Appeal No. UKEAT/0030/20/JOJ (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 & 23 October 2020

Before

THE HONOURABLE MR JUSTICE LINDEN
(SITTING ALONE)

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(1) TWIST DX LIMITED
(2) ABBOTT (UK) HOLDINGS LIMITED
(3) ABBOTT LABORATORIES LIMITED
(4) KEVAN GOGAY
(5) ROSS MACKEN
(6) LES MUGGERIDGE

Appellants/Respondents

(1) DR NIALL ARMES
(2) MRS HELEN KENT-ARMES

Respondents/Claimants

Transcript of Proceedings

JUDGMENT

APPEARANCES

The Appellants	MR PAUL NICHOLLS QC (One of Her Majesty's Counsel) Ms SOPHIE BELGROVE (of Counsel) Instructed by: Baker & McKenzie LLP, 100 New Bridge Street, London, EC4V 6JA
For the Respondents	MR RAVI MEHTA (of Counsel) Instructed by: Keystone Law 48 Chancery Lane London WC2A 1JF

<u>SUMMARY</u>

WHISLEBLOWING, PROTECTED DISCLOSURES

PRACTICE AND PROCEDURE

Appeal against refusal by the Employment Judge to strike out Dr Armes' claims under sections 47B, 103A and 100(1)(c) Employment Rights Act 1996. The application to strike out was made on the basis that Dr Armes had no reasonable prospect of establishing that his pleaded disclosures were "qualifying disclosures" within the meaning of section 43B(1), or health and safety disclosures within the meaning of section 100(1)(c) of the 1996 Act.

<u>Held</u>: the Employment Judge had erred in law in failing to identify the information which was said to have been disclosed in each of Dr Armes' pleaded disclosures and to consider whether that information was capable of satisfying the relevant statutory definitions. Six of the seven disclosures had no reasonable prospect of satisfying those definitions and would therefore be struck out subject to Dr Armes having the opportunity to apply to amend his pleaded case within 28 days.

Consideration of the interpretation and application of section 43B(1) of the 1996 Act in the light of <u>Kilraine v London Borough of Wandsworth</u> [2018] ICR 1850 CA and <u>Fincham v HM Prison Service</u> UKEAT/0925/01.

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THE HONOURABLE MR JUSTICE LINDEN

Introduction

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1. This is an appeal from the decision of an Employment Tribunal sitting at Bury St Edmonds (the "ET") after a Preliminary Hearing which took place on 21 to 24 October 2019. The Reasons for the decision were sent to the parties on 14 November 2019. I will refer to the Appellants as "the Respondents" as they are respondents to the claims before the ET. There are other respondents to the claims, but they are not directly affected by this appeal and therefore are not parties to it.

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2. The ET dealt with various interlocutory matters but the appeal is concerned with one aspect of the ET's decision, namely its refusal of an application by the Respondents to strike out Dr Armes' claims of victimisation and automatically unfair dismissal by reason of his having made protected disclosures, contrary to sections 47B and 103A of the Employment Rights Act 1996 ("the ERA/the 1996 Act"), and/or automatic unfair dismissal by reason of his having raised health and safety issues falling within section 100(1)(c) of the ERA ("health and safety disclosures").

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3. The Respondents' application was made under Rule 37(1)(a) of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations"). The basis for the application was that it was contended that Dr Armes had no reasonable prospect of establishing that any of his alleged protected disclosures satisfied the definition of a *"qualifying disclosure"* under section 43B(1) ERA, or of establishing that any amounted to a health and safety disclosure as defined by section 100(1)(c). It was said that it

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followed that the claims of automatic unfair dismissal and victimisation made on the basis that there had been such disclosures were bound to fail and should be dismissed.

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4. The Employment Judge noted that where an application to strike out is made on the basis that the claim has no reasonable prospect of success ("the no reasonable prospect ground"), the test is a strict one. Claims, therefore, generally should not be struck out where material factual matters are in dispute which are not capable of being determined by reference

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to incontrovertible evidence. He then briefly reviewed the evidence about the alleged protected disclosures in light of the case law relating to section 43B(1) ERA definition and held that, whilst Dr Armes' case appeared stronger in relation to some of the alleged disclosures than it

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did in relation to others:

> **"70…..taking Dr Armes' case at its highest, I cannot and will not say that the alleged protected disclosures he relies on have no reasonable prospects of success"**

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5. The hearing before me has been conducted using Microsoft Teams but was a public hearing. Mr Nicholls QC appeared with Ms Sophie Belgrove for the Respondents and Mr Mehta for Dr Armes. Mr Nicholls and Mr Mehta also appeared at the hearing before the ET. I

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am grateful to Counsel for their submissions.

<u>The claims before the ET</u>

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6. Dr Armes is a research scientist by background. In 1999, he and others founded a US company – ASM Scientific Inc. – which developed DNA sequencing technology and, which is relevant to the present case, DNA amplification technology, known as Recombinase Polymerase Amplification ("RPA"). RPA is used to diagnose infectious diseases by amplifying

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the DNA of the target disease.

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7. In due course, a UK company was set up – ASM Scientific Limited – and, in 2008, the names of the US and the UK companies were changed to Twist DX. In 2010, these companies became subsidiaries of a US company known as Alere Inc. and, as part of this transaction, Dr Armes transferred his shares in exchange for an immediate payment of $5.6 million and the right to receive a further $19 million if certain future financial performance targets were met. It appears that tensions in relation to this agreement form at least part of the context for the dispute which is now before the ET but I make no finding in this regard as Dr Armes does not allege that his protected/health and safety disclosures concerned breaches of this agreement.

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8. Alere Inc. was acquired by Abbott Laboratories, a multi-national US company and the second respondent to the proceedings before the ET, on 3rd October 2017. Dr Armes remained the sole Director of Twist DX Limited and was employed as its Managing Director. His wife, Mrs Kent-Armes, was its Chief Operating Officer.

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9. In May 2018, Dr Armes and his wife were both dismissed. They both brought claims in the ET in the autumn of 2018 but this appeal is concerned only with Dr Armes' claim. His case, against ten named respondents, is set out in considerable detail in a 56-page, single spaced, Particulars of Claim. In summary, he alleges that his dismissal was automatically unfair contrary to Section 103A ERA, automatically unfair contrary to Section 100(1)(c) of that Act, and unfair under "ordinary" dismissal principles. He also alleges that he was subjected to a number of detriments for having made protected disclosures and/or raised health and safety issues.

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10. At the heart of Dr Armes' case is a claim that he was victimised and dismissed for raising issues about "Alere-i" which is produced and marketed by Alere companies as a diagnostic tool for use in a wide range of clinical and healthcare settings. Using DNA

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molecular detection techniques, Alere-i tests for certain respiratory complaints. Dr Armes' case is that he was concerned that Alere-i had design faults which gave rise to a risk that reactions would be contaminated by earlier reactions, an event known as "amplicon contamination", with the effect that the results which tests produced would be unreliable because they produced false positives or false negatives. There was also a risk of delays in the diagnosis of patients as a result of invalid results. The product was widely sold and therefore the health and safety of large numbers of members of the public were at risk.

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11. Dr Armes says that his concerns raised legal and regulatory issues under US food and drugs legislation which is fundamentally concerned with the health and safety of the public and is, in a number of instances, underpinned by criminal law. The laws on which he relies are set out over approximately four pages at Section 7 of a twenty five-page witness statement which he submitted for the purpose of resisting the strike out application but, in summary, they are concerned with misdescription of products, misbranding of products which are hazardous to patient health and failing to report and to take corrective steps where an issue with a product is identified which may have caused or contributed to serious injury or death. Dr Armes says he raised these concerns and was penalised for doing so, ultimately by being abruptly dismissed, albeit on notice.

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12. For the purposes of his whistleblowing and health and safety disclosure claims, Dr Armes' pleaded case specifically alleges seven disclosures ("Disclosures 1 to 7") which are clearly identified in his Particulars of Claim. These disclosures are summarised in greater detail in the last part of this judgment. With one exception, they are said to have been made in emails sent after a conference with the leadership of Abbott Rapid Diagnostics Research & Development which took place in Scarborough, Maine in the USA in January 2018. The first of these alleged disclosures was on 17 January and the seventh on 8 May 2018. One of Dr Armes'

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alleged disclosures (Disclosure 2) was in a conversation between Dr Armes and a Mr Haas (the sixth respondent to the proceedings before the ET and Head of Infectious Diseases Developed Markets, which is part of Abbott Rapid Diagnostics) which Dr Armes pleads took place in a follow-up call in January 2018, but which the evidence currently suggests took place on 6 February 2018. In the case of this disclosure, Mr Nicholls was content for the ET to proceed on the basis that Dr Armes' evidence in his witness statement as to the contents of that conversation should be taken at its highest.

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13. Dr Armes' case under section 43B(1) of the 1996 Act is that each of the e-mails, and the conversation with Mr Haas on which he relies, disclosed information which, in his reasonable belief, tended to show matters falling within sub-sections (a), (b), (d) and, later, (f). The relevant parts of section 43B(1) provide as follows:

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

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14. Dr Armes' case is also that Disclosures 1 to 7 all fell within section 100(1)(c) of the 1996 Act which provides as follows:

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> **"100 Health and safety cases.**
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> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—….**

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(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee, but it was not reasonably practicable for the employee to raise the matter by those means,

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he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,"

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15. Dr Armes' claims are denied by the respondents. In their pleaded case, they accept that in any molecular laboratory it is important to have effective contamination controls in place so as to avoid or minimise the risk of amplicon contamination. At paragraph. 37 of their Amended Grounds of Resistance, they also accept that in January 2018 Dr Armes attended the Scarborough conference and that, at that conference, he raised what they call *"a general concern"* about *"amplicon contamination"* related to Alere-i which was, in fact, produced in Scarborough. They also accept that these concerns were then discussed between Dr Armes, Ms Qui (the fifth respondent to the proceedings before the ET) and others at the Scarborough conference. Ms Qui was Head of Research & Development for a business unit in Abbott Laboratories which included Twist DX.

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16. At paragraph 38 of the Amended Grounds of Resistance, the respondents also accept that *"Dr Armes also raised his concern regarding amplicon contamination with the Alere-i product with Mr Haas"*.

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17. The respondents say, however, that there was a constructive dialogue about these concerns, that the concerns were addressed, and that Dr Armes seemed satisfied. At paragraph 40, they plead that:

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"all concerned with the Alere-i product were alive to and receptive of the concerns expressed by Dr Armes and sought to address them as part of its general concern to address issues of contamination. His conduct in raising concerns is something which he would be expected to do. Ms Qlu engaged with his concerns."

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18. At paragraph 42 of the Amended Grounds of Resistance, the respondents deny that Dr Armes made qualifying disclosures for the reasons set out in paragraph 44(a) to (g). The sub-paragraphs of paragraph 44 then address each pleaded disclosure in turn. In summary, it is said that, on their face, none of the emails discloses qualifying information for the purposes of sections 43B (1) or 100(1)(c) of the 1996 Act.

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19. In relation to the conversation between Dr Armes and Mr Haas on or about 6th February 2018, paragraph 43 of the Amended Grounds of Resistance contests Dr Armes' complaint that he did not receive replies to his emails and pleads that Mr Haas did deal with the substance of the emails. The respondents plead that:

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> **"In any event, the Claimant does state at paragraph 23.5 of the Particulars of Claim that he had a lengthy telephone conversation with Mr Haas. That supports the Respondents' case that they engaged with matters raised by Dr Armes."**

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20. Paragraph 44 (b) of the Amended Grounds of Resistance then goes on to point out that Dr Armes' pleaded case as to this conversation states that he did not *"again call out the contamination directly"* and argues that, therefore, his own case is that he did not raise the amplicon contamination issue in this particular conversation. It is then said that Dr Armes is required to identify the date of the telephone conversation.

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21. The picture which therefore emerges from these parts of the Amended Grounds of Resistance is that although the respondents to Dr Armes' claims accept that he raised issues relating to amplicon contamination at the Scarborough conference and subsequently, they say that Dr Armes' pleaded case as to his protected disclosures is bound to fail because the particular disclosures which he pleads cannot satisfy the relevant statutory definitions. This

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tends to be confirmed by paragraph 45 of the Amended Grounds of Resistance, which reads as follows:

> **"45. The relevant Respondents will say that it is apparent from the documents on which the Claimant relies that none of them was or contained qualifying disclosures or health and safety disclosures and the case that any of them did should be struck out on the basis of what appears on the face of the documents. In consequence., the Claimant's case that he was dismissed or suffered detriment for making protected disclosures or health and safety disclosures should be struck out."**

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22. The Amended Grounds of Resistance goes on to deny that any qualifying disclosures made by Dr Armes were protected under section 43C-H of the 1996 Act, and that any health and safety disclosures fell within section 100(1)(c), on the basis that any such disclosure was not made to Dr Armes' employer – rather, it was made to employees of other companies in the Abbott Group. The respondents to the ET proceedings also deny that the raising of his concerns by Dr Armes was a, or the, reason for his dismissal or any other treatment about which he complains. At paragraph 56 of the Amended Grounds of Resistance, the respondents plead that Dr Armes and his wife were dismissed along with the Head of Human Resources because:

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> **"they had shown themselves to be antithetical and hostile towards Abbott Laboratories since the October 2017 acquisition and prior to that Alere".**

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23. The acts which are said to show this attitude are then pleaded at paragraph 57.

<u>The ET'S decision on the application to strike out</u>

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24. I asked to see the application which the Employment Judge was asked to determine and was shown a letter dated 15 October 2019 to the ET from Baker & McKenzie, who act for the Respondents. This included, as one of the seven items which the Employment Judge was asked to determine:

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> **“3. The Respondents’ application to strike out elements of Dr Armes’ as set out in paragraph 45 of the amended response to his claim.”**

25. Presumably this was intended to read *‘elements of Dr Armes’ case/claims as set out in paragraph 45…’*. I have set out paragraph. 45 of the Amended Grounds of Resistance at

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paragraph 21, above. Although this was not stated explicitly, it appears from the Employment Judge’s Reasons, and his Judgment, that he considered that he should decide whether the whistleblowing and health and safety claims should be struck out altogether, as per the second

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sentence of paragraph 45. Thus, paragraph 1 of his Judgment states:

> **“1. The Respondents’ application to strike out the (sic) Dr Armes’ claims arising out of alleged protected disclosures and health and safety disclosures prior to his dismissal fails.”**

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26. I understand, however, that the alternative of striking out *some* of the protected/health and safety disclosures was raised by Mr Nicholls at the hearing before the ET, in the event that the Employment Judge was not persuaded that they should all be. The Employment Judge’s

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Reasons do not deal specifically with this alternative proposal although, on one reading, he found that all of the Disclosures were realistically arguable and therefore did not need to do so. In any event, Mr Nicholls argued that in the event that I was satisfied that the Judge had erred in

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law, and that the appeal should therefore be allowed, I should strike out the whole of the whistleblowing and the health and safety claims or alternatively those disclosures which, in my view, had no reasonable prospect of satisfying the relevant statutory definitions.

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27. I understand that the Employment Judge spent the first day of the hearing reading the pleadings, the witness statements in relation to the various applications, the skeleton arguments on both sides and the documents on a recommended reading list which had helpfully been

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provided by Mr Nicholls. I understand that these documents included the emails which were said to be the qualifying disclosures.

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28. Dr Armes' witness statement for the purpose of the strike out application took the ET through each of his alleged disclosures and explained in detail why he said that they fell within the statutory definitions. His evidence explained the contents of each disclosure and the context within which his disclosures were made with a view to the ET understanding them. In his skeleton argument, Mr Nicholls had objected to Dr Armes' witness statement, but paragraph 11 of the Employment Judge's Reasons records that:

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> **"11. Mr Nichols (sic) in his skeleton argument objected to the witness statements. I need not go into his reasons for doing so, as the issue was sensibly resolved by the parties agreeing that I should read the witness statements, but the Claimants will not be called to give evidence and Mr Nicholls will make his oral submissions having regard to the content of the witness statements."**

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29. The submissions lasted in the order of 1.5 days. I was told that, in relation to the strike out application, Counsel went disclosure by disclosure and made detailed oral submissions by reference to the text of the emails, what was pleaded and what Dr Armes stated in his witness statement. Those submissions went to the question whether an ET would be bound to find that each of the alleged qualifying/health and safety disclosures was not, in law, such a disclosure.

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30. The Employment Judge dealt with various interlocutory applications, but the relevant part of his Reasons, for present purposes, is at paragraphs 47 to 71. The Judge set out the relevant statutory provisions at paragraphs 48 and 53 and the relevant parts of Rule 37 at paragraph 54. At paragraphs 49 to 52, he directed himself as to relevant aspects of the law relating to what constitutes a *"qualifying disclosure"* for the purposes of section 43B(1) of the 1996 Act. At paragraph 49 he reminded himself that:

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> **"49. The disclosures need not be factually correct, nor amount to a breach of a legal obligation, criminal offence or endangerment of health and safety, provided that the claimant reasonably believed them to be so, see <u>Babula</u>**

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v Waltham Forrest (sic) College [2007] IRLR 346."

31. At paragraph 50 the Employment Judge said this:

> **"50. The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The mere expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. However, there is a need for care; information can be disclosed within an allegation. The concept of "information" is capable of covering statements which might also be characterised as allegations. The correct question is to ask whether the disclosure contained information of sufficient factual content and specificity that it is capable of showing one of the matters listed in section 43B(1). This is a matter of evaluative judgment in light of the facts and the context in which it was made, see Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA."**

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32. I particularly note the last two sentences of this passage, in which the ET directed itself correctly in relation to the decision of the Court of Appeal in **Kilraine**.

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33. Paragraph 51 of the Reasons stated this, in a passage which Mr Nicholls says contains one of the errors of law which the ET made given that the test of "reasonable belief" is not purely subjective – it is both subjective (as to what belief the worker held) and objective (as to whether that belief was reasonable):

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> **"51. The expression, "reasonable belief" must be considered having regard to the personal circumstances of the discloser, in particular their "inside knowledge", what they know about the field in which they work, about their employer , about the subject matter to which the disclosure relates. *In other words, the test is subjective*, see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4." (emphasis added)**

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34. At paragraph 53, the Employment Judge then set out section 100(1)(c) of the 1996 Act but said nothing further about the law relating to this provision or the approach to its interpretation.

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35. The Employment Judge went on to consider the key cases on applications to strike out on the no reasonable prospect ground, including **Anyanwu v South Bank Student Union**

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[2001] ICR 391 HL, **<u>Ezsias v North Glamorgan NHS Trust</u>** [2007] 4 All ER 940 CA and **<u>Morgan v Royal Mencap Society</u>** [2016] IRLR 428 EAT. The Judge noted that these cases emphasise that where there is a dispute as to the central facts, applications to strike out on the no reasonable prospect ground will only exceptionally succeed, although they might do so where the facts on which the claimant's case is based are *"totally and inexplicably inconsistent with the undisputed contemporaneous documentation."* An application to strike out a claim on this basis might also succeed where, taken at its highest on the facts, it cannot succeed in law.

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36. At paragraph 57 the Employment Judge stated that:

> **"57. Whilst I am only being asked to strike out part of Dr Armes claims, that flowing from alleged disclosures prior to dismissal, the above principles equally apply. It is of course right to say, that if a claimant did not make protected disclosures, a whistleblowing case cannot even get off the ground and should be struck out."**

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37. At paragraphs 59 to 63 the Employment Judge considered Mr Nicholls' argument based on **<u>Fincham v HM Prison Service</u>** UKEAT/0925/01 and other authorities that, in cases where the claim is that there was a disclosure of information tending to show actual or likely breach of a legal obligation, section 43B(1)(b) of the 1996 Act requires that the legal obligation is identified in the disclosure or, at least, obvious from its contents. I will call this the '**<u>Fincham</u>** point'. At paragraphs 59 and 60 the Judge said this:

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> **"59. Mr Nicholls also argues that specifics are required as to what laws or legal obligations may be breached, which the emails lack. He referred me to paragraph 33 of the judgment of Mr Justice Elias, (as he then was) in <u>Fincham v H M Prison Service</u> UKEAT/0925/01:**
> **". . .*<u>there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employer is relying. "</u>***
>
> **60. Mr Mehta points out that was a very different case from this one and referred me to earlier paragraphs, (1, 2, 21 , 24, 25 and 30) . He was right to do so. The disclosures were in relation to health and safety endangerment and breach of the implied term to maintain trust and confidence. Of, *"I am under pressure and stress"* Mr Justice Elias said that the EAT found it impossible to see how that could be anything other than that health and safety is being endangered. The quoted passage arises out of the fact that although the claimant had complained about conduct toward her, she had not said or written anything that suggested this was a breach of the implied term."**

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38. Mr Nicholls argues that this passage contains another error of law in that it misunderstood the effect of the decision in **Fincham**.

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39. The ET went on to hold as follows:

> **"64. I agree that much of the correspondence relied on as amounting to protected disclosures is with regard to commercial matters, Dr Armes historic issues with Alere and his concerns about how he is going to be treated by the new owners of the business in the future.**
>
> **65. However, Dr Armes case is that a device marketed by Alere to identify flu could give false readings. It could give a false positive, leading to inappropriate medication being prescribed to the vulnerable. It could give a false negative, resulting in illness not being diagnosed and treated, or such being delayed. He said the product did not conform to the description on the basis of which it was sold and licenced, in breach of regulatory requirements in the US, (he lists the regulations and legal obligations potentially breached at paragraph 7 of his witness statement, running to 3 1/2 pages).**
>
> **66. Dr Armes says that these matters were raised by him with the management of the new owners of the business at a conference on 17 January 2018 and that he reiterated his points in his email of that day, (page 347, first disclosure). In that email he referred to a, "Black Swan event" He says that in context, everyone concerned would understand that to be a reference to a catastrophic product event, such as a product recall, because of a breach of regulations.**
>
> **67. The third alleged disclosure is a lengthy email of 13 March 2018, (page 352) in which he discusses the Alere product failings at length. The focus is undoubtably (sic) on the commercial ramifications, but the context is, on Dr Armes case, the health risks and the potential regulatory ramifications which, he says, everyone involved would have understood and been aware of. This email includes the following, *"I am however obligated to set out my concerns which pose both a business risk but also, more importantly, potentially a regulatory one".* (emphasis added)**
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> **68. Disclosure 5 is an email dated 12 April 2018, (page 378) which is short, but presses for communications on molecular strategy. This might in context, depending on the evidence, be a reference to the issues with the Alere product and its disclosed problems.**
>
> **69. Disclosure 6 is an email dated 26 April 2018, (page 384) and is undoubtedly primarily focused on the future of Dr Armes relationship with Abbott, but it is at least arguable, taking his case at its highest, that the context is his ongoing disclosure of the issue with the Alere product. The same mav be said with regard to Disclosure 7. an email dated 8 May 2018, (page 391).**
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> **70. In conclusion, taking Dr Armes case at its highest, I cannot and will not say that the alleged protected disclosures he relies on have no reasonable prospects of success.**
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> **71. It would be fair to say that I have more misgivings about some than others.**

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No doubt Dr Armes will consider carefully with his legal advisors, whether his description of his telephone conversation with Mr Haas on 6 February 2018, (paragraphs 3.8 to 3.13 of his witness statement) amounts to a disclosure of information and similarly with regard to his description of disclosure 4, (for which we do not have the actual emails referred to, but a narrative at paragraphs 5.3 and 5.4 of his witness statement) and the emails of 12 April, 28 April and 8 May 2018. It is doubtful whether chasing for a reply or communication amounts to a disclosure of information. He is on stronger ground, depending on the evidence, with disclosures 1 and 3."

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40. In summary, the ET therefore held that Dr Armes' case was stronger on some disclosures than others, but that it was not appropriate to strike out the whole of his whistleblowing or his health and safety claims.

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The Appeal

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41. Paragraph 18 of Mr Nicholls' skeleton argument helpfully summarises the Grounds of Appeal which he pursues but, essentially, the Appeal is based on the following propositions:

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a. First, the Employment Judge was wrong to state, at paragraph 51, by reference to the decision in **Korashi**, that the test as to the claimant's beliefs is subjective. As a matter of law, this aspect of the test under section 43B(1) of the 1996 Act has subjective and objective elements. This error, says Mr Nicholls, was material because the Employment Judge then focussed on what Dr Armes said about his disclosures, rather than on what the disclosures actually said and on the reasonableness of Dr Armes' professed beliefs about what they tended to show, which were objective questions.

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b. Second, as six of the seven alleged qualifying disclosures were set out in emails, and the 6 February 2018 conversation with Mr Haas was pleaded and then set out in Dr Armes' witness statement, the objective elements of the test under section 43B(1) required the Employment Judge to construe what was written in the case of each

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disclosure in turn and ask whether the text of the email, or the alleged contents of the conversation, could be said to disclose information which was capable of falling within sections 43B(1) and/or 100(1)(c) ERA. The construction of a document is a question of law and, therefore, the appeal raises issues of law.

c. Third, each of the Employment Judge's constructions was wrong or, alternatively, if the issue is one of fact, perverse. None of the alleged qualifying disclosures contained information of sufficient factual content and specificity that it was capable of showing one of the matters specified in section 43B(1), still less any reference to health and safety or to any criminal offence, and only one (Disclosure 3) referred to what was described as *"regulatory [risk]"*.

d. Fourth, even Disclosure 3, which referred to regulatory risk, could not be regarded as a qualifying disclosure because it failed to identify the regulatory requirements which were, or were likely to be, breached. This was Mr Nicholls' argument based on the **Fincham** line of cases, which was rejected by the ET.

e. Finally, because the relevant issues were objective questions and/or issues of construction, the ET was wrong to take into account the witness statement which Dr Armes had submitted as part of his case that the relevant claims should not be struck out; the decision should have been based on the pleaded case alone.

Legal framework

The law applicable to applications to strike out on the "no reasonable prospect" ground

42. Rule 37 of the 2013 Regulations provides as follows:

> **"Striking out**

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> **37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success….;"**

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43. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:

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a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, **Tayside Public Transport Company Limited v Reilly** [2012] IRLR 755 at paragraph 30.

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b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention *"has a realistic as opposed to a fanciful prospect of success"*: see, for example, paragraph 26 of the Judgment of the Court of Appeal in the **Ezsias** case (supra).

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c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of **Ezsias**.

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

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

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

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g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in

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Hassan v Tesco Stores Limited UKEAT/0098/16 and **Mbuisa v Cygnet Healthcare Limited** UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

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44. For these reasons and others, which I will come to, I reject Mr Nicholls' submission that the ET was bound to decide the matter purely on Dr Armes' pleaded case and could not take into account his written evidence and other explanations, for example by Mr Mehta, as to what his case at trial would be.

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The construction of sections 43B(1) and 100(1)(c) of the 1996 Act

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Overview

45. I have set out the relevant provisions above. Mr Mehta reminds me that, when interpreting and applying the whistleblowing legislation, I should bear in mind the *purpose* of the legislation. This was summarised by Mummery LJ on **ALM Medical Services Ltd v Bladon** [2002] IRLR 807 CA as follows at paragraph 2:

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> **"The self-evident aim of the provisions is to protect employees from unfair treatment (ie victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees…."**

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46. Similarly, the purpose of section 100(1)(c) of the 1996 Act is self-evidently to protect workers who reasonably raise issues of health and safety and this purpose should be borne in mind when interpreting the section.

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47. Mr Mehta points out the legislation is intended to protect workers who may or may not have a detailed or, indeed, any knowledge of the law. He submits, and I agree, that the

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provisions should be read broadly and with regard to substance rather than form. The concepts of a *"qualifying disclosure"* and a health and safety disclosure therefore should not be interpreted so as to place onerous requirements on the worker if they are to qualify

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for protection, or to create potential pitfalls for the unsuspecting worker, unless the words of the statutory provisions require this. They should not be interpreted in a way which introduces technical requirements which, if unfulfilled by the worker, will leave them exposed despite the fact that they are sincere and may have had to pluck up courage to come

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forward in the public interest or, in the case of health and safety disclosures, in the interests of safety at work.

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48. These submissions were no doubt based on paragraph 80 of the Judgment of Wall LJ in **Babula v Waltham Forest College** [2007] ICR 1026 CA:

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> **"80……The purpose of the statute, as I read it, is to encourage responsible whistleblowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute.**

The section 43B(1) questions

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49. At paragraph 9 of his Judgment in **Williams v Michelle Brown AM** UKEAT/0044/19/OO, His Honour Judge Auerbach helpfully identified five potential issues where an ET is required to decide whether an utterance by a worker amounted to a *"qualifying*

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disclosure" as defined:

> **"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."**

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50. I will call these the 'section 43B (1) questions.' As will be apparent, the first, fourth and fifth of these are in issue in this appeal. I make clear that what I say about them below is about the approach where the ET is required to make a final decision as to whether there was a qualifying disclosure. Obviously, in an application to strike out on the no reasonable prospect ground, the ET may be able to take a less rigorous approach, given that it is only concerned with whether an ET could properly find that there was a qualifying disclosure. But even in the context of a strike out application it is important for the decision maker to be clear as to what the legal issues will be a trial, what the competing cases are in relation to those issues and how they will be determined.

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51. I also note that in relation to the first, fourth and fifth section 43B(1) questions, the outcome under the relevant parts of section 100(1)(c) of the 1996 Act is unlikely to be different, particularly where the issue is considered in the context of an application to strike out on the no reasonable prospect ground. Neither party argued that it would be or could be different; on the contrary, no separate argument about section 100(1)(c) of the 1996 Act was addressed to me and nor was the Employment Judge criticised for focussing on the case under section 43B(1). That, then, is what I also propose to do.

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<u>The first section 43B(1) question: what information , if any, was disclosed?</u>

52. The first stage is to identify the information disclosed by the worker which is said to amount to the qualifying disclosure. This is crucial because section 43B(1) requires the tribunal to go on to consider whether the claimant's beliefs about <u>that</u> information fell within the section and, if the conclusion is that there was a qualifying disclosure, whether the disclosure of <u>that</u> information was a, or the, reason for the treatment complained of, depending on whether the

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complaint is victimisation contrary to section 47B of the 1996 Act, or automatic unfair dismissal contrary to section 103A.

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53. The leading authority on the first section 43B(1) question is **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 CA, which the Employment Judge summarised accurately at paragraph 50 of his Reasons and which I have set out above. However, in the light of Mr Nicholls' submissions, and particularly his characterisation of the exercise which the

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Employment Judge was required to undertake in this case as being one of construction, and his argument that it was an error of law for the Employment Judge to take into account Dr Armes' witness statement, it is necessary to consider the Judgment of Lord Justice Sales (as he then

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was) in a little more detail.

54. The background to **Kilraine** was that a series of cases had debated the effect of the

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decision of the Employment Appeal Tribunal ("EAT") in **Cavendish Munro Professional Risks Management Limited v Geduld** [2010] ICR 325 EAT, which some argued had established a legal distinction between making an allegation and disclosing information. Unsurprisingly, the Court of Appeal held in **Kilraine** that any such dichotomy is false and that

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Geduld was not authority for the existence of such a dichotomy. An allegation may or may not disclose information; the question whether it does requires the ET to look at what was said by the worker in the context in which it was said: see paragraphs 30 to 34 of the Judgement of

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Sales LJ in particular.

55. As to whether there are any qualitative requirements in relation to the information which is said to have been disclosed, Sales LJ said that this question is informed by the other

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requirements of section 43B(1) because the information has to be capable of satisfying those requirements. Thus, at paragraph 35 he stated:

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> **"35. (…) In order for a statement or disclosure to be a qualifying disclosure according to this language, *<u>it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1</u>*)." (emphasis added)**

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56. That, then, is the test to be applied in deciding the first of the five section 43B(1) questions. I therefore agree with Mr Nicholls' submissions to this extent: on an application to strike out, an ET is entitled to look at a written communication which is said to satisfy section

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43B(1) and consider whether that communication has a sufficient factual content and is sufficiently specific to be capable of satisfying the other requirements of section 43B(1).

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57. Where I disagree with Mr Nicholls is in relation to the proposition that, therefore, in a written communication case the issue can always be decided and, indeed, may *only* be decided, by looking at the words of the written communication: the Employment Judge therefore erred in law in taking into account Dr Armes' written evidence. The complaint that the Employment

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Judge took Dr Armes' witness statement into account is surprising, given that Mr Nicholls agreed that he could do so, as the Employment Judge noted at paragraph 11 of his Reasons (see paragraph 28, above. But, quite apart from this, Sales LJ held that even when deciding whether

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"information" was disclosed, evidence as to context is relevant and therefore admissible. Thus, at paragraph 36 he stated:

> **"36. *<u>Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case</u>*. It is a question which is likely to be closely**

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> **aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters." (emphasis added)**

58. At paragraph 41, he went on to say:

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> **"41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the *Cavendish Munro* case [at**

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paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner."

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59. So, it is quite clear that the evidence of Dr Armes' as to context and meaning *was* admissible for the purposes of the strike out application and will be admissible for these purposes at trial, should the claims survive the application to strike out. It also follows from these passages that the question whether a written communication discloses information which is capable of satisfying section 43B (1) will often require the determination of issues of fact as to context, and consideration of all of the relevant facts in the case. In such cases the issue will, therefore, be a mixed question of fact and law. There may be clear cut cases, or cases where the factual context is not in dispute and the issue is therefore one of pure law. But, otherwise, an application to strike out on the no reasonable prospect ground will meet with this difficulty. I also note that, even in the context of contractual interpretation the court would not give summary judgment if there were any material dispute as to the factual matrix within which the agreement was reached (i.e. a dispute as to factual matrix which affected the meaning of the words used): see **Khatri v Cooperatieve Centrale Raiffeissen Boerenleenbank** [2010] IRLR 715 at paragraph. 4.

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60. The need to proceed with caution in relation to applications for summary disposal where there are unresolved factual issues is underscored by what Sales LJ went on to say about the issue of the reasonableness of the worker's beliefs as to what the disclosed information tended to show, at paragraph 36 of his Judgment in **Kilraine**:

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> **"36 (…) As explained by Underhill LJ in <u>Chesterton Global Ltd v Nurmohamed</u>….[at paragraph 8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."**

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61. The importance of this point in the context of in the present appeal is that the information question is also linked to the questions of the worker's beliefs and the

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reasonableness of those beliefs. The former is a subjective question based on the evidence as to what the worker *thought* the evidence tended to show and is a question of fact. The context is also relevant to the latter question: what it is *reasonable* to believe will also be an evaluative

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exercise to be undertaken in the light of all of the facts of the case.

62. In relation to the first section 43B(1) question, Mr Nicholls also referred me to passages from His Honour Judge Auerbach's decision in **<u>Williams v Michelle Brown</u>** (supra). Whilst

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this decision is a useful illustration of the application of **<u>Kilraine</u>** it was, with respect, no more than that. As Judge Auerbach analysed the Judgment of the ET in **<u>Williams</u>**, it had found as a fact that the disclosure in that case did not contain information which was capable of being

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reasonably considered to tend to show that a criminal offence had been committed. The ET had been entitled to do so and therefore the EAT did not interfere. If anything, Judge Auerbach's approach tends to confirm that Mr Nicholls' arguments as to whether evidence is admissible, as

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to whether the question is one of pure law in written communications cases, and as to whether it is for the ET to decide whether the information tended to show a specified matter, are wrong. Had these arguments been right, Judge Auerbach could simply have construed the letter which was at the heart of the case and said whether he agreed with the ET's construction.

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63. Mr Nicholls also referred me to paragraphs 69 and 70 of the Judgment of Choudhury P in **Simpson v Cantor Fitzgerald Europe** [2020] ICR 236 EAT. Again, however, these passages reiterated and summarised what had been said in **Kilraine**. They do not appear to me to be inconsistent with what I have said about that case.

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The fourth section 43B(1) question: what were the claimant's beliefs about the information which was disclosed?

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64. Having identified the information which was disclosed, the ET should ask whether the claimant believed, at the time of the alleged disclosure, that the disclosed information tended to show one or more of the matters specified in Section 43B(1)(a) -(f) of the 1996 Act and, if so, which of those matters. As noted above, this is a subjective question to be decided on the

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evidence as to the claimant's beliefs and, for this reason, Mr Nicholls did not suggest to the Employment Judge that he could strike out on the basis that Dr Armes did not hold the requisite beliefs. On the contrary, whether he held such beliefs had to be assumed in Dr Armes' favour,

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given that it could not be established by incontrovertible evidence that he did not hold them. Mr Nicholls' fire was, therefore, focussed on the inter-related questions whether any "information" was disclosed by Dr Armes in the seven alleged qualifying disclosures and, if so,

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whether a belief that that information tended to show one or more of the specified matters was capable of being held by an ET to be reasonable. His case was that an ET would be bound to hold that these requirements could not be satisfied by Dr Armes' alleged qualifying disclosures.

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65. The second point I would emphasise about the fourth section 43B(1) question is that it is important for the ET to identify which limb, or limbs, of the definition (i.e. subsections (a)-(f)) are relevant, as this will affect the next, 'reasonableness', question. If the claimant says that

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they believed that the disclosed information tended to show that criminal offences were being, or were likely to be, committed, it is the reasonableness of that belief which must be

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considered. Likewise, if they say they believed that it tended to show that a legal obligation had been, or was likely to be, breached, the information should also be examined in context with a view to deciding whether such a belief was reasonable.

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66. Finally, I note that the belief must be as to what the information *"tends to show"*. This is a lower hurdle than having to believe that it *"does show"* one of more of the matters specified at section 43B(1)(a)-(f). This point was emphasised by Wall LJ at paragraph 79 of his

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Judgment in **Babula v Waltham Forest College** (supra):

> **"79. It is also, I think, significant that section 43B(1) uses the phrase "tends to show" not "shows". There is, in short, nothing in section 43B (1) which requires the whistle-blower to be right. At its highest in relation to section 43B(1)(a) he must have a reasonable belief that the information in his possession "tends to show" that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable….."**

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The fifth section 43B(1) question: was the claimant's belief reasonable?

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67. As Underhill LJ stated at paragraph 8(1) of his Judgment in **Chesterton Global Limited v Nurmohamed (PCAW intervening)** [2018] All ER 947, referring to **Babula**:

> **"8. (1) The definition has both a subjective and an objective element: …. The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1). The objective element is that that belief must be reasonable."**

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68. Underhill LJ added:

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> **"8. (2) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of *Babula*, where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would fall within head (a) of section 43B (1). There was in fact at the time no such offence, but it was held that the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was."**

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69. At paragraph 28 he said this in relation to the public interest element of section 43B(1):

> **"28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other**

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reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the *Wednesbury* approach" employed in (some) public law cases. Of course, we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative."

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70. In my view, this approach is also applicable when the issue is the reasonableness of the worker's beliefs as to what the disclosed information tended to show, consistently with the holding in **Babula** that the worker's view may be wrong but nevertheless reasonable. The fact that the ET disagrees with the claimant's view does not mean that the belief is necessarily unreasonable.

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71. As to the evidence which is relevant to the reasonableness question, there may be a tension between what the Court of Appeal stated should be the approach to the public interest question in the **Chesterton** case, and what the EAT stated, in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 EAT, should be the approach in relation to the fifth section 43B(1) question. Thus, in the **Chesteron** case, Underhill LJ went on to say this at paragraph 29:

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

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72. The perspective of the worker and their evidence as to why they thought that it was in the public interest to make the disclosure are therefore relevant, but primarily to deciding whether they *actually* held that belief. If they did, the reasonableness of that belief is for the ET to determine by reference to its views as to what is in the public interest, albeit on the basis that the question is whether the belief is reasonable rather than whether it is right.

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73. In **Korashi**, on the other hand, His Honour Judge McMullen QC said this on behalf of the EAT:

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> **"61. (…) What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word "reasonable".**
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> **62. This filter appears in many areas of the law. It requires consideration of the personal circumstances facing the relevant person at the time. Bringing it into our own case, it requires consideration of what a staff grade O&G doctor knows and ought to know about the circumstances of the matters disclosed. To take a simple example: a healthy young man who is taken into hospital for an orthopaedic athletic injury should not die on the operating table. A whistle-blower who says that that tends to show a breach of duty is required to demonstrate that such belief is reasonable. On the other hand, a surgeon who knows the risk of such procedure and possibly the results of meta-analysis of such procedure is in a good position to evaluate whether there has been such a breach. While it might be reasonable for our lay observer to believe that such death from a simple procedure was the product of a breach of duty, an experienced surgeon might take an entirely different view of what was reasonable given what further information he or she knows about what happened at the table. So in our judgment what is reasonable in s43B involves of course an objective standard - that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure. To bring this back to our own case, many whistle-blowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing."**

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74. On this approach, part of the context is the particular characteristics, knowledge and understanding of the worker at the time of the disclosure. This informs the reasonableness of

their beliefs, for good or for ill, rather than merely the question whether they actually held the beliefs alleged.

75. Prompted by questions from me about the tension between the two approaches, Mr Nicholls submitted that **Korashi** is wrong and should not be followed because it is inconsistent with **Chesterton**. I see the force of this argument, but the point was not pleaded or argued before the ET, or pleaded in the appeal, and was barely argued before me. I also see force in the contrary argument, that the fact that a given worker sincerely holds a view as to what the disclosed information tends to show ought to be relevant to the reasonableness of that view, particularly if they are working in a specialist area and are well-informed, as in the present case. This, therefore, does not seem to me to be a point which I should resolve in the context of an application to strike out and before the facts are found. Nor is it a point which I need to resolve in order to dispose of this appeal.

76. For completeness, I deal with one further argument of Mr Nicholls' in relation to **Kilraine**. He sought to persuade me by reference to the Court of Appeal's approval of the decision of Mr Justice Langstaff in the EAT in that case and, particularly paragraphs 33 and 34 of the Judgment of Sales LJ, that the Court of Appeal held that it is for the ET to decide whether the information disclosed tends to show any of the matters specified in Section 43B(1) of the 1996 Act. If the ET decides that the information does not tend to show any of those matters, then it cannot reasonably be believed by the worker to tend to show any of them. I reject this argument. Plainly, the question is not whether the ET accepts that the disclosed information tends or tended to show any of the matters specified in section 43B(1); the question is whether *the worker reasonably believes* that this is what the information tended to show, and

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the Court of Appeal was well aware of this, albeit Sales LJ may have used shorthand in some passages of his Judgment.

77. In respect of the third disclosure which was in issue in **Kilraine**, the Court of Appeal agreed with Langstaff J that this did not disclose information which had a sufficient factual content or specificity. In relation to the fourth disclosure, the Court agreed that although the ET had been wrong to find that no information had been disclosed, it had been entitled to make a finding of fact that the claimant did not have the requisite beliefs at the time of making the disclosure: see, in particular, paragraph 45 to 46. The Court of Appeal was clear that the information question is whether, taking into account the evidence as to context, the information is "capable" of satisfying the other requirements of the section - *could* a worker reasonably believe that it tended to show one of the specified matters, rather than *did* the information tend to show one of the specified matters.

78. Mr Nicholls' submission was also inconsistent with the decision in **Babula** that a qualifying belief may be wrong and yet be reasonably held. Indeed, in that case the claimant believed that an offence had been committed which did not in fact exist. Thus, a tribunal could consider that the disclosed information does not tend to show any of the specified matters but accept that the claimant's belief at the time of the disclosure, was reasonably held.

79. Thus, I understood Mr Nicholls' ultimately to accept that, in the light of **Kilraine,** the proposition in relation to his application to strike out had to be that there was no context in which the emails and the conversation with Mr Haas, on which Dr Armes relies, could be held by any properly directed tribunal to disclose information with sufficient factual content and specificity to be capable of being reasonably believed to tend to show one of the matters specified in section 43B(1) of the 1996 Act. It is plain that the Employment Judge did not

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accept this proposition, but the question remains as to whether this was on the basis of an erroneous approach to the law.

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How directly does the qualifying disclosure have to refer to one or more of the specified matters in Section 43 B (1)?

80. A theme in Mr Nicholls' submissions was that:

> **"objectively construed the disclosure must be preferable to one of the matters specified in Section 43 B (1)".**

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81. At times he appeared to argue that the words of the disclosure themselves must directly or explicitly refer to something falling within Section 43B(1)(a)-(f) of the 1996 Act and, at others, that the information must tend to show one of these matters if it is to be capable of being

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reasonably believed to tend to show one these matters. I have dealt with this, second, formulation already. With respect to him, the precise formulation of the requirement for which he contended in this part of his argument remained elusive but it appeared that he was arguing for an application of the **Fincham** point to all of the limbs of Section 43B(1) but then

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attempting to expand the principle so as to be in a position to argue that it was not sufficient for Dr Armes to refer, in Disclosure 3, to concerns about *"regulatory [risk]"*. Mr Nicholls argued that it would be unfair to the employer if they were to dismiss a worker for disclosing

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information, only to discover after the event that they had dismissed him for making a protected disclosure. Either it must be obvious from what is said, or the worker must expressly state that they are accusing the employer of criminality or illegality or one of the other specified matters.

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82. By way of illustration of this point, Mr Nicholls confirmed in answer to questions from me that, for example, in a case where what was said fell short of obviously alleging breach of legal obligation, a worker who was aware of a set of facts which he believed were evidence of

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illegality in the workplace, and who believed that it was in the public interest to bring them to the employer's attention, and whose beliefs were entirely sincere, entirely reasonable or even

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well-founded, but who, when he reported those facts, merely added that he was doing so because he thought it was "totally wrong" or was "wrongdoing", could not satisfy section 43B(1)(b). However, if the worker added that he also thought it was illegal, then the disclosure was capable of qualifying for protection although at times, and perhaps with Disclosure 3 in mind, Mr Nicholls appeared to submit that the worker would also have to identify which legal obligations he was referring to. In my view, this tends to expose the unattractiveness of Mr Nicholls' position on this point and suggests that it is inconsistent with the aims of the whistle-blowing legislation referred to at paragraphs 45-48, above.

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83. I also consider that these submissions had powerful echoes with the arguments which were rejected by the Court of Appeal in **Beatt v Croydon Health Services NHS Trust** [2017] ICR 1240 and are inconsistent with the clear meaning of section 43B(1) of the 1996 Act. In **Beatt,** the employer accepted that it had dismissed the claimant because of disclosures which he had made but argued that it genuinely believed that they were not qualifying disclosures because the claimant's views and behaviour were unreasonable. The ET found that the disclosures *were* protected and that therefore his dismissal was contrary to Section 103A of the 1996 Act. At paragraph 80 of his Judgment, Underhill LJ said this in upholding the conclusion of the ET:

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> "80 **…….It is necessary in the context of section 103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal, and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. I accept that the first question requires an inquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if Ms McNeill were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the employer itself believed that the disclosures for which the claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all. Even where he does, most often he will be convinced, human nature**

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> **being what it is, that one or more circumstances are present that mean that the disclosure is unprotected—…. I do not believe that Parliament can have intended employees to be unprotected in such cases….".**

84. So section 43B (1) is concerned with what information was disclosed and what *the worker* reasonably believed that information tended to show. It is not concerned with what *the employer* thought the information tended to show, nor whether the employer understood that the worker believed that the information tended to show one of the specified matters, nor whether the employer appreciated that the worker's belief was reasonable. This tends to undermine the argument that, in fairness to the employer, section 43B(1) requires the disclosure unmistakeably to allege actual or likely illegality if it is to be capable of qualifying for protection.

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85. I also consider that this aspect of Mr Nicholls' arguments is inconsistent with what was said in **Kilraine** and the emphasis, in **Babula**, on the point that the view of the worker merely needs to be that the information "tends to show" one of the specified matters. As noted above, in **Kilraine** Sales LJ emphasised that the question whether an utterance satisfies section 43B(1) involves three broad questions – the information disclosed, the worker's belief as to what it tended to show and the reasonableness of that belief - the answers to which may be affected by the evidence as to context. He made it clear that the information disclosed must have sufficient factual content and specificity to be capable of satisfying the section, but he did not suggest that there were any sub-rules, such as that this could *only* be the case if the worker expressly accused the employer of acting criminally or illegally under section 43B (1)(a) or (b) of the 1996 Act. It is quite clear from his Judgment that he regarded the three questions as inter-related ones of fact and degree, to be determined on the evidence in each case.

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86. This point is also quite apparent from the text of the section, which requires the disclosure of information and the holding by the worker of a reasonable belief that it tends to show illegality etc, rather than a statement by the worker that that is what the information tends

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to show. In my view, it is the text of the section which should be applied by tribunals when deciding whether a disclosure is a qualifying disclosure, rather than the section plus the additional and, with respect, unclear requirements advocated by Mr Nicholls.

87. This is not to say that the questions whether the worker mentions, for example, criminality or illegality or health and safety in their disclosure, or whether it is obvious that they had these matters in mind, are irrelevant. What they said, and whether the matter is obvious, are relevant evidential considerations in deciding what they believed and the reasonableness of what they believed, rather than these questions presenting an additional legal hurdle, as Mr Nicholls effectively contends. If the nature of the worker's concern is stated - if they say that they consider that the reported information shows criminality or breach of legal obligation or a threat to health and safety - it will be harder to dispute that they held this belief and that the professed belief that the disclosure tended to show the specified matter was reasonable. The point is the same if what the worker thinks is obvious from what they say in the alleged disclosure. Conversely, if the link to the subject matters of any of section 43B(1)(a)-(f) is not stated or referred to, and is not obvious, an ET may see this as evidence pointing to the conclusion that the worker did *not* hold the beliefs which they claim, or that the information is not specific enough to be capable of qualifying. But what cannot be said is that unless it is <u>stated</u> that the information tends to show one or more of the specified matters, or it is <u>obvious</u> that the concern falls within section 43B(1)(a)-(f), the information is incapable of satisfying the requirements of that section because it cannot <u>reasonably be thought</u> by the worker that it <u>tends to show</u> any of the specified matters. In my view, with respect to Mr Nicholls, this is flawed reasoning.

88. This leaves the question whether I am bound to reach a different view in the light of the **Fincham** line of cases on which Mr Nicholls relies. I do not consider that I am. In particular:

a. First, the passages on which Mr Nicholls relied were primarily concerned with section 43B(1)(b) of the 1996 Act whereas the present case is also concerned with sections 43B(1)(a), (d) and (f).

b. Second, even in relation to section 43B(1)(b) of the 1996 Act, I do not accept that **Fincham** or subsequent cases establish a rule which must be satisfied if the belief of the worker as to what the information tends to show is to be held to be reasonable. The only rule is that which is set out in the words of the section itself.

89. **Fincham** was decided very early in the life of the whistleblowing legislation, and before the amendment to section 43B(1) which introduced the public interest requirement. As is well known, this requirement was designed to deal with cases like **Fincham** in which the pursuit of purely private interests was said to amount to the making of qualifying disclosures based on alleged breach of contract, including the implied duty of mutual trust and confidence. The consequence of this possibility was that some claimants were manipulating the legislation by presenting ordinary workplace disagreements as involving the making of protected disclosures. One of the decisions which the ET in the **Fincham** case had made was that a series of complaints by the claimant to her line manager (which were about general workplace issues) did not amount to qualifying disclosures on the basis that they tended to show breach of the implied duty of mutual trust and confidence. The ET said:

> **"5. Finally, we considered whether the Applicant's disclosures or any of them tended to show a failure by the Respondent to comply with any of its legal obligations. We find that they did not. Almost every day in almost every workplace employee complain to managers of their treatment by other employees, often with good reason. Indeed, what has been revealed here appears to have been a hotbed of malice and petty spitefulness. It cannot possibly be the case, however, that each complaint tends to show a failure by the employer to comply with a legal obligation. The legal requirement on the part of an employer not to breach trust and confidence between employer and employee is not broken by an employer every time one employee behaves badly to another. It cannot be within the compass of the statutory provisions contained in sections 43B and 47B of the Employment Rights Act that every time there is bad behaviour by one person to another on works premises, the**

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aggrieved employee may complain of it and then obtain the protection of the statute.

6. We do not consider that the wording of section 43B of the Employment Rights Act in any event allows Tribunals to look at disclosures collectively. Each one must be looked at individually and none of these complaints made by the Applicant to her managers was such that it tended to show a failure to comply with the implied term of trust and confidence which must exist in every contract of employment."

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90. At paragraphs 32 and 33 Elias J (as he then was) said on behalf of the ET:

"32. Mr Cramsie also contends that the Tribunal erred in law in paragraph 5 of its decision when it concluded that there had been no breach of the duty of trust and confidence. *He said the Tribunal were wrong to require that disclosures must be looked at individually*. *He submitted that they could and should be looked at collectively in an appropriate case*. In our view there is no valid criticism that can be made at paragraph 5. If an employee complains on various occasions about the conduct of other employees that is not of itself demonstrating any breach of any duty by the employer at all. Of course, there can be a breach of trust and confidence resulting from a whole series of acts of inattention or carelessness or any inconsiderate behaviour by an employer over a period of time.

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33. *But there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employers (sic) is relying*. In this case the Tribunal found none. We have no reason to conclude that they erred in law in reaching that conclusion." (emphasis added)

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91. So the EAT appears to have considered that the ET had not erred in looking at each complaint individually and was entitled to come to the decision which it had reached on the evidence. In this context, I do not read paragraph 33 of the judgment in **Fincham** as establishing a generally applicable rule. The ET had not decided the case on the basis that there was such a rule and it is not clear that it had been argued that there was. The EAT did not identify any such rule in the language of the statutory provisions and what the EAT said had a, with respect, vague quality which would be inconsistent with the identification of a rule. In my view the EAT was merely identifying a missing evidential feature which was particularly significant in a case where the alleged qualifying disclosures were essentially grumbles about colleagues. In the absence of any reference to the mutual trust and confidence term, the ET was entitled to find, in effect, that the claimant did not reasonably believe that her grumbles tended to show breaches of legal obligation.

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92. Furthermore, subsequent authorities show that paragraph 33 of **Fincham** is not a statement of a rule. Thus, in **Bolton School v Evans** [2006] IRLR 500 when the case was at the EAT stage (the decision was subsequently upheld by the Court of Appeal), the EAT

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apparently did not consider that there was such a legal requirement. At paragraph 40, Elias J noted that the claimant had broken into the school computer system. Before doing this he had said to a Mr Edmundson that he was concerned that the system was insecure and would too

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readily lead to unauthorised disclosures of information:

> **"40……He also told Mr Edmundson and the headmaster, after the event, what he had done. That of course involved not merely informing them that he had broken into the system but perhaps more pertinently, as far as protected disclosure is concerned, that the system had been broken into."**

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93. At paragraph 41 Elias J said on behalf of the EAT:

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> **"41..Mr Chaudhuri, for the school, accepted, as we understand it, that the latter was information tending to show that a breach of a legal obligation was likely to occur. We think that is plainly so and it does not lose that characterisation merely because it is the informer himself who broke into the system. *It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a potential legal liability*" (emphasis)**

94. So, on the facts of the **Evans** case, the disclosure *was* capable of tending to show breach

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of legal obligation although it did not refer to legal obligations or identify any legal obligations which the worker had in mind. Given that it was obvious that the concern was potential disclosure of private information and it was appreciated that this could give rise to a potential

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legal liability, on the evidence in that case the disclosure was capable of reasonably being viewed by the worker as tending to show the matters described in Section 43B(1)(b). The ET in **Evans** had, therefore, not erred in coming to this conclusion.

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95. Again, there is nothing in **Evans** to suggest that there is a rule that there must be a reference to a legal obligation and/or a statement of the relevant obligations, or alternatively the

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implied reference to legal obligations must be obvious, if the disclosure is to be even capable of falling within section 43B(1)(b). It would have been illogical for the EAT to say so. As I have noted, plainly a belief that information *tends to show* something may be reasonable even if it is less than obvious that this is what it shows. Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong. Similarly, the fact that an employer appreciates that there is a concern about actual or potential breaches of legal obligation may support the worker's case that they reasonably believed that the information disclosed tended to draw attention to such concerns, but a worker may reasonably hold such a belief regardless of the employer's understanding.

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96. Turning to **Arjomand-Sissan v East Sussex Healthcare NHS Trust** UKEAT/0122/17 on which Mr Nicholls also relies, this contains a very helpful and clear review of the authorities by Mr Justice Soole but, ultimately, it is a decision that the ET in that case was entitled to find as a fact, on the evidence in that case, that the relevant disclosures did not fall within section 43B(1) of the 1996 Act and had not committed any error of law in coming to its conclusion. The central contention on appeal was that the ET had erred in approaching the matter on the basis that, as a matter of law *"it was necessary for the Claimant, when making a disclosure of information and within its terms, expressly to identify the matter within the section 43B(1) categories which the information tended to show"* (paragraph 25). Soole J held that the ET had not approached the matter on this basis. At paragraph 60, he said this:

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> **"60. In its section on the law, the ET also correctly noted the authorities which make clear, in respect of section 43B(1)(b), that *the disclosure does not need to identify in strict legal language the legal obligation on which the whistle-blower is relying; and that the potential legal liability may be obvious and/or a matter of common sense from the information provided*: paragraphs 16 to 17 citing Fincham and Bolton School. That the ET took the same *correct approach* in respect of the other categories in section 43B(1) is apparent e.g. from the "common sense" approach which it took in reaching its conclusion that disclosures 3 and 18 were protected: paragraphs 49 and 128." (emphasis added)**

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97. So, in effect, Soole J accepted that (contrary to Mr Nicholls argument) it would be an error of law for an ET to hold that failure on the part of the putative whistle-blower to state in the disclosure that this was a breach of legal obligation case and/or to specify the legal obligations which they had in mind meant that the disclosure could not qualify under section 43B(1), but that the ET had not made this error. I note that the possibility is raised in paragraph 60 that the potential legal liability might be obvious or "common sense" but, again, I do not read this as a further modification of a rule established in **Fincham**, and then modified in **Evans**, so that the concern about actual or potential breaches of legal obligation must be stated, or obvious, or apparent as a matter of common sense. These are no more than evidential considerations in applying the statutory test, which is whether the worker's beliefs about the information are reasonable on the facts of the case.

98. It is true that Soole J said this at paragraph 62, in a passage on which Mr Nicholls relies:

> **"62. In any event, I see no basis on which the ET could have come to any different conclusion on the material and case before it. As to section 43B(1)(b), the Claimant's case was that it was "obvious" that the information tended to show breach of a legal obligation (Schedule) and/or that in his reasonable belief it tended to show data protection breaches (POC and FBP). An assertion of obviousness has to be tested against the ability to identify, before the Tribunal, the legal obligation(s) in question. The ET rightly concluded that the letter did not refer explicitly or implicitly to breach of data protection legislation; nor was any breach of legal obligation obvious. There was nothing in the case before the Tribunal which provided anything more specific."**

99. But, again, those were his observations about the evidence in that case. The claimant had argued that the nature of his concerns was obvious, but the ET had not accepted this. Soole J did not disagree. He was not purporting to state a further, extra statutory, condition which must be satisfied if section 43B (1) is to be capable of being satisfied.

100. Finally, I turn to **Riley v Belmont Green Finance Limited** UKEAT/0133/19, on which Mr Nicholls also relied. Again, this was a case in which the EAT (Mr Matthew Gullick, sitting

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as a Deputy High Court Judge) dismissed an appeal against a decision of an ET that the claimant, who argued the appeal in person, had not made protected disclosures. The EAT declined to interfere with the findings of fact as to what had been said by the claimant and it accepted all of Mr Laddie QC's submissions, which were to the effect that the ET had applied the right legal test and had made permissible findings of fact given that the claimant had not said much more than that he had experienced problems with the employer's IT system "freezing" and that this was preventing him from processing customer cases, that work had on occasions been wrongly allocated and that his phone had not been fixed. It plainly was not obvious that he had matters of legal obligation in mind when he said these things and nor had he made any reference to legal obligation. Understandably, therefore, the ET had found as a fact that he did not reasonably believe that what he was saying tended to show matters falling within section 43 B(1).

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101. It is true that Mr Laddie referred to the **Fincham** line of cases, which I have dealt with, and also relied on cases such as **Eiger Securites LLP v Korshunova** [2017] IRLR 115 EAT, which state that the ET, as opposed to the worker, should identify the source of the obligation which the worker had in mind when making its findings of fact. It is also true that, as part of his argument, Mr Laddie pointed out that there was nothing in the disclosure to alert the employer to the fact that the concern was a breach of legal obligations, and it is true that Mr Gullick stated at paragraphs 44 and 45:

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> **"44. In my judgment, it is not possible, on the facts found by the Employment Tribunal, to say either that the Claimant made a disclosure covered by section 43B(1)(b) of the ERA 1996 where the breach of legal obligation was obvious, or that he identified, sufficiently or at all, within the disclosure itself the legal obligation said to have been breached. The Tribunal's findings were that the Claimant had complained about "working practices and procedures more generally".**
>
> **45. That conclusion is sufficient to dispose of the Appeal, on the basis that there was no material error of law in the Employment Tribunal's finding that the Claimant had not made a qualifying disclosure. However, I consider that Mr Laddie's submission on the second aspect of this issue is also well-founded…."**

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102. But, again, these are observations about the evidence in that case which meant that the ET's conclusion that there was no qualifying disclosure could not be said to be erroneous in law or perverse. Indeed, I note that insofar as Mr Gullick's formulation was intended to state a rule, which I do not think it was, it suggests that the question is whether the disclosure "*sufficiently*" identifies the legal obligation said to have been breached. That is vanishingly close to saying, as Sales LJ did in **Kilraine**, that the information must be sufficiently factual and specific to be capable of satisfying the requirement of section 43B(1) that the beliefs of the worker as to what it tended to show were reasonable. It is not a requirement that, other than in obvious cases, the fact that the concern is about legal obligations must be expressly stated.

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103. In summary, then, none of the cases relied on by Mr Nicholls in relation to this issue involved the EAT overruling an ET which had found that there was a qualifying disclosure despite a failure by the worker to identify in the disclosure the fact that they had an actual or potential breach of legal obligation in mind, still less despite a failure to spell out the legal obligations in question. **Evans**, in the EAT, shows an ET decision being *upheld* despite a failure by the worker to do so, and the other decisions are all ones in which the EAT upheld the ET's finding of fact that the disclosure in question did not satisfy section 43B(1) and then made observations about why such finding was open to the ET on the evidence. The cases also show a range of formulations of when there need be no express reference to legal obligation – where it is obvious, common sense or sufficiently clear – but this tends to undermine the proposition that there is any rule other than that the worker's beliefs as to what the information tends to show must be reasonable.

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104. I therefore do not consider that my analysis of section 43B(1) departs from existing case law. On the contrary, I regard it as consistent with that case law and with the decisions of the Court of Appeal in **Kilraine**, **Beatt** and **Babula** as well as the policy objectives which are sought to be achieved by the legislation. I also reject the suggestion that this analysis is unfair to employers. Quite apart from what is said in **Babula** and **Beatt** as to the scheme and aims of the legislation, as I have said, I accept that the extent to which it is apparent from the disclosure itself that the worker had the specified matters in mind is evidentially relevant to the question whether they had any of these matters in mind at the time of the disclosure, and whether any such belief about what the information tended to show was reasonable.

105. But I also note that the five requirements of section 43B(1) are evidentially exacting for the claimant, who has the burden of proof in relation to this issue. ETs, in my view, can be relied upon to use their common sense and awareness of the aims of the legislation to separate the genuine public interest disclosure cases from claims which are constructed. Moreover, even where the worker has made a qualifying disclosure which is protected, they will not succeed unless the ET concludes that the disclosure of the qualifying information was a, or the, reason for the treatment complained of: see, for example, the decision of the Court of Appeal in **Bolton School v Evans** at paragraphs 14 to 18. This is also an exacting evidential requirement, albeit the burden of proof is on the employer: see, for example, **Panayotiou v Chief Constable of Hampshire Police** [2014] IRLR 500 EAT and other cases which make clear that detrimental treatment for reasons *related to* the disclosure, but not *because of the disclosure itself*, is insufficient for liability to be established.

106. If an employer has victimised or dismissed a worker for coming forward in the public interest, sincerely and reasonably to raise issues of wrongdoing, consistently with **Beatt**, I do not consider that great injustice is likely to be occasioned if they are liable under the

A whistleblowing legislation, despite the fact that they did not appreciate that the worker had particular statutory protection.

Conclusions on the Appeal

B 107. Turning to the remaining arguments in the Appeal, although the statement in paragraph 51 of the Employment Judge's Reasons that *"in other words, the test is subjective"* is inaccurate, I would not necessarily have allowed the Appeal on this basis alone. Paragraph 51 C specifically refers to the term *"reasonable belief"* which appears in the statutory definition, and the passage in **Korashi** to which the Employment Judge was referring in this paragraph is entirely about the issue of reasonableness. On a fair reading, the Employment Judge may have been intending to say that the reasonableness question is informed by the characteristics and D circumstances of the particular worker. Moreover, I am not convinced that the Employment Judge's approach was to say that Dr Armes' evidence was that he believed his beliefs to be reasonable, and that that would be sufficient to satisfy the statutory test.

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108. Where I do accept Mr Nicholls' argument, however, is that in my view the Employment Judge did not sufficiently apply his mind to the questions (a) what information, if any, was F disclosed in the communications relied on by Dr Armes'? and (b) was that information capable of being reasonably believed to show any of the matters specified in section 43B(1) of the 1996 Act? Although, as I have noted, at paragraph 50 the Judge set out the qualitative test in relation to the disclosed information as explained in **Kilraine**, when it came to his conclusions, a fair G reading of paragraphs 65 to 71 of his Reasons (which I have set out at paragraph 39, above) suggests that this test was not applied or, at least, not applied sufficiently rigorously. These paragraphs do not refer to the question whether Dr Armes' disclosures had sufficient factual H content or specificity to be capable of satisfying section 43B(1), and the Judge's findings do not actually identify the qualifying information in each disclosure. Perhaps as a consequence of

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this, nor does the reader find any real consideration of the linked questions, whether any information which was disclosed was capable of being reasonably believed to tend to show one of the specified matters and, if so, which matters. These seem to me to be material flaws in his decision whether or not they flow from what the Employment Judge stated at paragraph. 51, as Mr Nicholls argues.

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109. Apart from the broad conclusion, at paragraph 70 of the Reasons, that *"I cannot and will not say that the alleged protected disclosures …have no reasonable prospect of success"*:

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a. In relation to Disclosure 1, the Employment Judge referred to a reference to a "black swan event" in the email of 17 January 2018 but he did not record what was said about such an event in the email, nor Dr Armes' explanation of what he said, as to which see further below. He did not make a specific finding that there was a reasonable prospect of Disclosure 1 being held to be a qualifying disclosure or explain why – paragraph 66 of the Reasons merely records Dr Armes' case in relation to this disclosure – although the Judge stated at paragraph 71 that Dr Armes was on stronger ground in relation to it than in relation to other alleged disclosures. What he said about Dr Armes' argument did not demonstrate that, if the argument was accepted, section 43B (1) would be satisfied.

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b. The Judge made no specific finding about Disclosure 2 or its contents other than to say, at paragraph 71, that Dr Armes should carefully consider whether he wished to pursue it. The implication was therefore that, at the very least, the Judge was doubtful that this aspect of Dr Armes' case would succeed. There was no explanation of the basis for concluding that he nevertheless had reasonable prospects of success on Disclosure 2 if, indeed, this was the Judge's view.

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c. At paragraph 67, the Employment Judge appears to have found that Disclosure 3 was realistically arguable, although he did not say so in terms and, as Mr Nicholls points out, the paragraph is expressed as merely noting Dr Armes' case and a single sentence from the email.

d. He dealt with Disclosure 4 in the same way as Disclosure 2 i.e. he made no specific finding other than to imply, in paragraph 71, that Dr Armes' case on this disclosure was weak.

e. At paragraph 68 he said that Disclosure 5 *"<u>might</u> in context, depending on the evidence"* (emphasis added) refer to the amplicon contamination issue but, at paragraph 71, he rightly observed that *"It is doubtful whether chasing for a reply or communication amounts to a disclosure of information"*. Again, he did not make a specific finding that Dr Armes' case on this disclosure was realistically arguable or identify the information which was capable of satisfying the test in section 43B (1). The impression given by paragraphs 68 and 71 is to contrary effect.

f. At paragraph 69 the Employment Judge said that Disclosures 6 and 7 were at least arguable but on the basis that arguably *"<u>the context</u> is his ongoing disclosure of the issue with the Alere product"* (emphasis added). However, section 43B(1) required consideration of what information was disclosed in the emails relied on, and whether that information was capable of satisfying the section, rather than mere consideration of the context in which the emails were written. At paragraph 71 he then made the same, in my view correct, observation as he made in relation to Disclosure 5 i.e. that it was doubtful that these emails did disclose qualifying information. It is also unclear why, given that, as the Employment Judge recognised,

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Disclosures 5 to 7 were part of a series of emails in which Dr Armes chased for a response, he dealt with Disclosures 6 and 7 separately.

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110. Mr Mehta rightly points out that the Appeal is not based on inadequacy of reasons, but obviously an ET's Reasons are evidence of its *reasoning*. In this case, the concerns I have described are with the latter. With respect to the Employment Judge, I accept Mr Nicholls' submission that he did not adequately apply the terms of Section 43B (1) and the guidance in

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Kilraine to the disclosures which were alleged in this case. For reasons which will become apparent, if I had been satisfied that the Employment Judge did apply the right approach in law, and he had specifically found that each of the alleged disclosures realistically arguably

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contained qualifying information, I would have been minded to find that his decision in relation to six of the seven disclosures relied on by Dr Armes was perverse. This, in turn, has reinforced my view that he did not apply the correct approach in law.

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Disposal

111. That being so, I allow the Appeal and the question of disposal arises. The first question is whether I should set aside the Judgment of the ET that Dr Armes' whistleblowing and health

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and safety claims should not be struck out and substitute a decision that they should be. I am not prepared to do that for reasons which I will explain, but essentially because I consider that the Employment Judge was entitled to dismiss the Respondents' application to strike out the

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whole of these claims.

112. The second question is whether I should rule on the prospects of success of the qualifying disclosures alleged by Dr Armes. I am prepared to do this, given that this will

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explain why, in my view, the appeal should be allowed but the ET's Judgment should stand, albeit on a significantly modified basis. The issues have been fully argued, given Mr Nicholls'

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contention that the Employment Judge was not entitled to find that it was arguable that any of the pleaded disclosures was a qualifying disclosure. Dr Armes' case has been pleaded in detail by lawyers and explained further in a detailed witness statement, as well as being elaborated on by skilled counsel, and it is therefore feasible for me to form a view at this stage of the litigation. I also hope that it will be helpful for me to do so, rather than remit issues to the ET, as this may assist in progressing the proceedings before the ET which relate to events which took place two-and-a-half or more years ago. It is also for this reason that I have dealt with the legal framework and Mr Nicholls' arguments in detail above.

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Disclosure 1: email dated 17 January 2018

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113. Disclosure 1 is an email from Dr Armes to Ms Qui dated 17th January 2018 which was sent from Dr Armes' iPhone and was responding to an effusive email from Ms Qui to the team, thanking them for their active engagement and meaningful contributions to the Scarborough conference and looking forward to working together in 2018. Dr Armes said:

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> **"Thanks, Katherine, for organising such a productive event.**
> **I will endeavour to help construct the white paper items we discussed.**
> **I also think that you now have the black swan firmly in your sites and 1 would continue to reinforce my view that this is where you should focus your stabilisation efforts. I think Myron's extreme view should not be sneered at and that in the room today you saw key R&D seasoned leaders be honest about this, probably for the first time in front at the new regime.**
>
> **We can help.**
>
> **Best**
> **Niall"**

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114. Dr Armes explains this email as follows at paragraph 3 of his witness statement:

> **"3.5 What I meant by "black swan" was a reference to the earlier group discussions at the meeting in Scarborough about R&D and product development. At that meeting, *<u>I raised my concerns that the lack of forward planning to deal with sudden and potentially unanticipated catastrophic product events (i.e. a black swan event) could be very disruptive to the development of products in the development cycle</u>*, such as tests to be launched on the Alere i, or indeed other products. During the same meeting the contamination problems were *<u>subsequently</u>* raised and therefore, in my email to Ms Qiu I suggested that the contamination problem faced by the Alere i could be an example of just such an event. I suggested to Ms Qiu that all efforts should be focused fixing the contamination problems." (emphasis added)**

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115. He goes on to explain that Myron Whipkey had made his concerns about the contamination issue very clear at the Scarborough conference, and his Particulars of Claim contain more detail about what Mr Whipkey said but, of course, these were disclosures by Mr Whipkey.

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116. I am not satisfied that it is realistically arguable that Dr Armes' email of 17th January 2018 disclosed information of sufficient factual content and specificity to be capable of falling within section 43B (1). I am also struck by the fact that Dr Armes' witness statement does not actually state specifically that at the time of the email he held the requisite beliefs as to what it tended to show: he appears to state his current interpretation of what he said. But even if he did hold such beliefs, I am also satisfied that it is not realistically arguable that they were reasonable. Taken at its very highest, this email simply thanked Ms Qui for organising a highly productive conference in Scarborough, expressed confidence that she had the contamination issue on board and expressed the view that she should continue to focus on that issue. It also expressed the view that, although extreme, Mr Whipkey's views should not be sneered at and that colleagues were being honest about the situation.

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117. Although Mr Mehta said that this disclosure was linked to what was said at the Scarborough conference, and he reminded me of the potential for an approach based on aggregation discussed, for example, in **Norbrook Laboratories v Shaw** [2014] ICR 40 and **Simpson v Cantor Fitzgerald Europe** (supra), the pleaded case as to what was said at the Scarborough conference does not currently allege that Dr Armes' made any protected disclosures at that conference. Nor is the pleaded case that there should be aggregation of statements made by Dr Armes on the two occasions or, indeed, on any other occasions. In this regard I respectfully agree with what Choudhury P said in the **Simpson** case at paragraph 33:

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"33. The need to identify the combination of communications relied upon, and the specific protected disclosure to which that combination gives rise, is not academic; it is a basic requirement in such claims. Specificity in relation to the disclosures relied upon is important because without such specificity, it may be very difficult for the Tribunal to answer the further questions which arise in such cases, namely whether or not (in a dismissal case) the reason or principal reason for the dismissal is that the employee made a protected disclosure."

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118. The contention that the email, in itself, was a protected disclosure therefore falls to be struck out subject to any application Dr Armes may wish to make to amend his case in this regard. Subject to any further submissions, I propose to allow him 28 days to make any such application on the terms and for the reasons which I explain below.

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Disclosure 2: conversation with Mr Haas on or about 6 February 2018

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119. The second disclosure is said to have taken place in a telephone call initiated by Mr Haas. That call is summarised at paragraph 2.16 of the Particulars of Claim as follows:

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"2.16. In a call later in February 2018, the matter was brought up by Mr Haas, to whom the matter had clearly been escalated by Ms Qui. *I expressed my view that a further generation of products would be necessary* (this was protected disclosure and health and safety disclosure 2) should be Alere I be unable to be maintained on the market. The attitude of Mr Haas was that the problem was 'not worse than our competitors'. I found this attitude to be very complacent." (emphasis added)

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120. Further particulars are provided at paragraphs 23.5 to 23.7 as follows:

"Follow up call with Jeff Haas: January 2018: second protected disclosure

23.5 Later in January I had a follow up call with Jeff Haas and it was attended also by Katharine Qui who remained silent throughout the entire hour-long call after introductions. *I did not again call out the contamination matter directly*, but it was referred to by Jeff Haas of his own volition who had earlier not responded to my email regarding "black swan events".

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23.6 In this call *I disclosed my view, in opposition to the view given by Mr Haas on that call), that a second generation of devices would be a necessary development and Investment by the company should the Alere i turn out to be unable to be maintained in the market*.

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23.7 When the topic of the Alere i having risks came up Mr Haas merely commented that the contamination issue was "not worse than that of our competitors"." (emphasis added)

121. Mr Armes then gives an account of the conversation at paras. 3.8 to 3.10 of his witness statement as follows:

> **"3.8 (…)** ***I did not again call out the contamination matter directly*****, but it was referred to by Mr Haas of his own volition. In this call,** ***I disclosed my view, in opposition to the view given by Mr Haas on that call, that a second generation of devices would be a necessary development and investment by the company should the Alere i turn out to be unable to be maintained in the market*****.**
>
> **3.9 Mr Haas voiced his concerns that it may not be economically viable to invest in a second product when there already existed a good enough product (the Alere i). I accepted the logic of his argument, but stated that, on the other hand it would be justifiable to invest in a second product if there were significant risks with the first product.**
>
> **3.10 I stressed that I thought that there was risk that the product could not remain in the market,** ***although on that occasion, I never specified what my concern was, and I did not use the term "contamination*****". When the topic of the Alere i having risks came up, Mr Haas merely commented that the contamination issue was "not more or less of an issue for us than for any other player". He clearly assumed that when I referred to product risk with the Alere i was talking about contamination."**

122. In my view, the pleaded case on Disclosure 2 does not have a realistic prospect of success. Dr Armes' pleaded account of this conversation disavows any mention by him of the contamination issue. All that he disclosed was his belief that it might be necessary to develop an alternative device if Alere-i could not be marketed successfully. He does not allege any disclosure by him of information which was sufficiently factual and specific to be capable of falling within section 43B (1). Nor could any properly directed ET find that any belief on the part of Dr Armes that his pleaded remarks tended to show any of the specified matters was reasonable. Again, I note that Dr Armes does not directly state in his witness statement that he held any relevant beliefs at the time of the conversation. I also have doubts that the account of the telephone conversation in Dr Armes' witness statement, even if accepted, could prove a qualifying disclosure, although I do not have to resolve this issue given that I propose to give Dr Armes 28 days to make any application to amend the Particulars of Claim.

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Disclosure 3: the email of 13 March 2018 with attached white paper

123. I am satisfied that it is reasonably arguable that this email and its attachment amounted to a qualifying disclosure, and I agree with the Employment Judge in so far as this was his finding. I agree with Mr Nicholls that the email has a heavily commercial flavour but, in my view, his arguments tended to suggest that Dr Armes did not actually hold the relevant qualifying beliefs at the time of the email – that Dr Armes had commercial rather than legal or health and safety issues in mind - rather than to lend strong support to the conclusion that there was no disclosure of information which was capable of satisfying section 43B(1).

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124. I need not set out all of the information disclosed in the email or reach a final view as to which information, if any, is capable of being qualifying information but, for example, there was the following passage in the first part of the email:

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> **"Isothermal technology**
> **(…)**
> **My thoughts are that the difference between the past of molecular and possible concerns of "the today" (alere-i) revolve mainly around a couple of key issues. These are : (1) Use setting, and (2) isothermal technology.**
> **(1) Use setting. Clearly the CLIA setting poses additional risks for mis-use, and/or in this case perhaps more importantly failure to detect possible ongoing changes in system performance:**
> **a. Clearly the product needs to be particularly well designed to prevent amplicon release when one assumes the end-users are unskilled. (…)**
> **b. (...) Thus a release event poses much much greater risk of (permanently) compromising later results and clean-ups needs to be ultra-effective.**
> **c. Detection - How does one know that the work environment is contaminated? If it has been successfully detected, how does one know it is clean? Unlike a skilled laboratory where operatives who may more readily detect that something is amiss, this is quite likely to be missed in the CLIA environment unless it is so awful that *everything* invalidates or is positive. *In reality a much worse more complex scenario might well evolve – local area contamination leads to sporadic transfer of amplicons into the system so that false positive (or negative) results are merely a statistical distortion from the true rates of infection. Say 5% of the time a contaminated patch is inadvertently transferred into the new test. This might not get noticed but compromises the system in a clinically meaningful manner*. Furthermore the current test protocols are not designed to reliably detect such sporadic events – a single negative and positive run in the morning does not prove that the environment is not affected. One might need to do 100 negative runs to get sufficient data to verify site cleanliness for example (see the attached review document referencing the problem of confirming clean-up)."**

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125. The first part of the email concluded as follows:

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> **"All in all I have to say that I am concerned about the risks evident to me today when combined with the available (admittedly limited) data. Perhaps others take a different view on the risks, and the actual fully analysed data will be the proof of how significant a problem there is or could be. *I am however obligated to set out my concerns which pose both a business risk but also, more importantly, potentially a regulatory one*." (emphasis added)**

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126. The email continued, but it is not necessary for the purposes of this Judgment to summarise what was said. Much depends on what the evidence ultimately is in due course, but for this very reason it is not appropriate to strike out this aspect of Dr Armes' case. I cannot say that the information in the email and attachment, which undoubtedly was factual in nature and sufficiently specific, is not even *capable* of satisfying section 43B (1), i.e. that even if Dr Armes held the requisite beliefs about this information an ET would be bound to find that such belief was unreasonable.

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127. Mr Nicholls complained that there was no reference in the email and the attachment to health and safety but, of course, the generation of incorrect results in relation to the detection of infectious diseases *is* a health and safety issue, even if it may raise other concerns, including concerns as to the commercial implications of the fact that a product is not effective. Dr Armes' email was, amongst other things, expressing concern that amplicon contamination, and therefore the fact that the system was clinically compromised and producing unreliable test results, might go undetected. As I have noted, Dr Armes also expressly referred to potential regulatory risk, which he said was more important than the business risk. This indicates, although it does not necessarily prove, that he had legal obligations in mind and, as I have noted, the regulatory framework which he relies on is in large part concerned with health and safety.

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128. In addressing Mr Nicholls' arguments on the **Fincham** point, above, I have rejected the contention that in his email Dr Armes had to spell out the particular legal obligations which he

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had in mind if the email was to satisfy section 43B (1). But, in any event, the email refers to regulatory risk and it seems to me to be realistically arguable that, in context, the risks referred to were obvious or a matter of common sense or sufficiently spelt out. The ET will, therefore, need to hear evidence in order to decide this part of Dr Armes' case.

Disclosure 4: emails in March to early May 2018

129. The position in relation to Disclosure 4 is curious. At paragraph 2.18 of the Particulars of Claim the following is pleaded:

> **"2.18 During March, April and into early May 2018 I sent several further emails. These emails comprised my fourth protected disclosure and health and safety disclosure. …"**

130. At para. 28.1 of the Particulars of Claim the following is pleaded:

> **"28.1 During March, April and into early May l sent several emails to Mr Haas, and limited responses were received, *in these communications I continued to request insight into Abbott's response to the issues raised*.**
>
> **28.2 I contend that these emails were protected disclosure and health and safety disclosure 4." (emphasis added)**

131. In the course of the hearing, I was told that no such emails had been located in the disclosure process. Mr Mehta told me that, therefore, Dr Armes proposed to give evidence as to what those emails said. He had not done so in his witness statement for the purposes of the strike out application because he had not appreciated that the emails would not become available.

132. On the face of it, Dr Armes' pleaded case on Disclosure 4 does not have realistic prospects of success. His allegation is limited to a claim that he requested insight into Abbott's response to the issues raised. That is *not* an allegation that he disclosed information in these emails, still less that he disclosed information which is capable of satisfying section 43B (1). Indeed, he does not specifically plead or state in his witness statement that he held relevant

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beliefs about the content of these emails at the time when they were sent. The pleaded case on this disclosure therefore falls to be struck out, subject to Dr Armes having 28 days to apply to amend on the basis, and for the reasons, which I set out below.

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Disclosures 5 to 7: emails on molecular strategy

133. I will deal with these alleged disclosures compendiously, given that they comprise emails dated 12th April 26th April and 8th May 2018 respectively, which form part of a series of exchanges between Dr Armes and Mr Haas, with Ms Qui copied in. These e-mails are headed "Molecular Strategy" and Mr Mehta very fairly pointed out that molecular strategy covers a range of issues, including product development. I also understood him to accept that, therefore, the heading and the contents of the emails do not directly refer to any contamination issue in relation to Alere-i, albeit such issues might influence decisions as to strategy in relation to which products should be developed and promoted.

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134. The emails begin on 12th April 2018 with Dr Armes complaining that he had not heard from Abbott leadership on molecular strategy or been consulted about it, although time was moving on. He refers to Alere-i "welching" on diligence obligations under the merger agreement but, as I understand it, this referred to commercial issues which are not relied on as part of Dr Armes' case, presumably because of the public interest element of the section 43B (1) definition. In any event, the email merely stated that there should be a grown-up conversation about these matters.

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135. The email of 26th April 2018 contains a detailed account of Dr Armes' views on commercial issues in relation to the merger agreement and product development, and the 8th May email contains yet more detail on these themes. The Employment Judge was right to describe these emails as *"chasing for a reply or communication"* and to express doubts about

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whether this could amount to a disclosure of information (paragraph 71). Despite Mr Mehta's robust submissions, and even assuming that the contamination issue in relation to Alere-i was part of the background to, or context for, what was said in the email exchanges, I remained and remain unable to detect the disclosure of information in these three emails which is capable of satisfying section 43B(1) or raises circumstances connected with Dr Armes' work which he could reasonably have believed were harmful or potentially harmful to health and safety. Again, I note that Dr Armes does not specifically plead, or state in his witness statement, that at the time of sending these emails he held the relevant statutory beliefs about the information which they contained.

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136. I therefore accept that Dr Armes' case that these emails amounted to qualifying disclosures should be struck out. Conscious of the risk of injustice, for example because I have not fully appreciated the purport of these emails or the nature of his case in relation to them, I will again give him 28 days to apply to amend to clarify his case on the same basis as in relation to the disclosures which I have referred to above, other than Disclosure 3.

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Permission to apply to amend

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137. For the avoidance of doubt, my decision on Disclosures 1, 2 and 4-7 do not prevent Dr Armes from relying on the communications as part of the narrative of the case. It prevents him, subject to any application to amend being allowed, from arguing that the communication satisfies section 43B(1) of the 1996 Act.

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138. In allowing Dr Armes an opportunity to apply to amend, I particularly have in mind the practice in the courts where a pleading is found to be defective, to which I have referred at paragraph 43(f), above, and the fact that, as I have noted, the Respondents accept in their pleaded case that he raised issues about amplicon contamination at the Scarborough conference

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and subsequently. Mr Mehta also assured me that Dr Armes *would* give evidence that at the relevant time he held the requisite beliefs as to what the information which he disclosed tended to show, and he would also give evidence to describe what was in the emails relied on as

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Disclosure 4. Mr Mehta also referred to the possibility of aggregation, although this is not currently pleaded, as I have noted. In addition to the fact that, in my view, the Employment Judge was right not to strike out Dr Armes' case on Disclosure 3, these considerations were part of my reason for holding that the Employment Judge was right not to strike out the relevant

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claims altogether. On the information available, such a step may have caused injustice, although this remains to be seen. Any application to amend should make clear what information was disclosed by Dr Armes, what he believed at the time of the disclosure that

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information tended to show and why such belief is said to be reasonable.

139. In the event that Dr Armes does not apply to amend within 28 days, his pleaded case on

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Disclosures 1,2 and 4-7 will be struck out without further notice.

Postscript

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140. After hearing submissions, the Order provided that any application to amend should be made to the Employment Tribunal.

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141. This judgment was given orally on 23 October 2020. Unfortunately, it was not transcribed until shortly before the Christmas vacation and it then required a number of corrections. I have made these as soon as reasonably practicable but apologise to the parties for the delay.

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