUP PLC	**Respondent**

- -
- -

Imran Benson (instructed by direct public access) for the **Appellant**
James Laddie KC (instructed by Aria Grace Law CIC) for the **Respondent**

Hearing date: 30 and 31 July 2024

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

COSTS

The claimant in the employment tribunal was the finance director of the respondent, a company listed on the Alternative Investment Market. Following his dismissal he complained of unfair dismissal for the reason or principal reason that he had made protected disclosures, alternatively ordinary unfair dismissal. The tribunal concluded that the claimant had not, in law, made protected disclosures, because the disclosures relied upon were not believed by him to have been made in the public interest (alternatively, if they were, his belief was not reasonable). Nor in any event was the claimant dismissed by reason of those disclosures. The tribunal found that this was a fair dismissal by reason of a breakdown in trust and confidence that had been caused by the claimant's conduct.

At a further costs hearing the tribunal awarded the respondent costs, in a capped amount, subject to detailed assessment on the indemnity basis. It rejected a costs application by the claimant himself. The respondent also successfully sought its costs in respect of the costs hearing, which it had limited to the maximum that could be summarily awarded, of £20,000.

The claimant's appeal against the decision dismissing the ordinary unfair dismissal complaint was unsuccessful. An appeal against the costs decision succeeded in two respects. The EAT concluded that, under the **Employment Tribunal Rules of Procedure 2013**, the tribunal does have the power to direct that a detailed costs assessment be on the indemnity basis; but the tribunal had not shown whether, or if so, why, it had decided that such a direction was warranted in this case, applying the guidelines in **Howman v Queen Elizabeth Hospital**, UKEAT/0509/12/JOJ.

In respect of the "costs of costs" award, the tribunal had not considered whether the sum of £20,000 was warranted having regard to the nature, gravity and effect of the conduct which gave rise to the award; or if it had considered that, it had not sufficiently explained its decision in that respect.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent.

2. The respondent is a producer, wholesaler and distributor of toys. Its shares are listed in the Alternative Investment Market. The claimant was employed by it from 2012 until, in September 2017, following an internal hearing, he was dismissed with three months' pay in lieu of notice. His internal appeal against dismissal was unsuccessful.

3. The claimant began an employment tribunal claim which was defended. Both parties were represented by solicitors. The matter came to a full merits hearing before EJ Khalil, Mr Shaw and Mr Clay, sitting at London South, in September 2020. Both parties were represented by counsel. In a reserved decision the tribunal dismissed complaints that the claimant had been subjected to detriments on the ground of having made protected disclosures (sections 47B and 48 **Employment Rights Act 1996**) , that he had been unfairly dismissed for the sole or principal reason of having made protected disclosures (section 103A) and that he had been ordinarily unfairly dismissed (sections 94 and 98). The tribunal also determined certain particulars that should have been included in a written statement of terms, in particular relating to the claimant's bonus and notice entitlement.

4. The respondent then applied for costs. That was considered at a further hearing, before the same panel, in November 2021, along with the claimant's own costs application and a further application by the respondent for the costs of the costs hearing itself. The claimant had ceased to be represented by solicitors in September 2021, and he represented himself at the costs hearing. The respondent was again represented by counsel.

5. In a further reserved decision the tribunal (a) dismissed the claimant's costs application; (b) ordered the claimant to pay the respondent's costs, capped at £127,563.70, or 21% of its overall claimed costs of £600,000, subject to detailed assessment on an indemnity basis; and (c) ordered the

claimant to pay the respondent £20,000 in respect of the costs of the costs hearing itself.

6. The claimant appealed from both the liability decision and the costs decision. At a combined rule 3(10) hearing at which the claimant was represented by counsel, I permitted two grounds in respect of the liability decision, and five grounds in respect of the costs decision, to proceed to a full appeal hearing. That hearing also came before me. The claimant was represented by Mr Benson of counsel, instructed by direct public access. The respondent was represented by Mr Laddie KC (who had also appeared for it at both hearings in the employment tribunal).

The Factual Background

7. The claimant gave evidence to the tribunal in his own behalf. There were six witnesses for the respondent: Mr Shah, Mr Kissane, Mr King, Mr Kapadia, Ms Nahal and Mr Harris. I draw the following factual summary from the tribunal's findings in the liability decision, contemporaneous documents that were before the tribunal or matters confirmed to me by both counsel. Quotations and citations in this section are from the tribunal's liability decision. I have focussed on areas relevant to the live grounds of appeal, although a number of other areas were covered by the tribunal.

8. The founding directors of the respondent were Mr Shah, Mr Diver (the joint Managing Directors) and Mr Kissane. The claimant was employed in 2012 as Chief Financial Controller. In 2016 he was appointed as Group Financial Director and Company Secretary. He reported to Mr Shah. There was a dispute as to what had been agreed between them as to the claimant's notice period. The claimant contended six months had been agreed, the respondent three months. The tribunal found that three months had been agreed. As to bonus the claimant's case was that this had been set at 100% of salary. The tribunal found that 50% had been agreed, subject to certain targets being met.

9. The claimant had asked to be provided with a written Director's Service Agreement. The tribunal made detailed findings of fact about the exchanges of emails between the claimant and Mr Shah about that in the period from mid-March through to August 2017. In the course of these same

exchanges the claimant was also seeking an increase to his basic salary. Having been provided with a draft service agreement in June, the claimant sought from the respondent's solicitors copies of the service agreements of his fellow directors and was provided with some. Mr Shah, who was copied in, commented that he believed that all service agreements were held at the New Malden office.

10. On 14 June 2017 the claimant emailed the Board of Directors advising that all directors' service agreements needed to be available for inspection by shareholders at the respondent's registered office. Around this time he also discussed this requirement with Mr Shah, who stated that there was no urgency and that it would be sorted out in the next few weeks.

11. At a meeting on 16 June 2017 Mr Shah asked the claimant to provide comments on the draft service agreement. In further emails of 26 and 27 June he asked for comments by 29 June.

12. The claimant emailed Mr Shah on 26 June referring to their discussion about the requirement to make directors' contracts available for inspection, citing section 228 **Companies Act 2006**. The claimant's evidence in cross-examination was that Mr Shah told him not to discuss this with Mr Kissane or Mr Diver. But that was not put to Mr Shah, the tribunal found it "incredible" that this was not in the claimant's witness statement, and it found that there was no such instruction. On 3 July the claimant emailed the Board with more detailed thoughts on the requirements of section 228. In an email to directors on 10 July he referred to the requirements of section 228 as a "technical breach".

13. On 5 July 2017 the claimant stated in an email that for him to provide a mark-up of the draft service agreement would breach the corporate code. Mr Shah replied disagreeing. The claimant requested a proposal (for an improved financial package) from the Board and then, on 10 July, from the Remuneration Committee (RemCo). Mr Shah consulted the RemCo, which made the claimant an offer of an improved financial package on 14 July, stated to be open for 14 days.

14. The claimant asked for more time to respond to the service agreement terms. Mr Shah replied that this request would be referred to the RemCo, that the claimant should in any event respond by 7

August, and that the 14 July financial offer had lapsed. The claimant replied on 8 August that this was unfair and asked to deal directly with Mr Harris, who was a member of the RemCo. Mr Shah replied the same day maintaining his position; but he said that the claimant's comments could still be reviewed if he provided them by way of a *Word* document marked with tracked changes.

15. The claimant was on leave from 10 to 24 August 2017. Following his return he emailed accusing Mr Shah of being "insidious" and asked to deal directly with the RemCo. Mr Harris suggested a meeting on 31 August and again requested the claimant to provide a tracked-change *Word* mark-up of the draft service agreement. On 29 August the claimant "provided a pdf version of his service agreement with changes handwritten in several places which he referred to as 'amended' and deletions elsewhere. There were 36 paragraphs with the word amended in the margin area but with no corresponding amendment. There were 16 other deletions some with comments. There was no tracked-change *Word* version supplied." [87] The claimant and Mr Harris met on 31 August. In advance Mr Harris had repeated the need to supply a tracked-change *Word* version.

16. Pausing there, the tribunal made findings of fact about two other developments during August 2017. First, in connection with work on the respondent's corporation tax returns due at the end of August, the claimant had instructed consultants, Smith & Williamson (S & W), and accountants, Macintyre Hudson (MHA), to work on a particular aspect. This was done without the knowledge or consent of Mr Shah. This resulted in a large number of emails being exchanged between the claimant, Mr Shah, Mr Kapadia, MHA and S & W during August (in which the claimant continued to be involved while on holiday). These exchanges included repeated requests by Mr Shah to the claimant to provide him with all of the S & W emails. Some were provided on 1 September. MHA had been instructed by the claimant to send "tagged accounts" prepared by them to the claimant only. On 21 August S & W asked the claimant if they could communicate with Mr Shah. The claimant instructed them to provide himself with all their advice, and, as to that request, to "hold the email".

17. Secondly, there was a meeting between the claimant and Mr Shah on 24 August 2017 which

became heated and voices were raised. In an email to the claimant the same day Mr Shah wrote: "Your behaviour was inappropriate and unprofessional. You raised your voice towards me in a threatening manner and pointed a pen in my face whilst rolling forward towards me with your chair. I had to roll my chair back to prevent injury to my face." In a reply the claimant apologised for raising his voice but said that this was the "only" thing he had done. [85]

18. Mr Shah discussed this incident with Mr Kissane. Mr Shah told Mr Kissane that it made him distraught. He also provided Mr Kissane with the emails that had passed between him and the claimant regarding the service agreement and in relation to his requests of the claimant regarding S & W. This was to enable Mr Kissane to decide whether there was a disciplinary case to answer.

19. By a letter of 4 September 2017, given to the claimant in person, Mr Kissane invited the claimant to a disciplinary hearing to take place on 6 September, to consider allegations of misconduct. These were, in summary: (1) "unprofessional and threatening" behaviour towards Mr Shah on 24 August; (2) failing to respond "in a timely and professional manner" in relation to the draft service contract sent in June – 7 dates of reminders were given in the letter; (3) not providing emails to and from S & W until asked to do so six times, and providing no explanation for failing to do so the first five times; (4) not having provided sufficient notice of taking annual leave; and (5) "Your conduct has become, generally, in the last few months, aggressive, unhelpful, adversarial and unproductive."

20. The claimant was also given a letter placing him on a Performance Improvement Plan (PIP). The letter referred to his handling of three particular matters which I do not need to set out, the background to which the tribunal addressed as part of its findings of fact.

21. Later that day the respondent tabled a without-prejudice proposal of terms for a mutually agreed parting of the ways, with an attached draft settlement agreement. Also later that day, the claimant returned a marked-up *Word* copy of the draft service agreement to the respondent.

22. The disciplinary hearing went ahead on 6 September 2017. The claimant "did not need or

seek any clarity around the charges. He did not ask for more time or an adjournment." [95] On 14 December Mr Kissane recommended dismissal to the Board. He sent the claimant a dismissal letter later that day. The tribunal found that ground (5) was abandoned during the disciplinary hearing, as Mr Kissane took advice, which was that it was a conflation of the other grounds. The holiday charge was not upheld but the other three were. "The decision included a belief that the claimant had been untruthful about saying he sent the S & W emails to Mr Shah upon his return from holiday." [97]

23. The claimant appealed and put in appeal grounds and a statement of case which referred for the first time to his having made a public interest disclosure. Various allegations were made about Mr Shah, which the tribunal found "were not linked by the claimant on a causal basis to his dismissal."

24. The appeal was heard by Mr King on 12 October 2017. The claimant was accompanied by a union representative. The appeal was rejected. Mr King commented that an allegation that Mr Shah had fabricated facts about the August incident had not been raised prior to the appeal process; he also remarked that the claimant had provided "some but not all" of the S & W emails. He also disbelieved the claimant about not seeing Mr Shah's emails regarding S & W until 5 September.

The Tribunal's Liability Decision

25. In the opening sections of its decision the tribunal addressed matters to do with the claims and the conduct of the hearing and set out the agreed issues. There was then a section addressing matters specifically relating to the claimant's credibility. Among the matters discussed the tribunal referred to the claimant having claimed not to have certain emails to which he had nevertheless managed to refer in his witness statement. In cross-examination he confirmed that he had electronic copies of the all the emails in question. The tribunal found his initial position on this to have been dishonest. [26] In relation to a particular detriment (relating to a particular project) the tribunal found the claimant's evidence "entirely unsatisfactory and was rejected out of hand." [28]

26. The tribunal also referred to an allegation in a witness statement by the claimant that Ms Nahal

had altered, or faked, an email. The tribunal said that this was a serious and unambiguous allegation of fraud and dishonesty, which was maintained at the hearing and not withdrawn. The making of it had required Ms Nahal (who was not employed by the respondent) to report it to her employer, because she is FCA regulated. Her unchallenged evidence was that an investigation had exonerated her. [29] The tribunal also referred to the claimant having alleged that Mr Shah and a Mr Ragg had altered or falsified information on a website. That allegation was withdrawn during the hearing, and the respondent then stood down Mr Ragg as a witness. The timing of the withdrawal "cast a doubt" on whether the original allegation had been made in good faith. [30]

27. This section also referred to the allegation, raised for the first time when the claimant was cross-examined, that Mr Shah had said that he did not want any of the other directors to know about the requirement for directors' service contracts to be available for inspection, which evidence the tribunal rejected and did not consider to be truthful. [31] The tribunal also referred to what it regarded as another allegation made by the claimant for the first time in evidence, that Mr Kissane's diary entries were "questionable", which it regarded as an allegation of dishonesty, and which it rejected. [32] It also referred to the claimant referring to "coded messages" from the respondent in relation to the S & W emails, the rearranging of a Board meeting, and the PIP letter. But the tribunal accepted these actions "at face value and did not find anything sinister or suspicious at all." [33]

28. After setting out its findings of fact, on which I have already drawn, the tribunal addressed the applicable law. No criticism is made by the grounds of that self-direction on the law, as such.

29. The tribunal then set out its conclusions and analysis, topic by topic. Having set out its findings as to the matters which should have been included in a written statement of terms, including what had been factually agreed as to bonus and notice pay, it turned to whether the claimant had made qualifying or protected disclosures. The claimant relied upon his discussion with Mr Shah, and emails to him and the Board stating the respondent was in breach of its duty under section 228 of the **2006 Act** to make copies of the directors' service agreements available for inspection. Breach of these

provisions is an offence which may, on summary conviction, attract a fine.

30. As to whether these were protected disclosures, the only live issues were whether the claimant believed his disclosures were made in the public interest and, if so, whether such belief was reasonably held. I will set out the tribunal's conclusion on the first issue, at [119], in full.

> **"However, the Tribunal concludes that the claimant did not believe that in respect of any of the aforementioned, his disclosures were in the public interest pursuant to the first part of the public interest test in Chesterton. The Tribunal reached this conclusion for a number of reasons:**
>
> **• The Tribunal took into consideration the claimant's acknowledgment that he was not aware of any shareholder having ever exercised the right to inspect**
>
> **• The Tribunal took into consideration the respondent's solicitors view (conveyed by the claimant himself) that he was not aware of any prosecution in relation to S.228 (page 302)**
>
> **• The Tribunal took into consideration the reference in the claimant's email of 10 July 2017 to the breach being a 'technical' breach. The natural meaning of this word in context was that the breach was, to use an explanatory/analogous expression - not a big deal. In fact, under cross examination on this point by Mr Laddie QC he reaffirmed that view when he used the expression "in the eyes of the law". That carries the same meaning as 'technically', in context.**
>
> **• The claimant sent his memorandum of terms to the Solicitors and copied to Mr Shah in purported compliance with S.228 CA. Most of the terms, apart from salary, were not agreed. This was known to the claimant. The Tribunal questioned the claimant about this document when he confirmed that to be the case. The Tribunal concluded that the claimant could not have believed that it was of major significance that he should provide agreed/up to date terms. If he did, he would have qualified what he said or waited to provide his particulars.**
>
> **• The claimant's queries of Mr Smyth for Directors' terms comparator information commenced the day after (9 June 2017) Mr Shah had sent him his draft service agreement (8 June 2017). In addition, in his email of 26 June 2017, he stated expressly he needed to see those terms "to progress this" which was a reference to his service agreement negotiations. The claimant's interest was a private one. Whilst that does not exclude a dual/concurrent public interest purpose, for reasons given above/below the Tribunal concludes that wasn't the case at all.**
>
> **• Whilst it is not a barrier to being a qualifying protected disclosure, the fact that the claimant first alleged he had made a public interest disclosure was not until his appeal against dismissal in October 2017, following advice, suggested to the Tribunal that it was not a thought of the claimant at all."**

31. The tribunal went on to find in the alternative that, if the claimant did hold such a subjective belief, it was not reasonably held.

32. These conclusions meant that complaints of detrimental treatment and unfair dismissal based on the claimant having made protected disclosures must fail; but, in case it was wrong thus far, the tribunal went on to consider each of the "alleged detriments asserted and the alleged causal link", [125] complaint by complaint, setting out its reasoning and conclusions in relation to each one. These included (among others that I do not need to consider) the following particular complaints of detrimental treatment on the ground of the (claimed) protected disclosures.

33. First, the claimant complained that Mr Shah had falsely accused the claimant of having attacked him with a pen on 24 August 2017. The tribunal concluded that this incident had happened as described by Mr Shah. [129]

34. Secondly, the claimant complained of Mr Shah having subjected him to closer monitoring in respect of a number of different matters, including the S & W matter. The tribunal found that he had not informed Mr Shah that he had involved S & W and MHA in work on the particular matter relating to the corporation tax return. Mr Kapadia had expressed concern that an individual from the respondent's auditors was about to go on holiday, but the claimant had advised that due diligence was being carried out. That then prompted Mr Shah's enquiries. This conduct on the part of Mr Shah was "a million miles away from close scrutiny" and "unconnected to any disclosures entirely." [133]

35. Thirdly, the claimant complained of the decision to put him on a PIP without prior warning. The tribunal considered that this was not inherently detrimental treatment, but in any event that there was no causal link to the protected disclosures. Each of the matters raised in the PIP letter had a different triggering event. [137]

36. Fourthly, the claimant complained of being invited to a disciplinary hearing without warning. The tribunal found that the decision to do so had been taken by Mr Kissane, based on his analysis of the email traffic between the claimant and Mr Shah and his conversation with Mr Shah. There was no prior investigation meeting, but this was not required in every case. At [138] the tribunal said:

> **"There was no causal link to the asserted protected disclosures. Each issue had their own triggering events. There was a proper basis for the instigation of the process. It was key part of the claimant's evidence that he was being 'set up'. He said this more than once in relation to the requests made of him during the contract negotiations and the S&W emails. This troubled the Tribunal. The obviously flaw in that conspiracy theory was that if he had provided his comments tracked in a word document and the S&W emails, these 2 charges against him would have been extinguished. It also required foresight that the claimant would persistently refuse to comply. The requests were not difficult to comply with at all. Instead, his refusal put the respondent in an impossible position, and it was inevitable then that his insubordination would lead to a natural progression and elevation of the issue. The claimant was thus the author of his own misfortune in this regard."**

37. The claimant also complained of detrimental treatment by way of pressure on him to resign, in particular by the making of a without-prejudice offer two days before the disciplinary hearing. The tribunal rejected this. It considered that the claimant could have asked for more time to consider the offer, or for the disciplinary hearing to be put back (but did not); and that only acceptance in principle was sought by 5 September 2017. The offer was also resurrected after 6 September. There was no unfair pressure to resign. "The claimant was not subjected to a detriment." [140]

38. The final matter considered in this section was the dismissal. At [141] the tribunal said:

> "**It was difficult to escape an inevitable conclusion that 2 of the 3 issues for which the claimant was dismissed showed persistent/repeated insubordination towards his boss. The claimant struggled even when giving evidence in Tribunal to accept that he was subordinate. The conspiracy case, as analysed above was hopeless. The claimant accepted in response to Tribunal questions that had he complied with Mr Shah's requests there would have been no case for the respondent to advance in respect of those matters. The Tribunal noted that in fact the claimant's taking of leave, last minute, a few weeks before the Corporation tax deadline was not, ultimately, upheld as a contributing factor to his dismissal. The August incident however was a contributing factor which portrayed a further example of insubordination. The other common factor was that all issues had arisen in a relatively short and very recent period of time. There was no reliance on anything peripheral. The claimant also accepted in evidence that he had deliberately withheld emails from Mr Shah which was what the respondent believed at the time. In fact, at the appeal (against dismissal), Mr King had formed a belief that the claimant had been dishonest in relation to the S&W emails which will be analysed further below. The Tribunal concluded that the claimant was perhaps fortunate that the case against him was not for gross misconduct. The S.228 CA breach did not have any causal relevance to the claimant's dismissal. Its relevance was no more than a chronologically historical fact."**

39. The final section of the tribunal's decision concerned the complaint of ordinary unfair dismissal. I will set out this passage in full.

> **"142. The Tribunal repeats to a large extent, its conclusions in paragraph 131 above. The Tribunal reminds itself that it must apply a test not dissimilar to the Burchell test to the respondent's decision to dismiss the claimant especially as the substantial reason relied upon overlapped considerably if not entirely with matters of conduct. The Tribunal also reminded itself that it must not substitute its view. The range of reasonable responses test also applies both to the decision to dismiss substantively and procedurally. Paragraph 137 above sets out why the Tribunal concludes that the respondent had a genuine belief in the loss of trust and confidence in the claimant and why it had reasonable grounds upon which to hold that belief. In relation to investigation, the Tribunal concluded that the respondent could have spoken with the claimant and Mr Kapadia at least in relation to the August incident and the S&W emails. However, the Tribunal went on to conclude that was not, overall, fatal to the reasonableness of the investigation. This was not about the need to have a pre-disciplinary investigation, but about whether pre-dismissal there was a reasonable investigation. By the time of the disciplinary hearing and indeed by the conclusion of the appeal hearing, the claimant had had a full right of reply including any investigation concerns. It was also apparent to the Tribunal that the email traffic captured a very significant amount of the respondent's concerns and the decision to take the matter further. There was no suggestion that the 'dossier' of evidence given to Mr Kissane by Mr Shah was selective or incomplete.**
>
> **143. The appeal Hearing was conducted independently and thoroughly. The Tribunal concludes that by the conclusion of the appeal hearing the loss of trust and confidence in the claimant had in fact become more aggravated and had in fact elevated in to disbelief of the claimant – not as a separate charge against him but why his response (s) were rejected. The claimant was disbelieved at the dismissal stage about providing the S&W emails when he returned from leave and by the conclusion of the appeal hearing he was disbelieved about not seeing Mr Shah's emails until 5 September 2017 particularly as the claimant had provided some of the emails on 1 September 2017 and because of the claimant's email of 22 August 2017 (which the Tribunal concluded related to the email at page 516).**
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> **144. This dismissal was within the band of reasonable responses both procedurally and substantively. In so far as it might have been alleged, the appeal process through its independence and comprehensiveness, cured any defect with regard to any insufficiency of preparation time, clarity of the case against the claimant or otherwise (which the Tribunal did not find)."**

The Tribunal's Costs Decision

40. In the opening sections of the costs decision the tribunal considered and refused recusal and postponement applications. Under the heading "Statement of Means" the tribunal said this:

> **"22. The claimant was in breach of the Tribunal's Order to provide a statement of means. His explanation for not doing so – that he was seeking clarification why the Tribunal had not Ordered the respondent to provide a statement of means was wholly inadequate. It did not excuse noncompliance with an Order.**
>
> **23. The Tribunal took evidence of the claimant's means under oath and invited the respondent to cross examine that evidence if it wishes to do so, on the morning of day 2."**

41. The tribunal then turned to the basis of the respondent's costs application of 4 December 2020

as fleshed out in Mr Laddie KC's skeleton argument, which it set out at [25] as follows:

> "***Unreasonable conduct in that the claimant:***
>
> • **Gave dishonest evidence in respect of a large number of disputed matters;**
>
> • **Came up with new and unheralded evidence on a whim;**
>
> • **Accused the Respondent of not having made disclosure in circumstances where he himself had concealed his possession of the very documents that he was accusing the Respondent of not having disclosed;**
>
> • **Pursued and failed to concede a ludicrous and distressing allegation of forgery/documentary fabrication against Ms Nahal even though it was obvious;**
>
> • **Contrived a whistleblowing case in a cynical and misconceived attempt to displace the statutory cap on recovery of awards for ordinary unfair dismissal (thereby enabling him to claim the wholly unrealistic sum of £1,463,567.34 + ACAS uplift in his final schedule of loss. The Tribunal will recall, he said, that the Claimant first raised the possibility of whistleblowing detriment after his dismissal, in his appeal (and even then it was barely related to the Companies Act s.228 issue); whilst not specifically referred to in the Judgment, there are numerous passages in the Claimant's witness evidence where he claimed that he knew that the writing was on the wall shortly after making his alleged protected disclosures. Plainly, that evidence was false. He knew that his "whistleblowing" had nothing to do with the events leading up to and culminating in his dismissal. Why, then, did he bring a whistleblowing claim? The answer is obvious – to be able to serve an intimidating and grossly inflated schedule of loss.**
>
> • **The nature, gravity and effect of the unreasonable conduct was profound. The Claimant advanced a claim that was in large part false, presumably designed to embarrass the Respondent and/or pressurise it into compromising the dispute at an unrealistic and disproportionate level. The Claimant's unreasonable conduct led directly to the trial being far longer than it needed to be, with far more documents and witnesses than were necessary. Had the Claimant limited himself to an ordinary unfair dismissal claim, as he ought to have done, the claim is unlikely to have been heard at all (i.e. it would have been compromised on a commercial basis, consistent with the sensible approach taken by the Respondent immediately prior to the Claimant's dismissal). If it had been heard, it would have taken no more than a couple of days of Tribunal time and the Respondent would have had to call many fewer witnesses and would not have needed to instruct a QC.**
>
> ***The Claimant's whistleblowing claims – i.e. his claims under ERA, s.47B and s.103A had no reasonable prospect of success. In particular:***
>
> • **The Claimant knew at all times that he had no subjective belief that his disclosure of information relating to the technical breach of the Companies Act 2006, s.228, was in the public interest.**
>
> • **The Claimant knew at all times that his dismissal and any detriments that he suffered had nothing whatsoever to do with his communications about the technical breach of s.228, but were caused by his own sub-optimal conduct whilst in post. In this regard, the Respondent relies in part on the Claimant's appreciation that the Respondent's reaction to the S.228 information was both appreciative and unworried.**
>
> • **The points made at sub-paragraphs (a) (v) ('contrived a whistleblowing case) and**

> **(b) ('the nature, gravity and effect of the unreasonable conduct was profound') above are repeated and reiterated in respect of the contention that the whistleblowing claims had no reasonable prospect of success.**
>
> ***Costs/amount sought by the respondent***
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> **• As to the proportion of the Respondent's costs that the Claimant ought to pay, the Respondent is prepared to make the following concession of principle. A significant element of the Respondent's costs were incurred because the trial was twice adjourned, on both occasions not due to the fault of either party. That said, the lion's share of the costs of pleadings, disclosure, preparation of witness statements and attendance at trial were and would always have been incurred regardless."**

42. The tribunal then set out the specific amount of costs sought by the respondent. In the course of this passage it noted that the respondent asked that the costs be assessed on the indemnity basis.

43. The tribunal then summarised the respondent's oral submissions, which "placed significant reliance on the claimant's credibility and specifically the claimant's dishonesty in respect of the unreasonable conduct limb of its application." The respondent relied on the findings in the "credibility" section of the liability judgment and a number of other specific findings that were listed out. These included, at [119] of the liability judgment, "rejection of the claimant's subjective belief in the public interest". The tribunal added here in its costs reasons, in italics: "*the respondent emphasised that this paragraph was critical/really important in support of its application*." [26]

44. The tribunal continued:

> **"27. In submissions, the respondent also sought reliance on the without prejudice save as to cost correspondence which the claimant had included in his bundle. The rejection of the pre-trial offer, it said was unreasonable. It said, essentially, that the claimant did so because the claimant had advanced a dishonest case on whistleblowing to remove the statutory cap.**
>
> **28. In addition, the respondent said the claimant's whistleblowing claim was founded on a lie because the claimant did not have the public interest in mind. This was in support of the no reasonable prospects of success limb of its application. The respondent said the issue of whistleblowing was not raised until the claimant's appeal against dismissal and even then, was not about S.228 Companies Act 2006. The respondent submitted that the litigation would not have continued/taken place had it not been for the claimant's cynical and untruthful whistleblowing claim."**

45. The tribunal then summarised the claimant's costs application, based on the respondent having failed to comply with obligations in relation to witness evidence and disclosure. In an amended

version of the application this conduct was said to have prevented a fair trial, and the original amount sought of £8620 was revised, the claimant now seeking the whole of his costs, put at £99,126.97.

46. The next section set out the tribunal's findings of fact relevant to the costs hearing. This addressed a number of matters. At [34] to [38] the tribunal wrote:

> **"34. On 5 February 2018, the respondent made a without prejudice save as to costs offer to the claimant in settlement of all of his claims, including a putative high court claim in relation to shares. That claim was never before the Tribunal and/or within the Tribunal's jurisdiction.**
>
> **35.The offer was expressly stated to include the claimant's unfair dismissal claim and was also expressly stated to be on a commercial basis. The whistleblowing claims were stated to be 'wholly without merit'. The offer was for £200,000, including breach of contract claims. The claimant was forewarned of an application under Rule 76 if the offer was refused.**
>
> **36.This offer was rejected. This correspondence was in the claimant's bundle for the Costs Hearing. The claimant's reply was not in the bundle. The claimant said in submissions it was not about the money. The Tribunal asked the claimant if he had said in his response said he was seeking a declaration. He said he had but there was no correspondence in the bundle at all in relation to his response.**
>
> **37.There was a further offer made to the claimant without prejudice save as to costs after the Hearing had taken place but before the Tribunal had decided the case. This offer was for £55,000 and was expressed to be in the context of the respondent's assessment of the claimant's case and evidence at trial and in relation to the threatened outstanding High Court claim. This offer was rejected too. The response to this letter was also not in the bundle.**
>
> **38.The Tribunal noted that the claimant, in his written skeleton argument for the Costs Hearing was relying on the case of *Telephone Information Services v Wilkinson* 1991 IRLR 148 in which case an offer from the respondent for the maximum Unfair Dismissal claim had been refused in circumstances where an express declaration had been sought. That had not happened in this case. The claimant would thus have appreciated the potential relevance of that factor, yet there was no evidence before the Tribunal of the claimant's written response via his Solicitors after the offer was made on 5 February 2018. The Tribunal thus found, on a balance of probabilities, that there was no such request made."**

47. The tribunal then referred to the claimant having sought to take issue with or reopen a number of matters that had been decided in the liability decision. One of these related to the issue addressed in Ms Nahal's evidence. In that connection the tribunal noted that the claimant had also, at the costs hearing itself, made an allegation against Mr Laddie KC of dishonest conduct, which allegation the tribunal found "entirely inappropriate". [42] The tribunal also referred to an allegation of dishonest conduct against the respondent's solicitor, which it rejected. The tribunal noted that the claimant had

provided three schedules of loss during the course of the litigation, each claiming a higher amount than the last. The third of these claimed £1,463,657.34 plus ACAS uplift. [45]

48. The tribunal referred to the claimant having failed, as directed, to provide a statement of means 14 days before the costs hearing. The claimant had referred in correspondence to the respondent not having been so directed. The tribunal considered that the claimant should have appreciated why a PLC trading on the AIM market had not been so directed; but in any event this did not excuse his conduct. The consequence was that the respondent had no advance notice of what he would say about his means. But it was not proportionate to disbar him from giving such evidence. Instead the tribunal had permitted him to do so live under oath, and the respondent to cross-examine on day two. [47]

49. The tribunal went on to discuss the evidence the claimant gave about his means and what the tribunal made of it, including, in relation to aspects relating to the extent of his savings, evidence which the tribunal found unconvincing and rejected. [56]

50. After a self-direction as to the law the tribunal set out its conclusions and analysis. In relation to the respondent's main costs application, the tribunal concluded that the costs threshold was crossed, and that it should exercise its discretion to make an award, in the following passage

> **"64. The Tribunal first considered the respondent's application for costs based on its assertion that the claimant's whistleblowing claim had no reasonable prospect of success.**
>
> **65. The Tribunal considered in some detail its own conclusions in paragraph 119 of the Liability Judgment which set out multiple reasons why the Tribunal concluded that the claimant did not have a subjectively held belief that the disclosure of information relied upon was in the public interest. Those reasons are not repeated herein but they were all very compelling reasons why the Tribunal concluded as it did, in particular that the claimant only believed he was raising a 'technical' breach with the respondent. The Tribunal also noted its conclusion and remarks on the triviality and inadvertency of the breach referred to in paragraph 123 of the Liability Judgment and that the claimant himself was prepared to send on a memorandum of terms to the Solicitors, copied to Mr Shah, without qualification, in purported compliance with S.228 CA, knowing that on his case, most of the terms were not agreed (paragraph 119, bullet 4 of the Liability Judgment). This was wholly contradictory to a Director holding a subjective belief that the reporting of the S.228 CA breach was in the public interest.**
>
> **66. The Tribunal concluded in the light of its own conclusions that the claimant knew or ought to have reasonably known that he did not have a subjective belief in the**

public interest and that even if he did, it was not objectively reasonable. With regard to the latter, the Tribunal considered its own conclusion in paragraph 122 of the Liability Judgment and found it particularly notable that the claimant did not assert a reference to whistleblowing until after his dismissal and that when he did, it was not in reference to the S.228 CA breach issue at all, but something altogether separate which never formed part of his claim.

67. The whistleblowing claim was on any analysis the key and main claim of the claimant. The escalating and considerable schedules of loss made that plain. There was no prospect of the sums being sought being 'awardable' unless the statutory cap on an unfair dismissal claim was removed.

68. The Tribunal has concluded in its liability Judgment that none of the detriments relied upon by the claimant had occurred. This view was expressed in the alternative to the conclusions that the claimant did not have a subjective belief and if he did, was not objectively held. Conclusions in the alternative are not uncommon and are open to be made by a Tribunal. The alternative conclusions do not undermine or dilute its earlier conclusions. Within the context of a costs application where the prospects of success are being analysed, the Tribunal concluded that the alternative 'in any event' conclusions of no detriment did in fact have force in support of such an application rather than if some or all of the detriments were found to have occurred. This was not a case where the claimant would have succeeded on his claims for detriment or detriments had his disclosure of information been found to be a qualifying protected disclosure.

69. In relation to at least 2 of the key components of the disciplinary case against the claimant, there was a complete answer as to the reason why the claimant had been charged – first, his repeated refusal to provide changes/comments on his contract in a marked up Word document and his refusal to provide S&W emails as requested by Mr Shah. In respect of both, the Tribunal has already concluded in its liability judgment that the claimant's 'conspiracy case' was hopeless and flawed (paragraphs 138 & 141). This fundamentally undermined the claimant's assertion on his case that the reason (or principal reason) why he was dismissed was the whistleblowing.

70. The Tribunal thus concluded that the whistleblowing claim had no reasonable prospect of success and this was known or ought to have been known to the claimant. It was the main reason why the case had not been capable of a commercial resolution. The claimant had turned down, unreasonably, a £200,000 offer, wherein the respondent had expressly stated the whistleblowing claims to be wholly without merit. The pursuit of the whistleblowing claims was the main reason why the Hearing was listed for the number of days it was and before a full panel. It was the main reason why the respondent had to call the number and/or nature/extent of its evidence and documentation running to several lever arch bundles and a volume of witness statements and rebuttal witness statements from the claimant. The overwhelming share of the preparation was engaged on the whistleblowing claims under S.47B and S.103A - to advance them or to resist them.

71. In addition, the claimant's conduct in relation to his conduct of the proceedings was unreasonable – collectively for the all the reasons set out in the Tribunal's findings and conclusions in its liability judgment, in particular, under its credibility findings, including by way of emphasis being dishonest and unreasonably accusing others of fabrication in furtherance of his case and in so doing causing or risking reputational or economic harm to them. That was the effect. The basis of the claimant's own costs application was about disclosure, yet it was his own position on multiple requests for disclosure which ultimately exposed the claimant. In addition, the claimant unreasonably turned down an offer of £200,000 intertwined with submitting increasing and grossly exaggerated/inflated compensation in his schedules

> **of loss, ultimately seeking £1.464 million plus an uplift. The offer was way above the Statutory maximum for 'ordinary' unfair dismissal (and in circumstances where no other breach of contract claim was ever advanced). No declaration (for unfair dismissal or otherwise) was sought, even if it had been, the Tribunal was not satisfied that it would have been in the overriding interest of proportionality or saving expense to (still) pursue the claim.**
>
> **72. In considering whether to exercise its discretion to award costs in relation to the threshold being met in relation to both limbs of the respondent's costs application, the Tribunal noted that the claimant was represented by counsel and had previously been represented by Solicitors. He knew or ought to have known the stakes of pursuing a bad claim and of not conducting himself reasonably. In addition, the nature and gravity of his conduct was extremely serious. He gave dishonest evidence under oath. He made very serious allegations of fraud against at least 2 other employees causing actual or risking significant harm to reputation and/or livelihood to those individuals. The whistleblowing claim, (which also had no reasonable prospect of success), risked significant reputational and/or financial risk to the respondent and the individual employees who were targeted by that claim."**

51. Having considered the claimant's means the tribunal concluded at that an award of just over 21% of the respondent's stated overall costs of £600,000 was reasonable, fair and proportionate. "The sum is awarded on indemnity basis for the same reasons set out in paragraph 65, *subject to* detailed assessment by the County Court." [74]

52. The tribunal then set out its reasons for rejecting the claimant's costs application.

53. As to the respondent's application for the costs of the costs hearing, the tribunal said this.

> **"80. The Tribunal concluded the respondent's costs of the costs Hearing should be met by the claimant. The Tribunal had regard to the claimant's conduct referred to in the respondent's skeleton argument, paragraph 15 and in its submissions in paragraph 22.**
>
> **81. The claimant had not provided a statement of means, in breach of the Tribunal's Order. In evidence, the claimant referred to a lower value of his flat (£600,000) which was a figure lower than he had paid for it 7 years earlier, without explanation. He also submitted a document which stated it was a 1-bedroom flat when he knew it wasn't. The Tribunal concluded he did this to distinguish the value from that of the other 2-bedroom flat, particulars for which he had submitted, which had a January 2020 value of £735,000. This was misleading. The claimant was also evasive about the disposal of his savings and the amount of those savings. The Tribunal also concluded that the claimant had also inflated his own costs application to negate and detract from the Respondent's application, not because his own application had any merit. The claimant referred almost exclusively to the liability judgment being wrong. That was an improper basis to defend the costs application.**
>
> **82. The Tribunal exercises its discretion to award the respondent's costs of £20,000 as it considers the claimant's conduct to be serious and wilful. The respondent's overall costs were £28,000. The claimant sought advice and was represented by solicitors in**

> **relation to the costs applications until September 2021. He would thus have known, or ought to have known of the risks involved. The respondent was reasonable in continuing to instruct Mr Laddie QC for the Costs Hearing, which took place over 2 days and the preparation for which would have been disproportionate owing to the sizeable bundle and substantial witness statements submitted by the claimant. The same means consideration as above have been taken into account in relation to the costs Hearing too."**

The Liability Appeal

54. There were two live grounds of appeal in respect of the liability decision, numbered 9 and 11. Both relate to the tribunal's decision to dismiss the complaint of ordinary unfair dismissal. I will consider ground 11 first, and then ground 9.

Ground 11

55. This ground contends that the tribunal "failed to give adequate reasons for its conclusion that the Respondent's investigation and procedure were fair". The body of the ground contends that it failed to consider key features, being that the investigating and dismissing officers were the same person, that there was a lack of documentary evidence relating to the initial investigation, and that there was a failure to provide to the claimant the documentary evidence that was relied upon by the respondent in support of the charges. It is also said that the tribunal's conclusion that the appeal hearing was conducted independently and thoroughly lacked any supporting reasons.

56. I will consider the first two strands of this challenge together.

57. The respondent contended that the reason for dismissal was that there had been a fundamental breakdown in trust and confidence caused by the claimant's conduct in three respects. For the purposes of section 98(1) of the **1996 Act**, the reason was said to amount to a substantial fair reason and/or one relating to conduct within section 98(2). While a mere assertion of breakdown of trust and confidence is not a substitute for concrete factual grounds to dismiss, in this case the context was the running theme that his alleged conduct had fatally undermined the necessary relationship of trust between him and Mr Shah. Against that background there was no dispute that, having found the

reason made out for section 98(1) purposes, the tribunal rightly treated this as, in substance, a case where the **British Home Stores Ltd v Burchell** [1980] ICR 303 (EAT) approach fell to be applied when considering the fairness of the dismissal pursuant to section 98(4) of the **1996 Act**.

58. Factually, this was not a case where there was an initial investigation conducted by one manager, who recommended disciplinary charges, and then those charges were considered at a disciplinary hearing by a different manager. Mr Shah raised his concerns with Mr Kissane, and provided him with relevant emails, Mr Kissane decided that the claimant should be invited to a disciplinary hearing and Mr Kissane also presided at that hearing and took the decision to dismiss.

59. However, there is no rule of law that, in order for a dismissal to be fair, there must be a pre-investigation (whether or not including a meeting with the employee) in every case, and then, if there are charges, these must be considered by a different person. It is well-established that, when considering whether the employer has conducted a reasonably sufficient investigation (applying a band-of-reasonable-responses approach), what matters is whether enough overall investigation has been carried out, one way or another, at the point of the decision to dismiss (and/or, where there is an appeal, in the overall end-to-end process including the appeal stage).

60. An employment tribunal is required by virtue of section 207 **Trade Union and Labour Relations (Consolidation) Act 1992** to take into account, where relevant to any issue before it, the *ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015)*. The present tribunal specifically referred to paragraph 5 of that Code in the course of [138], noting, correctly, that it only indicated that a prior investigation meeting is required in "some cases". In the course of [142] the tribunal correctly stated that the issue was "not about the need to have a pre-disciplinary investigation, but about whether pre-dismissal there was a reasonable investigation." This point is not new. See: **ILEA v Gravett** [1988] IRLR 497, and, more recently, **Sunshine Hotel Limited v Goddard**, UKEAT/0154/19/OO, 15 October 2019 at [12] – [14].

61. In so far as this ground contends that the tribunal should have found this dismissal to be unfair because Mr Kissane, having decided that disciplinary charges should be raised, then also presided at the disciplinary hearing, I therefore conclude that it did not err in not so finding.

62. It is also clear that there was no documentary evidence about any initial investigation, because, Mr Shah having raised his concerns, and provided Mr Kissane with the relevant emails, Mr Kissane then decided to proceed with disciplinary charges. It was not suggested before the tribunal, or in this ground of appeal, that Mr Kissane had carried out other investigations or interviews in respect of which contemporaneous documentation might, or should, have existed. Once again, the lack of such further investigations or associated documentation prior to the disciplinary charges was not something which, in itself, the tribunal should have considered must point to the dismissal being unfair.

63. The central plank of this challenge, it seems to me, is the undisputed fact that Mr Shah provided Mr Kissane with a pack of emails relevant to what became the disciplinary charges, but a copy of that pack was not provided to the claimant with the letter inviting him to a disciplinary hearing. Failure to provide the employee with copies of all the evidence that is before the disciplining officer, or to provide it in the same form, does run the risk of unfairness in, potentially, more than one way. In particular, it may lead a tribunal to conclude that the employee did not have all the information he needed, sufficiently to understand the nature of the conduct of which he was being accused, and/or did not have a fair opportunity to respond to all of the evidence that was being relied upon, and liable to be taken into account, when reaching the decision whether or not to dismiss.

64. However, such a failure will not necessarily always lead to the conclusion that the dismissal was unfair. Whether it does is sensitive to the facts of the particular case; and the task for the tribunal is always to decide whether the process followed was fair or unfair in all the circumstances of the case before it, applying section 98(4). See, for example, the discussion in **Fuller v Lloyds Bank plc** [1991] IRLR 336 (EAT). In the present the following points are relevant to a consideration of whether the tribunal should have found that this failure rendered the dismissal unfair.

65. First, I do not think the tribunal erred by not concluding that the claimant was not given sufficient information to understand what the charges were about, in particular in relation to the three matters ultimately relied upon by Mr Kissane. He was told in the letter inviting him to the disciplinary hearing that these were that on 24 August 2017 he had been "unprofessional and threatening" in his behaviour towards Mr Shah, that there had been a failure by him to respond in a timely or professional manner in relation to the draft service agreement, and that he had been "unforthcoming" when asked for copies of his emails with S & W and not provided them the first five times that they were requested. It was not suggested that the claimant did not understand which encounter with Mr Shah was being referred to. I note also that the tribunal found at [95] of the liability decision that the claimant did not, at the disciplinary hearing, "need or seek any clarity around the charges."

66. Secondly, the tribunal also specifically considered, at [94], the fact that the letter "referred to rather than enclosed all supporting evidence." It said: "That might have caused the Tribunal concern if the events had not been recent or if the emails included third parties i.e. where the claimant had not been the sender, or the recipient. That was not however, generally, the case."

67. In this regard Mr Laddie KC also drew attention to the following. Firstly, in relation to the incident with Mr Shah, Mr Shah's account of that was set out in the email that he had sent to the claimant shortly after it occurred (the salient part of which the tribunal set out at [85]). That same email was in effect Mr Shah's statement about the facts of the incident which appears to have been provided to Mr Kissane: the disciplinary charge, in alleging that the claimant's behaviour had been "unprofessional" and "threatening" was using the words that Mr Shah had used in that email.

68. Secondly, in relation to the service-agreement issue, the letter from Mr Kissane setting out the disciplinary charges did give the date on which the draft agreement was first sent to the claimant, and then six dates on which it was said that the claimant had been reminded. Thirdly, in relation to the S & W matter, while dates were not given, the letter postulated that the claimant had been asked for the

relevant emails six times, and failed to provide them the first five times. This, submitted Mr Laddie KC, gave the claimant sufficient information to be able to look out all of the relevant emails. It was also not suggested, whether in the internal process or before the employment tribunal, that he had been deprived of access to his work email account or was for any other reason unable to do so.

69. In the final twelve lines of paragraph [142] (which I have set out earlier) the tribunal set out its conclusion as to whether there had been a reasonable investigation prior to the dismissal. It concluded that the claimant had had a full right of reply, including any investigation concerns; that it was apparent that the email traffic captured a very significant amount of the respondent's concerns and the decision to take the matter further; and that there was no suggestion that the dossier of evidence given to Mr Kissane by Mr Shah was selective or incomplete.

70. Although it can certainly be said that it was not best practice that Mr Kissane did not enclose with his letter a copy of that dossier in the form that it had been given to him, and perhaps that the respondent took a risk by not doing so, in all these particular circumstances I do not consider that this was a feature that should have led the tribunal to conclude that the dismissal must be unfair.

71. The final strand of this ground of appeal relates to the tribunal's statement at [143] that the appeal hearing was conducted independently and thoroughly. The ground complains that this statement was not supported by any reasons or explanation whatsoever. Mr Benson in his skeleton referred generally to the claimant's witness statement before the tribunal. However, the ground itself does not identify any particular argument run before the tribunal about the conduct of the appeal hearing that the tribunal failed to address; nor did Mr Benson develop this strand in oral submissions.

72. It is clear that the claimant's general stance was that the appeal process (like, on his case, the dismissal process) was a sham and the outcome pre-ordained. But Mr King, who heard and decided the appeal, gave evidence before the tribunal, which also had before it the relevant documents relating to the appeal and its outcome. The tribunal's statement that the hearing was conducted

"independently and thoroughly" clearly conveys that it concluded that the process was not a sham and that Mr King came to his own decision. I do not think that it needed to say more in this case.

73. Other criticisms were raised by Mr Benson in argument, but not in fact raised in this ground, so, strictly, I do not need to address them. Nevertheless I will mention them briefly. The first was that placing the claimant on a PIP and making a time-limited settlement offer were tactics which placed the claimant under unfair pressure. But the tribunal did not agree. The second was that the minutes of the disciplinary hearing showed that Mr Kissane was appalled that the claimant had not given proper notice of his holiday, yet he did not rely on this when dismissing, and that he needed to pause to consult lawyers about the basis for the fifth ground. However, the tribunal concluded that Mr Kissane *did* come to his own decision to dismiss, and did so for the reasons that he gave; and these features of what happened at the disciplinary hearing do not show that it erred in doing so.

74. For all of these reasons ground 11 fails.

Ground 9

75. The headline of ground 9 is that the tribunal's conclusion that the respondent had a reasonable belief in the conduct relied upon as giving rise to a loss of trust and confidence was "based on its making its view and assessment of the evidence" and/or was not supported by adequate reasons and/or was perverse. The challenge of substance raised by this ground is, therefore, that the tribunal erred by substituting its own view for that of the employer.

76. I have set out already the final paragraphs of the tribunal's liability decision at [142] – [144]. It was common ground before me, and I agree, that there are a couple of clear errors in the numbering of cross-references given in paragraph [142]. In the first sentence, it is apparent from the substantive content that the tribunal was referring back to what it had said at paragraph [141] (not [131]); and, a few lines on, the reference to [137] was clearly meant to be a reference to [138].

77. In the detail of this ground, and in argument, it is contended that at paragraph [138] the

tribunal, at its highest, found that there was a proper basis for instituting the disciplinary proceedings raising each of the matters of alleged conduct raised, but that this does not address whether there was a basis for a reasonable belief that the conduct had occurred, when the decision to dismiss was taken. Paragraph [141] is also said to address the reasons why the claimant was dismissed, and why his appeal was not upheld, but not to address whether those concerned had a reasonable basis for their beliefs. Those paragraphs are said otherwise to have addressed the tribunal's own views.

78. I start by noting again that it was not disputed that the tribunal did not err as such, by deciding to take the **Burchell** approach in this case. The tribunal also correctly summarised the elements of the **Burchell** test at [111] and [112] including stating at [112] that the "range of reasonable responses applies both to the substantive decision to dismiss and to the procedure." In the course of its conclusion at [142] itself the tribunal again in terms reminded itself that "it must not substitute its own view" and that the range of reasonable responses test applied to the decision to dismiss substantively and procedurally. At [144] the tribunal stated in terms its conclusion that the dismissal was "within the band of reasonable responses, both procedurally and substantively".

79. Where a tribunal has given itself a correct self-direction as to the law on a particular point at issue, the EAT should be slow to conclude that it has not followed it when reaching its conclusions, unless it is plainly apparent that something has gone wrong. That approach applies even more strongly in a case where, as here, the point of law is one as well-known as this one, and is actually reiterated by the tribunal in the dispositive section of its reasons.

80. The tribunal opened paragraph [142] by referring back to its conclusions in (allowing for the numbering error) paragraph [141]. The context is that this was a case where, as well as claiming ordinary unfair dismissal, the claimant claimed to have been unfairly dismissed for the reason or principal reason of having made protected disclosures. Although the tribunal had found that the communications that he relied upon did not amount in law to protected disclosures, it had nevertheless gone on to consider whether he was subjected to detriments on grounds of those communications

and/or dismissed for the sole or principal reason of having made them.

81. At [141] the tribunal considered that latter question relating to the dismissal. In that paragraph it concluded that Mr Shah and Mr King did genuinely take their decisions because of the view they had each formed of the conduct of which the claimant was accused in relation to the three matters in question, and not because of the prior disclosures, which were no more than a "chronologically historical fact". When it moved on to consider the complaint of ordinary unfair dismissal, beginning at [142], and applying the **Burchell** test, the tribunal had therefore already answered the first question, relating to whether the employer genuinely believed in the purported reason for dismissal.

82. However, part of its reasoning towards that conclusion, at [141], had itself relied upon a consideration of the nature and content of the evidence of the claimant's conduct that was before the employer. In relation to two of the three matters the conduct was in the form of emails which were before Mr Kissane and Mr King and were also, I was told, to be found in the bundle of documents before the tribunal. There was, I interpose, never any issue that the claimant had written and sent those emails, and hence no issue that the respondent reasonably believed that he had done so. The challenge here is limited to whether the tribunal failed to address whether the view that Messrs Kissane and King took of the contents was a view that was reasonably open to them.

83. As to that, the tribunal began [141] by observing, in respect of those charges, that it was "difficult to escape an inevitable conclusion" in respect of those matters that they showed "persistent/repeated insubordination towards his boss". Though it is not spelled out, it is clear that the form of reasoning in which the tribunal was engaged was to the effect that it accepted that Mr Kissane and Mr King both genuinely did take the view they claimed of the emails, *because* the content of those emails compellingly supported that view. Although, within that paragraph, that reasoning supported the conclusion that that view was genuinely held, it amounted also itself implicitly in substance to a conclusion that, in light of the content of the emails, that view was *reasonably* held.

84. The charge in relation to the 24 August incident was different from the other two as it related to alleged conduct not by emails, but at a meeting, and in relation to which there was some factual dispute. However, Mr Kissane had the email that Mr Shah had sent to the claimant that same day, giving Mr Shah's account, and the claimant's email in response. The tribunal had those emails and also had evidence from Mr Kissane, which it plainly accepted, about what Mr Shah had said to him about the incident, which was simply that he had been distraught by it. But his substantive account of what actually occurred was in the email that he had sent that day. While, of course, that was not the account of an independent observer, it was very specific, sent the same day, and relied upon as having considerable credibility for those reasons.

85. In the course of [138] the tribunal concluded that there was a proper basis for the instigation of disciplinary process in respect of all three matters, which was effectively a finding that it was reasonably open to Mr Kissane to consider, at that point, that there was a case to answer. Mr Benson made the point that this is not the same as saying that that was how matters stood at the end of the disciplinary hearing. But the tribunal had evidence that Mr Kissane had told the Board, which ratified the decision to dismiss, that he had not been satisfied by the claimant's explanation of his conduct; and it was not suggested to me that the claimant said anything so significant or compelling at the disciplinary hearing that the tribunal should have concluded that, in light of it, no reasonable employer could have come to the final view about this charge that Mr Kissane took.

86. Further, in the context of a section in which the tribunal was specifically addressing the dismissal, including the decision at the appeal stage, and in which the tribunal reminded itself not to substitute its own view, the sense of the reference back to [138] is that the tribunal considered that the evidence which reasonably supported the bringing of the three charges in question – including this third one – also reasonably supported the conclusion that they should be upheld.

87. I note also that the overall sense of the tribunal's decision is that it considered that the decision to dismiss was fair in particular because of the view that Mr Kissane and then Mr King took of the

claimant's conduct in relation to the service agreement and, above all, in relation to the S & W emails. That emerges from the following passages read as a whole.

88. At [97] the tribunal referred to the dismissal letter including a belief that the claimant "had been untruthful about saying he sent the S & W emails to Mr Shah upon his return from holiday." That was plainly a reference to numbered paragraph 3 of the dismissal letter in which Mr Kissane wrote that this aspect was "key to my decision". At [97] the tribunal stated that it was "open to the respondent to reach that view." In similar vein, in relation to the appeal stage, the tribunal found that the claimant was disbelieved by Mr King "about not seeing Mr Shah's emails regarding S & W until 5 September 2017" and stated again that it "finds that the respondent was entitled to come to this conclusion." These amount in substance and effect to findings that the views that Mr Kissane and Mr King took were reasonably open to them.

89. At [141] the tribunal then began with the two allegations relating to the service contract correspondence and the S & W correspondence. The 24 August incident was then referred to as a "contributing factor which portrayed a further example of insubordination." At [142] the tribunal observed that "the email traffic captured a very significant amount of the respondent's concerns". At [143] it then referred to the ways in which the claimant was disbelieved at the dismissal stage and then at the appeal stage, referring to the same matters that had been discussed at [95] and [97].

90. In this case the main battleground, and the bulk of the tribunal's long decision, was devoted to the issues about bonus and notice entitlement and the wide-ranging protected-disclosure complaints, including of unfair dismissal. The complaint of ordinary unfair dismissal was the final matter that the tribunal dealt with, and it did so in part by cross-referencing back to earlier findings. It might have been better, perhaps, for it to have spelled out elements of its conclusions more explicitly and fully within the four walls of this section, even if at the cost of some repetition.

91. But standing back, and reading this section together with the other relevant passages in the

decision, I have no doubt that the tribunal not only stated and understood the test that it had to apply, but did apply it, and plainly was of the view not only that both Mr Kissane and Mr King took their decisions for the reasons that they gave, but that their conclusions when they reached them were also reasonable. Read as a whole the reasons are sufficient; and this conclusion was certainly not perverse.

92. Ground 9 therefore fails.

93. The appeal against the liability decision is therefore dismissed.

The Costs Appeal

94. There are five live grounds of appeal against the costs decision, numbered 1, 2, 3, 4 and 7.

Ground 1

95. Ground 1 is simply that the costs judgment cannot stand if the liability appeal succeeds. However, the liability appeal has failed, and so this ground, in and of itself, must fail too. This does not mean that parts of the liability decision which were not challenged by the live liability appeal cannot be relevant to the costs appeal; but they must fall to be considered only to the extent that they are relied upon in support of other grounds of the costs appeal, not this one. In so far as I canvassed a different possible approach, when permitting this ground to proceed, I was, on reflection, wrong.

96. In any event the respondent did not contend in its costs application, nor did the tribunal find, that the claimant acted unreasonably in bringing the *ordinary* unfair dismissal complaint as such.

Ground 2

97. Ground 2 challenges the tribunal's finding that the claimant knew, or reasonably ought to have known, that his whistleblowing claim had no reasonable prospect of success. The tribunal is said to have erred by (a) failing to apply the correct test; (b) reaching a conclusion which was perverse or did not take account of relevant considerations; and/or (c) providing inadequate reasons.

98. As to (a) the correct approach was set out in **Radia v Jefferies International Limited** [2020]

IRLR 431 at [61] – [67]. In particular, where it is said that a claimant knew, or should have known, that a complaint had no reasonable prospect of success, from the outset, that must be judged by reference to what he knew, or reasonably should have known, at the outset, and not with the benefit of hindsight. But that does not necessarily mean that, because the *tribunal* was not in a position to judge the strength of the complaint until trial, it may not conclude that the evidence that is presented to it at trial casts light on what the *claimant*, for his part, knew, or should have known, from the start.

99. In submissions Mr Benson noted that, in its self-direction, the tribunal did not refer to **Radia** or the principles that can be derived from it. He also submitted that at [65] – [69] the tribunal did not address what the claimant knew or ought to have known about the prospects of his whistleblowing claims from the outset, or what material was available to him at the outset. Instead it relied upon the conclusions which it had reached in its liability decision about why those claims had not succeeded.

100. As to (b) the ground contends, first, that the tribunal erred in concluding that the claimant should reasonably have known that there was no reasonable prospect of a finding that he believed his disclosures to have been made in the public interest, given that they related to a criminal offence, and the complexity and uncertainty of this newly-developing area of the law in relation to the concept of public interest, as illustrated by the discussions in **Chesterton Global Limited v Nurmohamed** [2017] EWCA Civ 979; [2018] ICR 731 and **Dobbie v Felton** [2021] IRLR 679 (EAT).

101. Secondly, it is contended that the tribunal also erred in relying on its view that the claimant should have realised that there was no reasonable prospect of any of his complaints of detrimental treatment by reason of his disclosures succeeding, given that the tribunal did find that some of the matters complained of amounted to detrimental treatment, the claimant could be said to have had an arguable case in relation to others, and given the range of the original disciplinary charges.

102. I will take each of the strands of this ground in turn.

103. As to strand (a), first, there was no dispute that **Radia** was specifically cited to the tribunal by

Mr Laddie KC. In any event, it appears to me that the tribunal did, in relation to the first limb of the costs application, ask itself what the claimant knew or could reasonably have been expected to know, from the outset of his tribunal claim. It began, at [65], by considering its liability finding that the claimant had not had a subjective belief that his disclosures were made in the public interest. That related to his state of mind when he made them, and therefore, logically, to his state of mind when he later began his claim. The tribunal was saying that he knew, when he began his claim, that he had not, when he made them, believed that his disclosures were made in the public interest, and therefore knew, or ought to have known, that an essential component of his whistleblowing claims was missing.

104. At [66] the tribunal referred to the fact that the claimant had not claimed to be a whistleblower until the stage of his appeal against dismissal; and that, when he did, it was in relation to something which did not form part of his later tribunal claim. It was therefore, once again, looking back to events *prior* to the issue of the tribunal claim, consistent with its focus being on what it could infer that the claimant knew, or reasonably ought to have known, at the time when he began that claim.

105. In relation to the prospects of success of the tribunal finding that there had been detrimental treatment on the ground of his claimed disclosures the tribunal highlighted at [69] of the costs reasons, its findings at [138] and [141] of the liability decision. Those related to the decision to invite the claimant to a disciplinary hearing and what the tribunal referred to in the discussion at [138] as the conspiracy theory and, at [141], to the decision to dismiss. Once again it appears to me that the tribunal was therefore looking at events prior to the issue of the claim, to inform its consideration of how matters stood from the outset when it was issued.

106. The tribunal also referred at [70] to the claimant having turned down a £200,000 offer. I will consider this further when I come to ground 3. The point I note in relation to ground 2 is that this offer (referred to at [34] of the costs decision) was made on 5 February 2018 in response to the respondent having received notice of the claimant's claim, which had been issued in December 2017, in advance of the deadline to enter a response, and on without-prejudice-save-as-to-costs terms.

107. I am therefore satisfied that the tribunal did in principle consider the position by reference to the correct time frame of how matters stood when the claim was presented and before the respondent had begun to incur the cost of defending it; and so the tribunal did not err in that respect.

108. As to strand (b) Mr Laddie KC correctly pointed out that the issue concerning whether the claimant did subjectively believe that the disclosures he relied upon were made in the public interest turned solely on the claimant's own state of mind when he made the disclosures. The tribunal, he contended, was therefore entitled to take the view that he himself knew what was the true position on that issue when he commenced the litigation. Mr Benson contended, however, that the tribunal had not, in its costs decision, confined its reliance to its previous finding that the claimant did not subjectively hold that belief, which was the focus of [65]. Its discussion continued at [66], in which it also relied upon its finding in the liability decision that, *if* the claimant had held such a belief, he had not reasonably done so.

109. Mr Laddie KC replied that the respondent had, on this aspect, specifically rested its costs application *solely* on the premise that the claimant knew, or should have known, that he would not succeed on the subjective test, because he had not *in fact* had the requisite belief. The respondent had *not* relied on the proposition that, *if* he had held the belief, he should have realised it would not be objectively reasonable. The tribunal had correctly captured at [25] and [26] how the respondent had founded its application in this regard, including highlighting in the penultimate bullet point of [26] the respondent's particular reliance on the previous finding that the claimant lacked the requisite subjective belief. Mr Laddie KC suggested, in light of this, that the tribunal's reference in line 4 of [66] to "the latter" must be a mistake, and it must have meant to refer to "the former."

110. I do not agree with Mr Laddie KC on that last point. But I also do not agree with Mr Benson's submission that the content of [66] shows that the tribunal relied, in part, when awarding costs, on its earlier conclusion that, even if the claimant did subjectively believe the disclosure to have been in the

public interest, such belief was not reasonable. I will explain why.

111. Paragraph [119] of the tribunal's liability decision was concerned with the question of whether the claimant had held the requisite subjective belief. Paragraphs [121] and [122] were then predominantly concerned with whether, if, contrary to the tribunal's view, he *had* held the subjective belief, such belief was objectively reasonable. But in the final sentence of [122] the tribunal referred to the fact that the claimant did not mention the public interest until his appeal, which the tribunal considered cast a doubt on whether, if he had held the belief, it was reasonable, but "also on whether he believed at the time he was making the disclosure that it was in the public interest." So the tribunal was there making a further point pertaining to the subjective-belief issue. It was then that final part of [122] to which the tribunal specifically referred at [66] of the costs decision.

112. Reading the costs decision as a whole, I think it is clear that the tribunal appreciated that the respondent relied, for the purposes of its costs application, solely on the subjective issue. At [25] it set out the basis of the application, including, in terms, that the claimant always knew that he had not held the requisite belief. Further, when summarising the respondent's oral submissions it noted in particular the reliance on [119] of the liability decision – and added in italics that the respondent emphasised that this was "critical/really important to its application." In the concluding section the tribunal then began [65] by stating that it considered in some detail its conclusion at [119].

113. That reinforces my reading that at [66] the tribunal was doing no more than picking up a further strand from its liability decision, which was pertinent to the issue of whether the claimant always knew that he had not held the requisite subjective belief. I therefore do not agree with Mr Benson that the costs award was predicated in part on the further conclusion in the liability decision that, had the claimant held the subjective belief, it was not reasonably held.

114. I turn to the argument based on what is said to be the difficult and evolving nature of the law relating to the concept of "public interest" in the context of these provisions.

115. To spell out the challenge, the proposition here is that, given the uncertain state of the law on the concept of public interest, and that the **Companies Act** requirement was a criminal offence, the tribunal was wrong to conclude that the claimant should reasonably have realised that what he believed at the time of the disclosure would not amount to a reasonable belief that it was made in the public interest. However, the tribunal found, in the liability decision, that the claimant simply did not believe, at the time, that he was acting in the public interest; and then in the costs decision it relied upon that conclusion. It does not matter, for those purposes, whether he appreciated what the law might regard as features that would reasonably support a belief that a disclosure is made in the public interest, nor whether he could have reasonably expected to anticipate the nuances of some of the points discussed in cases like **Chesterton** and **Dobbie**. What mattered, simply, was whether he in fact held any such belief, at the time, at all.

116. That does not mean that the individual has to have the phrase "public interest" in mind; but they do have to have had a belief, one way or another, that what they were doing served a wider interest of the requisite character (to borrow Underhill LJ's language in **Chesterton** at [31] and [35]). The tribunal found here that the claimant did not at the time, or indeed ever, entertain *any* such belief. It was therefore entitled to conclude in the costs decision that he knew, or should reasonably have realised, that this essential element of his whistleblowing claims was missing.

117. I would add that authorities such as **Chesterton** and **Dobbie** provide invaluable guidance about the overarching nature of the concept. They also give examples of particular considerations or factual features that *might* be considered relevant touchstones in some cases, which have a particular kind of factual matrix. But those examples should not be regarded as universally apposite, and may not be pertinent in a case where the nature of the content of the disclosure, or the wider work context, is different than it was in those cases. In the present case, the features that the tribunal set out at [119] of the liability decision as supporting its conclusion that the claimant did not hold the public-interest belief did not turn on any difficult or sophisticated legal analysis, but were features that, as a matter

of common sense, mitigated against the conclusion that he entertained such a belief at the time.

118. The last substantive strand contends that the tribunal erred at [68] of the costs decision by relying also upon what it referred to as its earlier conclusion that none of the detriments occurred. Mr Benson submitted that the tribunal had actually found that certain of the detrimental treatment *did* occur: inviting the claimant to a disciplinary hearing and dismissing him. The tribunal had also been wrong to consider that treatment such as putting the claimant on a PIP was not detrimental treatment in law. This, and other features, he submitted, showed the error of the tribunal's conclusion that the claimant should have realised that his whistleblowing claim was hopeless in all respects.

119. I am not persuaded by this challenge. That is for the following reasons. First, the tribunal's statement that "none of the detriments … occurred" bespeaks a type of terminological inexactitude that is not uncommon. When it comes to examining the alleged conduct complained of in the given case, issues may arise as to (a) whether the alleged conduct factually occurred; (b) whether, if it did, it falls to be regarded, in law, as detrimental treatment; and/or (c) what the reason or reasons for it were. However, parties, and tribunals, often use the word "detriment" as a short-hand way of referring to the alleged *conduct*, or to the overall *complaint*. Statements by a tribunal that a detriment did not occur, may, correspondingly, actually reflect a conclusion that the complaint failed on one, two, or all three of these elements.

120. In the present case, I do not think the tribunal had forgotten, in its costs decision, what it had decided in the liability decision in relation to each of these questions relating to each complaint, or why. It was describing its earlier overall conclusion that, even if the disclosures relied upon amounted to protected disclosures, all of the complaints in any event would have failed, because, in relation to the alleged *conduct* complained of, they each fell at one or more of these three hurdles. This can be seen at the end of [68] for example where it referred to his "claims for detriment or detriments". This language was also all of a piece with the broad-brush use that the tribunal made of the word "detriment" at various points in the liability decision.

121. Secondly, what the tribunal was avowedly doing at [68] was considering what impact, if any, its liability-decision conclusions on these questions relating to the alleged conduct had on the costs question. It made the following particular points. First, the fact that it had, in the first decision, gone on to consider these questions in the alternative, should not be seen as undermining or diluting its earlier conclusions that the claimed disclosures did *not* amount to protected disclosures. Secondly, this was not a case where the *only* reason why these complaints had failed was because the claimed disclosures were not protected disclosures. Finally, and consequentially, the tribunal concluded that these further conclusions in the liability decision had force "in support" of the costs application.

122. Further, the tribunal went on, at [69] of the costs decision, to focus on the most important complaints, relating to those disciplinary charges which were upheld when dismissing the claimant; and it referred to its conclusion that his "conspiracy case" in relation to the two charges concerning the service agreement mark-up and the S & W emails was hopeless and flawed, which "fundamentally undermined" his assertion that he was dismissed for whistleblowing.

123. The tribunal was plainly of the view that, given that the claimant knew all along the true facts the matters for which he was dismissed, he knew, or should have known, that this was another reason why the whistleblowing complaints had no reasonable prospect of success. The fact that some disciplinary charges fell away, or that the tribunal can be said to have erred by not considering placing someone on a PIP to be detrimental treatment, as such, does not mean that it erred in considering that this part of the liability decision provided "support" to the respondent's costs application.

124. Finally, I reject the *Meek* challenge. I consider that the tribunal *did* set out sufficiently what it considered the claimant knew or ought have known about the basis of these complaints, in light of which he knew, or ought to have known, that they had no reasonable prospect of success.

125. Ground 2 therefore fails.

Ground 3

126. This ground contends that the tribunal erred, at [70] to [71] of the costs decision, in relying upon its conclusion that the claimant had unreasonably turned down an offer to settle. This was a reference to the offer discussed at [34] to [36] of that decision, a passage which I have set out above.

127. There are the following sub-strands to this challenge. First, relying upon **Solomon v University of Hertfordshire** [2019] UKEAT/0258/18, it is said that the tribunal should have taken a "band of reasonable responses" approach to its consideration of the claimant's response to the respondent's offer to settle, but did not do so and instead substituted its own view. Secondly, it is said that the tribunal failed to take into account relevant considerations, being that the offer required the claimant to compromise both the tribunal claim and a potential High Court claim, the merits and quantum of which the tribunal was not in a position to evaluate, that the claimant had, in his particulars of claim, sought a declaration, and that there could, regardless of remedy, be value in a finding of unfair dismissal in and of itself. The tribunal is also said wrongly to have regarded as relevant the fact that a High Court claim had not yet been commenced. Once again, there is also a *Meek* challenge.

128. I will start with the law and, first, a reminder that the relevant provision of rule 76(1)(a) is that costs may be awarded if the paying party has "acted…unreasonably in…the way that the proceedings (or part) have been conducted."

129. In **Solomon** the conduct relied upon by the tribunal in making a costs award included the claimant in that case on two occasions refusing particular offers to settle that had been made by the respondent, and electing instead to continue with the litigation. At [107] the EAT said:

> **"It is, we think, important for an ET, when it is dealing with the question whether the conduct of litigation is unreasonable, to keep in mind that in many (though not all) circumstances there may be more than one reasonable course to take. The question for the ET is whether the course taken was reasonable; the ET must be careful not to substitute its own view but rather to review the decision taken by the litigant."**

130. The EAT went on at [108] to make the point that there may be cases in which, faced with a

particular offer, it might be said to be reasonable for the claimant to accept it, but also reasonable to refuse it. So there was a "range of reasonable responses test apposite to this question." When discussing one of the offers that had been made and refused in that case the EAT observed at [109]:

> **"So, once it is appreciated that the true task of the ET was to examine why she took the decision to refuse the offer and whether that decision was within the parameters of reasonableness, a key question may be whether it was reasonable for her to hold these underlying views about her case. The question … might also arise: was it reasonable for her to wish to have her case determined by the ET?"**

131. In **Telephone Information Services v Wilkinson** [1991] IRLR 148 the employer applied for a claim of unfair dismissal to be struck out on the basis that it had offered to pay the employee the maximum amount of compensation. The employee had refused the offer because he wished to seek a determination from the tribunal as to whether he had been unfairly dismissed. The employment tribunal refused to strike out the claim and the EAT upheld its decision on the basis that the employee was entitled to seek such a determination. The EAT's reasoning was cited with approval in **Gibb v Maidstone & Tunbridge Wells NHS Trust** [2010] EWCA Civ 678; [2010] IRLR 786.

132. In **Evans v The London Borough of Brent**, UKEAT/0290/19 the tribunal struck out a claim of unfair dismissal on the basis that, although the dismissal was arguably procedurally unfair, there was no reasonable prospect of the claimant being awarded any compensation, and the tribunal had no power to make a declaration. Upholding an appeal Eady J at [47] reasoned that there was no material difference between the remedy of a declaration and a finding of unfair dismissal, and held that the latter could be of real value to a claimant, citing **Wilkinson** and **Gibb** in support. However, she also went on to say at [48] that the possibility of a finding of unfair dismissal could not amount to a "trump card on any consideration of the ET's power to strike out a claim." She went on to conclude, however, that in that case the tribunal had failed to consider the value to the claimant of a finding of procedural unfairness, and had therefore erred in striking out that part of his claim.

133. I observe that what **Solomon** calls attention to is that the task of the tribunal in the given case, pursuant to rule 76(1)(a), is to decide – for itself – whether the impugned conduct is unreasonable. If

not, it cannot be relied upon in support of an award. Where the conduct is the refusal of an offer in favour of continuing with the litigation, the question is therefore not whether it would have been reasonable to accept the offer; and it would also be wrong to reason from the conclusion that an offer was reasonable to the conclusion that refusal of it was *therefore* unreasonable. But what the tribunal must always do is indeed focus on the particular impugned conduct, and decide whether it was reasonable in all the circumstances of the particular case. That involves a consideration of why, *in fact*, this employee adopted the stance that he did, and the other circumstances of that case relevant to the tribunal's consideration of whether it was reasonably open to him to adopt that stance.

134. In the costs decision in the present case, the tribunal's discussion of the settlement offer followed immediately upon its discussion of the whistleblowing complaints, and, at [70], opened with its conclusion that the claimant knew or ought to have known that those complaints had no reasonable prospect of success. It is clear from [70] – [71] as a whole that the tribunal considered his conduct in refusing the offer, and fighting on, to be unreasonable, because of that knowledge, because the respondent had specifically stated when making the offer that those claims were without merit, and because his stance was the main reason why the case had not been capable of commercial resolution, and was the cause of the "overwhelming share" of the costs to which the respondent was put.

135. In his particulars of claim the claimant had stated that he reserved the right to pursue a civil claim based on a right to six months' notice, and for loss of a 100% bonus and share options. But, as Mr Laddie KC pointed out, the tribunal found in the liability decision that only three months' notice had been agreed (and paid) and only a 50% bonus had been agreed. He submitted that the respondent's offer compared favourably with the maximum amount of ordinary unfair dismissal compensation, plus the maximum value of the bonus claim and the claimant's own (albeit disputed) valuation of the share-options claim. Mr Benson disagreed, submitting in particular that Mr Laddie KC had not properly compared the net value of the gross offer of £200,000, had it been accepted, after tax, with the net value of these claims, included the share-options claim, at their highest.

136. I do not need to go through the rival number-crunching in more detail. That is because it is clear that the tribunal did not consider that the claimant had refused the offer because he reckoned that its net value fell short of the maximum net value of his ordinary unfair dismissal, and "reserved" High Court claims. Rather, the tribunal found that he rejected it because it placed no value on his *whistleblowing* claims, and he was determined to proceed with them, despite the fact that he knew, or should have known, that they had no reasonable prospect of success. In that same vein it referred to his unreasonably turning down the offer being "intertwined" with submitting "increasingly and grossly exaggerated/inflated compensation in his schedules of loss, ultimately seeking £1.464 million plus an uplift." The tribunal was there plainly referring to the substantial part of the very high losses claimed in the schedules being predicated upon the whistleblowing claims.

137. Mr Benson, citing **Evans**, and its discussion of **Wilkinson** and **Gibb**, said that the tribunal had not taken account of the fact that in his particulars of claim the claimant sought a declaration of unfair dismissal, nor of the value to him of a finding upholding the ordinary unfair dismissal claim.

138. However, at [36] the tribunal specifically considered the claimant's case that it was not about the money, but noted the absence of any evidence that he had responded to the offer to the effect that he wanted a declaration. At [70] it was his stance in relation to the whistleblowing claim which, it found in terms, was the main reason why the case had not been capable of commercial resolution. The authorities indicate that an employee who in fact hold outs purely for a finding in their favour on liability, which they have a reasonable prospect of securing, may be acting reasonably. While the present tribunal may have overlooked that the particulars of claim included a prayer for a declaration, it is abundantly clear that it did not consider that this claimant's conduct in refusing this offer in this case was explained by his desire for a ruling on the merits of his ordinary unfair dismissal claim.

139. Finally, Mr Benson contended that the tribunal erred by relying in part, at [71], on the fact that "no other breach of contract claim was ever advanced." He submitted that this should have been

regarded as irrelevant, given that the claimant had reserved his right to bring such a claim, was within the limitation period to do so, and there were obvious good reasons why he might want to hold off doing so until his tribunal claims had been determined. However, once again these submissions miss their mark, because it is clear that the tribunal's point was that the fact that no such claim had been begun (at the time – it was begun later) was reflective of the fact that the claimant's focus was on the whistleblowing claims, to which he attached by far the highest value; and, once again, that that was why he rejected the offer, and not because of the value that he put on the putative contract claims.

140. For all of these reasons ground 3 fails.

Ground 4

141. This ground relates to the direction that the principal costs award should be assessed on the indemnity basis. It contends that the tribunal had no power so to direct. Alternatively, it failed to apply the correct test when so directing (with *Meek* and perversity alternatives attached).

142. I will start with the law.

143. In **Beynon v Scadden** [1999] IRLR 700 employees complained of a failure to consult and inform in connection with what they claimed was a transfer of undertaking. The claims failed because there was merely a transfer of shares in the employing company, and no transfer of undertaking. The respondent then applied for costs. The prevailing rules were in schedule 1 to the **Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993.** Rule 12(6) provided:

> **"Any costs required by an order under this rule to be taxed may be taxed in the county court according to such of the scales prescribed by the county court rules for proceedings in the county court as shall be directed by the order."**

144. The tribunal decided that the claimants' trade union, which had supported the claims, should have been aware that the claims had had no reasonable prospect of success. The claims were also found to have been pursued vexatiously, because the union's purpose in pursuing them was to put pressure on the employer to grant it recognition, which was held to be an abuse of process. The

tribunal ordered the claimants to pay the respondents' costs "to be taxed, if not agreed, on an indemnity basis on the Higher County Court scale." The claimants appealed.

145. The EAT (Lindsay J presiding) held that the tribunal did not err, as such, in taking into account the means of the union, and in founding its order for costs on its conclusions that the claims had been pursued vexatiously and unreasonably by the union on the claimants' behalf. As to whether there was power to award costs on the indemnity basis the EAT said the following.

> **"29. Then, as to quantification of costs, Mr Galbraith-Marten referred to Rule 12 (6) supra as enabling costs to be taxed on "Such of the scales prescribed by the County Court Rules for proceedings in the County Court as shall be directed by the order". That Rule, he points out, makes no provision as to the basis of such taxation. There is therefore no jurisdiction, he argues, to order a taxation on the indemnity basis and in any event, even if there had been, in point of discretion there was no sufficient reason to order taxation to be on that basis. He does not quarrel (in this part of his case) with the requirement that the scale of costs should be "The higher County Court scale" - namely scale 2.**
>
> **30. The appellants' argument that there is no jurisdiction to order an indemnity basis of taxation transpired to depend on Order 62 Rule 12 of the Rules of the Supreme Court which provides at (3):-**
>
> > **"(3) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on [a] basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis".**
>
> **Mr Galbraith-Marten argues that consequently, as Rule 12 (6) is silent as to the basis of taxation, the costs must be taxed on the standard basis. However, as Mr Booth for the Respondents points out, Order 62 Rule 12 (3), even if otherwise applicable (which he accepts it is) deals, so far as relevant, only with the position where the Court makes an order for costs "Without indicating the basis of taxation". Here the Tribunal specifically did indicate a basis - the indemnity basis. Order 62 Rule 12 (3) thus has no application to exclude the indemnity basis. The fact that Rule 12 (6) of the Industrial Tribunal Rules does not in terms provide for a basis of taxation to be specified is without significance, says Mr Booth, as every order for costs has to be on one of two bases - the standard or the indemnity - and that that is as much the case under the County Court Rules (to which IT Rule 12 (6) refers) as it is in the High Court - see e.g. the County Court Practice 1998 pages 1656-1657. We accept Mr Booth's argument; nothing in Rule 12 (6) prohibits an order, in an appropriate case, for the taxation to be on the indemnity basis."**

146. In **Esure Services Limited v Quarcoo** [2009] EWCA Civ 595 the claimant made a claim on his car insurance policy on the basis that his BMW had been stolen. The claim was refused. The claimant pursued proceedings which were dismissed at trial. The decision included findings that the claimant had been dishonest and told a number of lies, which affected his credibility generally. The judge declined to award the insurers indemnity costs. The insurers successfully appealed. The Court

of Appeal confirmed that the test is whether the conduct relied upon takes the case "out of the norm". But they rejected the judge's approach that conduct which often occurs in litigation would not meet that test. Rather, Waller LJ at [25] (Longmore and Richards LJJ concurring) reasoned that "out of the norm" means "something outside the ordinary and reasonable conduct of proceedings. To bring a dishonest claim and to support a claim by dishonesty cannot be said to be the ordinary and reasonable conduct of proceedings."

147. In **Howman v The Queen Elizabeth Hospital** UKEAT/0509/12 the employment tribunal ordered an unsuccessful claimant to pay the respondent's costs to be assessed in the County Court on an indemnity basis. The prevailing rules at that time were in schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**. Rule 41(1)(c) provided for the amount to be paid pursuant to a costs order to be determined (in England & Wales):

> **"…by way of detailed assessment in a County Court in accordance with the Civil Procedure Rules 1998 … as shall be directed by the order."**

148. The EAT (Keith J presiding) observed at [9] that it was not suggested that the tribunal did not have power to order assessment on an indemnity basis, and said that the words "as shall be directed by the order" gave the tribunal the power to direct the basis on which the county court should assess the costs, adding that that was the view reached of the predecessor rule in **Beynon v Scadden**.

149. At [10] the EAT said:

> "**So when should an assessment on the indemnity basis be ordered? In civil proceedings in the courts, costs will be assessed on the indemnity basis rather than the standard basis where the conduct of the party has taken the situation away from the norm. The norm in civil proceedings in the courts has been that the unsuccessful party would be ordered to pay the costs of the successful party. That is to be contrasted with proceedings in employment tribunals where it is only in the particular circumstances identified in rule 40(3) that a party will be ordered to pay the other party's costs. In our view, therefore, costs incurred in proceedings in employment tribunals should only be assessed on the indemnity rather than the standard basis when the conduct of the paying party has taken the situation away from even that very limited number of cases in the employment tribunal where it is appropriate to make orders for costs. That is why we think that the employment judge was right to say that it was very rare for an order to be made for costs to be assessed on the indemnity basis. In our opinion, it was open for the reasons which the employment judge gave to treat this case as one of those very rare cases in which such an order**

was appropriate. ..."

150. The current rules are in schedule to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. Rule 78(1)(b) provides that the tribunal may order the amount to be paid to be determined (in England & Wales):

> "…**by way of detailed assessment carried out by a County Court in accordance with the Civil Procedure Rules 1998, or by the Tribunal applying the same principles;"**

151. Mr Benson submitted that crucially absent from the 2013 rule, by contrast with its predecessors, are the words "as directed by the order". However, with respect to the EAT in **Howman**, it appears to me that the EAT in **Beynon** did not rely upon those words as the source of the power to direct assessment on the indemnity basis. Rather, it reasoned that, pursuant to the County Court Rules, taxation had to be on either the standard or the indemnity basis, and the standard basis only applied by default where the costs order did not direct the indemnity basis. In that case the tribunal *had* so directed. Mr Laddie KC also submitted, correctly, that what was said in **Howman** on this issue was strictly *obiter*, as the whole costs order in that case was overturned for a different reason. In any event, I respectfully find the reasoning in **Beynon** more cogent and compelling.

152. Further, and in any event, I agree with Mr Laddie KC that the words in the 2013 rule: "in accordance with the Civil Procedure Rules 1998" import *all* of the relevant provisions of the CPR, including the two alternative bases – standard and indemnity – set out in CPR 44.3. Mr Benson relied on the fact that, pursuant to CPR 44.3(4), the standard basis applies where "the court" does not direct the basis, and postulated that the tribunal cannot direct the indemnity basis because it is not the court. I do not agree. The adoption by the tribunal rules of the CPR provisions means that references to the court may embrace directions given by the tribunal itself.

153. Finally, Mr Benson contended that rule 78(1)(b) is to be read as referring only to the procedure for detailed assessment set out in CPR 47, and not also to the provisions of CPR 44. As to that, I agree that the rule means that the assessment should be carried out in accordance with CPR 47. But

every such assessment must, perforce, be carried out either on the standard or the indemnity basis, and I do not see why rule 78(1)(b) should be treated as precluding the tribunal – pursuant to CPR 44 and reading the reference to the court as including the tribunal – directing which it should be.

154. I conclude that under the 2013 rules the tribunal does have power to direct detailed assessment on an indemnity basis; but if its direction is silent as to the basis, then the standard basis will apply.

155. This ground contends, in the alternative, that this tribunal's decision to direct the indemnity basis was perverse or inadequately reasoned. Mr Benson submitted that the tribunal had failed to cite or apply the guidance in **Howman**. Its conclusions at [65] of the costs decision were in any event not sufficient to support an indemnity-basis direction. The main plank of its criticism of the claimant was that he had known from the outset that his whistleblowing claims were unsustainable. That was not enough. He further noted that the original costs application had not sought indemnity costs. That had only been raised in Mr Laddie KC's skeleton argument for the costs hearing.

156. Mr Laddie KC submitted that the discussion in **Howman** about the test for indemnity costs in the employment tribunal was also *obiter* and the unaltered guidance in **Esure** was to be applied. But even if **Howman** correctly set the bar higher, this tribunal's findings surpassed it. He noted also that the respondent had not, in its application, relied upon the tribunal's conclusion, referred to at [65] of the costs decision, that the claimant had not held the requisite subject belief, but on his found conduct in various respects, including giving dishonest evidence, making baseless allegations of dishonesty against others, and taking an initially dishonest stance on what documents he had in his possession. But in any event, submitted Mr Laddie KC, the tribunal was entitled to view the matters referred to at [65] of the costs decision as sufficient to surpass the bar for an indemnity costs order.

157. My conclusions on this limb of ground 4 follow.

158. First, while indeed strictly *obiter*, I respectfully consider that this passage in **Howman** sets out the correct approach for a tribunal to follow when asked to direct the indemnity basis, rather than

the unvarnished guidance in **Esure**. In the civil jurisdiction, the starting point is that the winner ordinarily gets their costs, without more. That is not the position in the employment tribunal. One of the circumstances in rule 76(1) must be found to apply, and even then the tribunal may, but is not bound, to award costs, and must decide whether or not to do so. In many cases the factors or circumstances which cause the tribunal to decide to award costs would also, as such, satisfy the unvarnished **Esure** test. But in the tribunal a higher bar must be surpassed for assessment on the indemnity basis also to be warranted. If the tribunal decides so to direct, it is important that, whether or not by specifically citing **Howman**, it shows that it has applied that higher bar, and what features of the case caused it to conclude that it was surpassed.

159. In the present case, while the tribunal at [74], in directing the indemnity basis, referred back to the matters set out at [65], it is not clear whether it applied a higher bar, when concluding that these factors warranted not merely an award of costs in principle, but also the indemnity basis; or, if it did, what particular features led it to that further conclusion.

160. To that extent, therefore, this ground succeeds and the direction specifically that the assessment be on the indemnity basis will be quashed.

Ground 7

161. This ground relates to the further costs award made by the tribunal, in respect of the costs of the costs hearing, in the sum of £20,000. It contends that the tribunal failed sufficiently to explain why it decided to award that amount, the maximum that it could award without a detailed assessment. The references to the serious and wilful nature of the claimant's conduct and it being reasonable for the respondent to have instructed leading counsel were not sufficient to justify the sum ordered. The tribunal is said to have failed to consider and apply the guidance in **Barnsley MBC v Yerrakalva** [2011] EWCA Civ 1255; [2012] ICR 420. Once again there are perversity and *Meek* alternatives.

162. Mr Benson acknowledged that this challenge does not extend to the decision to award these

costs as such. It is confined to the amount. But he submitted that the tribunal had not, in terms, at [82], held that it was unreasonable for the claimant to have defended the costs application *at all*, as opposed to finding that he should have known the risks, and that the level of costs incurred by the respondent was justified. Its comments about his approach to the bundle and his witness statement did not explain why it awarded £20,000 against an unparticularised costs claim of £28,000. It is also not unusual for a litigant in person at a costs hearing to aim some of their fire at the liability decision. The tribunal's criticism at [81], of the claimant's evidence as to means, may have supported its decision not to *reduce* its award on account of means, but did not explain the underlying award.

163. Mr Laddie KC submitted that **Yerrakalva** explains that the tribunal does not have to find precisely what proportion of the overall costs have been caused by the conduct that has triggered the costs award. That conduct had made the hearing substantially more complicated than it had needed to be, and the hearing had been prolonged by, for example, the claimant failing to provide a statement of means, and the claimant's own "ludicrous" costs application. Mr Laddie KC, on checking, believed that the respondent's overall costs of preparing and for the hearing itself were actually £35,702. The respondent had limited its claim to £20,000. Although it was not wholly clear, the tribunal may have proceeded on the footing that £28,000 was the costs of the hearing itself.

164. I start with the authorities.

165. In **McPherson v BNP Paribas (London Branch)** [2004] EWCA 569; [2004] ICR 1938 the claimant made misleading statements in support of an application to adjourn a hearing. The tribunal awarded the respondent the whole costs of the proceedings, not just those occasioned by the adjournment. The Court of Appeal overturned that decision. Mummery LJ (Bennett J and Thorpe LJ concurring) rejected a submission that the rules required the costs awarded to be "attributable to" specific impugned conduct, as there was no such "causal requirement". He continued at [40]:

> **"The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific**

> **unreasonable conduct of Mr Macpherson caused particular costs to be incurred."**

166. In **Yerrakalva** Mummery LJ (Patten and Brooke LJ concurring) said at [41]:

> **"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *McPherson* was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

167. The place to start, therefore, is to identify what was the conduct of the claimant, with respect to the costs hearing, which founded the decision to award costs. The tribunal stated at [80] that it had regard to the conduct referred to by Mr Laddie KC in his skeleton argument for that hearing. That was the claimant's failure to provide a statement of means, his allegation, in an email relating to the bundle, that the respondent's solicitor had been complicit in misleading the tribunal, and the claimant having provided an excessively lengthy witness statement, focussing on the liability decision, and also tabling a revised version with numerous irrelevant attachments. I note that the tribunal, at [81] and [82], also referred to the claimant having inflated his own costs application.

168. I note that the net effect of the guidance in **McPherson** and **Yerrakalva** is that, while the tribunal does not need to identify a precise causal link between the conduct leading to the costs award, and the amount of costs thereby incurred, it *does* need to give some consideration to what effects that conduct had (as well as its nature and gravity), and causation is, in that sense, not irrelevant. While the tribunal has a wide discretion in deciding upon its award, a reasoned assessment which explains the amount awarded is nevertheless required. The lack of such reasoning in **McPherson** led to the costs award being overturned; and in **Yerrakalva** the EAT overturned the costs award entirely and the Court of Appeal then substituted an award of 50% of the assessed costs claimed.

169. In the present case the tribunal correctly directed itself by reference to these authorities. But, specifically in relation to this "costs of costs" claim, it appears from what it said at [80] to have decided that the respondent should, in principle, receive the whole of its costs of the costs hearing, though it had limited the amount claimed to the maximum summary assessment figure. The discussion at [81] and [82] explains why the tribunal considered the costs threshold to have been crossed, and then decided to make an award. But there is no suggestion that the tribunal then also considered whether, having regard to the nature, gravity and effect of the relevant conduct, an award of at least £20,000 was in any event appropriate. Or if it did, its reasoning is not explained.

170. I was shown that the tribunal had earlier directed that evidence and argument should be completed on day one, allowing for a possible oral decision on day two. In fact the substantive hearing continued in to day two, and the tribunal reserved its decision. But the decision does not indicate that the claimant's conduct had put the respondent to greater cost in terms of its attendance at the hearing, as such. Even if the tribunal considered that it had (as well as the claimant's approach having put the respondent to greater preparation costs) that would not so obviously have justified an award of £20,000, as against what the tribunal understood (rightly or wrongly) to have been the respondent's overall costs of £28,000, that a sense check did not need to be demonstrably applied.

171. Having regard to all of that, I am not satisfied that the tribunal properly reasoned or explained its decision to award the respondent the amount of £20,000 that it had sought.

172. For these reasons ground 7 of the challenge to the costs decision also succeeds.

Outcome

173. The appeal against the liability decision is dismissed. The appeal against the main costs award is allowed, only in respect of the decision to direct assessment of the costs on the indemnity basis, although the tribunal did have the power, as such, to make such a direction. The appeal against the "costs of costs" award is allowed, in respect of the amount awarded. The costs-decision appeal is

otherwise dismissed.

174. I was told that the detailed assessment of the main costs award has, in fact, already been carried out. The tribunal will now need to decide afresh whether that should have been conducted on the indemnity basis, and, if it decides not, the assessment will need, as necessary, to be revisited. The tribunal will also need to decide afresh the amount of the costs of costs award.

175. Mr Benson submitted that, should any part of these appeals succeed, any direction for remission should be to a different tribunal panel, given, in particular, the strong pronouncements that this tribunal had made, in its decisions, about the claimant's credibility and conduct. However, I consider that the tribunal's conclusions on such matters were expressed in appropriate language; and, even if remission was to a different panel, the original panel's reasons for its main decisions, including that it was appropriate to make both costs awards as such, would still form the starting point. The existing panel will also, by virtue of its prior involvement, be better placed to consider afresh the two very limited matters that must now be remitted for fresh determination. It will need to follow my guidance in this decision, in retaking the relevant decisions, and to explain its reasoning. In my judgment it can be trusted to do so conscientiously.

176. I will therefore direct that fresh consideration of the basis of assessment of the main costs award, and the amount of the "costs of costs" award, be remitted to the same, or as nearly the same, three-person tribunal panel, as is now practically possible.