Neutral Citation Number: [2022] EAT 44

Case No: EA-2021-000761-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 March 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MISS A DODD **Appellant**

- and -

UK DIRECT SOLUTIONS BUSINESS LIMITED (1) **Respondents**
MR S MOSLEMI (2)

- -
- -

Mr G Powell (instructed under Direct Access) for the **Appellant**
Mr J Bromige (instructed by Stephens Scrown LLP) for the **Respondents**

Hearing date: 27 January 2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Disclosure

The claimant in the employment tribunal complains that she was subjected to detrimental treatment because she made a number of protected disclosures (PDs) and was constructively unfairly dismissed, for the reason or principal reason of having done so. The claims are contested and ongoing. This appeal relates to the refusal of an application by her for specific disclosure. All of the requests contained within that application related to documents which she believed would be likely to show that the allegations of wrongdoing that were the subject of her claimed PDs were factually true.

As confirmed and discussed in **Santander UK Plc v Bharaj** [2021] ICR 580 disclosure in the employment tribunal is governed by the principles and guidance derived from CPR 31 and the associated practice directions. The touchstone is necessity and applications for specific disclosure must be considered and determined in accordance with the overriding objective.

The statutory definition of a PD does not, itself, turn upon whether allegations of wrongdoing that are the subject of a claimed PD are factually true. There is no rule of law that this will necessarily be an issue that needs to be determined by the tribunal generally or in a particular type of case. Whether this is relevant to any particular issue in a given case, and if so, how, or to what extent, will be fact-sensitive to the particular pleadings, and issues, in the given case. *Dicta* in **Darnton v University of Surrey** [2003] IRLR 133, **Chesterton Global Limited v Nurmohamed** [2018] ICR 731 and **Babula v Waltham Forest College** [2007] ICR 1026 considered.

Accordingly, an application for specific disclosure of documents said to be likely to show whether allegations of wrongdoing made in claimed PDs factually occurred, must be supported by reasoned argument by reference to the particular pleadings and issues in the case at hand, explaining why the

disclosure is both sufficiently relevant to an issue or issues in the case, and necessary to the fair determination of such issue or issues.

The tribunal in this case, which correctly directed itself as to the essential guiding principles of law, was, applying those principles, largely right to reject the claimant's specific disclosure application. In relation to the bulk of the application the appeal was therefore dismissed. However, certain of the requests relating to a claimed PD of alleged furlough-grant fraud warranted further consideration as to whether they may, at least partially, have been justified. The appeal was allowed in respect of those requests.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they are in the employment tribunal. The first respondent is an energy consultancy which acts as an intermediary between suppliers and business customers. The second respondent is its managing director. The claimant was in-house legal counsel from 6 January to 14 August 2020. Her employment ended by resignation. Her complaints include that she was subjected to detriments, both during employment and in a further episode after her employment ended, on the ground that she made protected disclosures, and that she was constructively unfairly dismissed for the reason or principal reason of having made protected disclosures.

2. More specifically, it is her case that, among other things, she made a protected disclosure during April 2020 that the respondent was fraudulently claiming furlough grants in respect of employees who were continuing to work, and a number of protected disclosures between May and August 2020 to do with what may be called, for short, mis-selling. The complaints are defended and no findings of fact have yet been made, or substantive conclusions reached, by the tribunal.

3. This is the claimant's appeal against the decision of EJ Aspden, at a case management hearing on 5 August 2021, refusing her application for a specific disclosure order. The claimant was represented at that hearing by Mr Powell of counsel through direct access. The respondents were represented by Mr Bromige of counsel. Both appeared again at the hearing of this appeal. At the time of the 5 August tribunal hearing the full merits hearing was due to open in September 2021. It has since been postponed and relisted to open in November 2022.

4. There are eight grounds of appeal relating to the disclosure issue. DHCJ Gavin Mansfield QC, who considered them on paper, was of the view that three points at least were arguable. As the appeal at that time appeared to be urgent, and in view of the overlap among the grounds, he decided that the best course was to permit them all to proceed to a full appeal hearing.

The Substantive Legislation

5. Section 43A **Employment Rights Act 1996** states that a protected disclosure is a qualifying disclosure as defined by section 43B which is made in accordance with any of sections 43C to 43H. Section 43B(1) provides as follows.

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

6. Section 47B gives a worker the right not to be subjected to detriment on the ground of having made a protected disclosure ("PD"). Section 103A provides that a dismissed employee shall be regarded as unfairly dismissed if the reason or principal reason is that they made a PD.

The Specific Disclosure Application

7. I need to say something about the procedural history leading up to the 5 August hearing. At a preliminary hearing ("PH") on 1 April 2021 EJ Sweeney gave directions for preparations for the final hearing in September. The claimant had tabled amended particulars of claim. The respondents were directed to table an amended response. The judge also directed that they send the claimant a draft list of issues, on which she was to comment by 11 June 2021. The judge also directed disclosure to be given on the basis of standard disclosure within CPR part 31.6, by 4 June 2021, with requested copy documents then to be provided by 18 June 2021. The judge listed a 90-minute PH for 5 August

2021 to take stock, discuss the agreed list of issues, final arrangements for the full hearing "and any other issues that might arise between now and then".

8. Following general disclosure, Mr Powell sent the respondents' solicitors on 12 July a list of categories of documents, of which, he said, they had wrongly failed to give disclosure. In a reply to the claimant of 16 July they asserted that most categories sought were not relevant. They suggested that she provide a more focussed list of specific documents sought, explaining relevance. They noted that her comments on the list of issues were awaited. In a reply of 19 July the claimant maintained that all the documents sought were relevant. On 30 July she emailed her application to the tribunal, asking that it be considered at the 5 August PH, and the time estimate increased to 2 hours. On 4 August the respondents' solicitors emailed opposing the application. Later on 4 August Mr Powell tabled an amended draft list of issues. I had copies of the amended pleadings and of all these materials in my bundle. There was also a Scott schedule, but counsel were agreed that I did not need to see it.

9. The amended draft list of issues, and the text of the paragraphs setting out the disclosure sought, extracted from the claimant's application, were attached to the tribunal's decision. This appeal is solely concerned with the disclosure sought in relation to the furlough and mis-selling PD complaints. I attach to my own present decision as Annex 1 the paragraphs of the list of issues which describe the claimed PDs, being one in relation to furlough fraud and seven in relation to mis-selling. I also attach as Annex 2 the text of the disclosure that was sought in the eleven numbered paragraphs of the request said to relate to those PDs. I add here some further points about the issues.

10. First, regarding the claimed furlough PD, the July 2021 correspondence says that she saw a spreadsheet of 2 April 2020, containing details of furloughed employees. She knew that two of them were doing some work from home because of her own dealings with them. When she raised her concern with the Head of HR he confirmed that those employees marked FL1 on the spreadsheet were individuals in respect of whom furlough grant had been claimed, but who were doing some work

from home. There were six of them in that category, including the two she had dealt with.

11. Secondly, the claimant's case is that she reasonably believed the furlough PD to be made in the public interest, because it was of deliberate conduct amounting to a fraud on the public purse; and she reasonably believed the mis-selling PDs to be made in the public interest, because the first respondent, by not complying with regulatory legislation, was making significant secret commissions and breaching the fiduciary duties that it owed to thousands of business customers.

12. The amended grounds of resistance deny that the claimant made disclosures which she reasonably believed tended to show wrongdoing, and that she believed that there was a wider public interest in her making the disclosures. In relation to the furlough PD they deny that the alleged conversation with the Head of HR took place, and state that the first respondent "denies that they made any fraudulent claims either connected with the Coronavirus Job Retention Scheme, or at all."

13. In relation to the first mis-selling PD it is said that the particular sale was discussed, the second respondent cancelled it "acknowledging that it was a misrepresentation which would not be tolerated", and that the first respondent did not receive payment and the transaction was not processed. They deny any breach of legal obligation "or that this was a sales trend". In relation to the second such PD there is a denial that mis-selling was common practice. In relation to the third it is said that ensuring such transactions were compliant fell within the claimant's remit. In relation to the fourth it is said that the claimant emailed after being requested to advise following customer complaints. In relation to the fifth such PD it is said that the claimant emailed to point out features of terms that she had drafted; in relation to the sixth, that she emailed in relation to terms that she was responsible for drafting and provided information about disputes of which she had a record. In relation to the seventh it is said that the claimant was asked to advise on a sale, she was concerned it was not compliant with the first respondent's thresholds, and that was taken up. The respondents assert generally that it was part of her job to raise compliance issues, and when she did they were followed up or addressed.

14. Multiple incidents of detrimental treatment are claimed. The alleged conduct is in some cases factually denied outright, or the respondents give a different account of what happened and why. There are assertions at various points in the grounds or resistance that conduct was "unconnected" with any alleged disclosure. In some cases there is a denial that the conduct complained of amounted to a detriment. There is a denial that the respondent was in fundamental breach, or alternatively that any such conduct was connected with any PDs, or was the reason for resignation.

The Tribunal's Reasons

15. The judge summarised at [23] and [24] of her written decision the issues to which the claimant said that the disclosure requests were relevant. These were, in summary (a) whether she reasonably believed that the information disclosed tended to show wrongdoing; (b) whether she reasonably believed her disclosures to be made in the public interest; (c) whether she had been subjected to detriments because she made PDs; and (d) certain matters positively pleaded by the respondents.

16. I need to set out in full the judge's reasons for refusing the disclosure application:

> **"27. The Tribunal's ability to make an Order for specific disclosure is expressed in rule 31 of the Employment Tribunals Rules of Procedure. The overriding objective of the Rules, including Rule 31, is to enable Employment Tribunals to deal with cases fairly and justly. That includes, so far as is practicable, ensuring that the parties are on an equal footing, dealing with cases in ways that are proportionate to the complexity and importance of the issues, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense. I must seek to give effect to the overriding objective in interpreting and exercising the powers given by rule 31.**
>
> **28. In deciding whether to make an order and, if so, the extent of it the principles to be applied are those set out in CPR 31.12 and Practice Directions 31A and 31B that accompany that rule. As was made clear in *Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740* and *Santander UK Ltd v Bharaj UKEAT/0075/20 (15 October 2020, unreported)*, the test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings', in other words whether it is in accordance with the overriding objective to order specific disclosure. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. As noted above, the overriding objective includes the principle of proportionality, saving expense and avoiding delay. It includes doing justice not only in this case but in others: the Tribunal's limited resources must be allocated fairly amongst all of the cases it has to deal with. The greater the importance of the disclosable documents to the issues in the case, the greater**

the likelihood that they will be ordered to be disclosed, subject always to any other considerations which are relevant to the application of the overriding objective in the circumstances of the particular case and in particular the principle of proportionality. Fishing expeditions are impermissible: if disclosure is sought in relation to a category of documents, it must be shown that the category is likely to include documents that are likely to support or adversely affect the case of one or other party.

29. The issues for the tribunal to decide in this case in order to determine whether or not the claimant's claims succeed are those set out in the draft list of issues. Those issues are extensive, which is reflected in the fact that the parties estimate that 10 days of the Tribunal's time will be required to hear the parties' evidence and submissions on liability, with additional time then needed for the Tribunal's deliberations and to reach decisions on liability and, should any aspects of the case succeed, a further hearing to deal with remedy. The issues for the Tribunal to decide to determine liability include, but are far from limited to, the issues set out at paragraph 22 above.

30. The claimant alleges she made 14 protected disclosures about a variety of alleged wrongdoing. The claimant's case is that some of those alleged disclosures concerned alleged fraudulent furlough claims and alleged mis-selling and misrepresentations in respect of energy contracts. It is clear that reason the claimant is seeking disclosure of documents is that she believes those documents will or might show that the respondent did in fact commit relevant wrongdoing.

31. With regard to the issue of whether the claimant reasonably believed that the information she disclosed tended to show relevant wrongdoing, I do not accept that the question of whether the respondent did in fact commit wrongdoing is pertinent. The assessment of the claimant's state of mind, in so far as it is relevant, must be based upon the facts as understood by her at the time. In any event, the question for the Tribunal is not whether the claimant can show she believed there had been wrongdoing but whether she can show she believed that the information she disclosed tended to show relevant wrongdoing.

32. With regard to the issue of whether the claimant reasonably believed the disclosures were in the public interest, this can be broken down into two parts: (a) the question of whether the claimant believed the disclosures were in the public interest at the time she made them and (b) the question of whether that belief was reasonable. I accept that whether or not the claimant believed there had been wrongdoing may be relevant to question (a) but I do not agree that the question of whether there was in fact wrongdoing is pertinent to that issue. Mr Powell relies on *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, in which it was held that the question of whether the claimant's belief was reasonable can take into account grounds that were not contemplated by the claimant at the time she made the disclosure. Even so, the question of whether or not the claimant's belief that disclosures were in the public interest was objectively reasonable does not turn on whether or not the respondents were in fact doing something wrong. It is unnecessary for the claimant to set out to prove actual wrongdoing in order for her to establish that she reasonably believed it was in the public interest to disclose to her employer information about the perceived wrongdoing. Not only that, but if the parties

were to focus on whether or not there was in fact wrongdoing, there is a risk of obscuring the central issues that the Tribunal in fact has to decide: it is difficult to see how a focus on those issues will assist the Tribunal in the determination of the case. Furthermore, the documents in respect of which disclosure is sought are extensive. The exercise of searching for documents in such broad categories will be time consuming and will put the respondent to disproportionate expense. The respondent says it could take many weeks to conduct searches on its server, putting in jeopardy the hearing in September. Even if disclosure could be completed before the hearing, and the hearing could start as planned, expanding the issues before the Tribunal to include the issue of whether in fact the respondents did engage in wrongdoing is likely to extend the time needed for the hearing beyond that which is proportionate. In short, the disclosure sought is not necessary for the fair disposal of the case.

33. If the claimant had identified certain documents she had had sight of that led her to believe there had been wrongdoing then I could see the potential relevance of those documents. However, although the claimant said in her application that she saw certain documents during her employment that informed her belief that the respondent had committed the wrongdoing in question, she did not identify which of the documents in respect of which she seeks disclosure were within that category. Indeed, many of the documents in respect of which the claimant sought disclosure post-dated the relevant disclosure. Had the claimant confined her application to documents which had informed her belief that the respondent had committed wrongdoing, I may have viewed the application differently. I say 'may' because it remains the case that disclosure will only be ordered if it is necessary to dispose of the case fairly. I would have had to be persuaded that was the case. Mr Powell's submissions at this hearing focused on relevance rather than necessity.

34. The claimant said that some of the documents were seen by other employees who, in turn, provided her with information that informed her belief in wrongdoing. If that is the case then what is relevant is what those other employees told the claimant: it matters not whether the employee(s) in question had a positive belief in the truth of the information they passed to the claimant.

35. It was also submitted on behalf of the claimant that the documents sought are relevant to the issues of whether or not the respondents subjected the claimant to detriment and/or the respondents' motivation for so doing. I can see that, in principle, in a whistleblowing detriment case like this, an employee may seek to argue that an employer that has engaged in wrongdoing has a motivation to subject an individual who draws attention to the wrongdoing to detriment. In that sense, evidence relevant to the question of whether or not the respondent did in fact engage in wrongdoing could, in theory, have some bearing on the issue of the reason for the alleged detriments. However, it does not follow that an employer that is innocent of wrongdoing is unlikely to subject someone who makes a protected disclosure to detriment. Evidence of actual wrongdoing is, therefore, of limited relevance. Furthermore, as noted above, if the parties were to focus on whether or not there was in fact wrongdoing, there is a risk of obscuring the issues that the Tribunal in fact has to decide, which will not assist the Tribunal in the determination of the case; the exercise of searching for and disclosing documents will be time consuming, will put the respondent to

> **disproportionate expense and there is a risk that the final hearing would need to be postponed (with the hearing then being delayed potentially for 12 months or more); and, even if the hearing can start on 13 September 2021 as listed, expanding the issues to be determined to include whether the respondents did engage in the wrongdoing the claimant claims was the subject of her disclosures is likely to extend the duration of the hearing.**
>
> **36. Mr Powell submitted that the respondents themselves are advancing a positive case that they did not commit wrongdoing and that they are doing so to demonstrate that the alleged protected disclosures did not materially influence their treatment of the claimant. I do not consider that that is the case being put forward by the respondents. The respondents' position, as set out by Mr Bromige at this hearing, is that it would not be appropriate for the Tribunal to determine whether or not there was in fact wrongdoing. On a fair reading of the amended grounds of resistance I do not consider that the respondents are seeking to demonstrate that the alleged protected disclosures did not materially influence their treatment of the claimant by showing that they did not engage in wrongdoing.**
>
> **37. In conclusion, the documents sought are of limited relevance, and bearing in mind the overriding objective, I am not persuaded that their disclosure is necessary for the fair disposal of the case."**

Grounds of Appeal

17. With respect to Mr Powell, the grounds of appeal are lengthy, discursive and overlapping. I have found it helpful to try to identify, in short form, the essential points of challenge that they raise. They seem to me to be to the effect that the judge erred in law in the following respects:

(a) By taking the view that whether the first respondent did in fact commit wrongdoing was at best of limited or marginal relevance, when it was in fact highly pertinent, in particular to (i) whether the claimant genuinely and reasonably believed in the relevant wrongdoing; (ii) whether she genuinely and reasonably believed her disclosures were made in the public interest; and (iii) whether there was detrimental treatment *because of* her claimed PDs;

(b) By failing to take sufficient account of the claimant's case that she had become aware of the matters that she disclosed from first-hand sight of documents, or from colleagues who passed information to her, and had in turn relied upon documents that they had seen;

(c) By not recognising that she was not now in a position to identify individual documents, but had properly and sufficiently identified the categories of documents sought;

(d) By commenting that evidence of wrongdoing was of limited relevance as it did not follow that an innocent employer was unlikely to subject an employee to detrimental treatment for making PDs;

(e) By taking the view that the scope of the disclosure sought was unduly wide and far-reaching and would put the respondents to disproportionate expense;

(f) By failing to take account of the fact that the first respondent had advanced a positive case as part of its defence, to the effect that it had not engaged in any wrongdoing in respect of furlough or mis-selling, and that it had positively relied on the claimant's job role, and advanced a positive case as to the reason for the treatment complained of;

(g) By refusing the application as a whole, rather than determining whether to make an order in respect of each category of which disclosure was sought, in turn, in whole or in part;

(h) By not taking sufficient cognisance of the fact that the respondents ought already to have provided the disclosure sought, in compliance with the order of EJ Sweeney of 1 April 2021;

(i) By wrongly prioritising the preservation of the trial dates.

18. That, it appears to me, is essentially the territory covered by grounds 1 – 7, with ground 8 adding a catch-all perversity ground.

Arguments

19. I had the benefit of detailed written skeleton arguments and hearing extensive oral argument from both counsel. I have considered it all. The following is my summary of what appear to me to have been the most significant points advanced on each side.

Claimant

20. The general principles applicable to disclosure in the employment tribunal are as follows.

21. In principle CPR 31 principles apply to disclosure in the employment tribunal: **Santander**

UK Plc v Bharaj [2021] ICR 580. Standard disclosure should include documents which adversely affect the disclosing party's case, or support the other party's case. Specific disclosure should be ordered if it is necessary to the fair disposal of the proceedings. A party seeking specific disclosure does not have to identify each document individually. It is sufficient if they identify the category, class or nature of the documents sought, and why disclosure of such documents is necessary: **City of Gotha v Sotheby's** [1998] 1 WLR 114 (CA). While "fishing expeditions" are not permitted, it is not a condition that the applicant for specific disclosure show that their case is *prima facie* likely to succeed: **Tesco Stores Limited v Element**, UKEAT/0228/20, 13 January 2021, at [82].

22. Regarding the law relating to PD detriment and unfair dismissal claims Mr Powell made the following particular submissions, drawing principally on **Darnton v University of Surrey** [2003] IRLR 133 and **Chesterton Global Limited v Nurmohamed** [2018] ICR 731, and other authorities.

23. Whether a belief that the disclosure tends to show wrongdoing or is made in the public interest is reasonably held is an objective question to be determined by the tribunal in light of all the circumstances of the particular case: **Chesterton** at [37] and [40]. Determination of the factual accuracy of the disclosure will in many cases be an important tool in determining whether the worker had a reasonable belief that it tended to show wrongdoing: **Darnton** at [29]. Documents which may support the reasonableness of the worker's belief are not limited to those of which they were aware when they made the disclosure: **Santander** at [12]. A disclosure may be considered to be reasonably viewed as being in the public interest for reasons that the worker did not have in mind at the time when they made it: **Chesterton** at [29].

24. In deciding whether there has been detrimental treatment because of a protected disclosure, the tribunal must consider the conscious or unconscious mental processes of the decision-maker, and whether their decision was materially influenced by the disclosure: **London Borough of Harrow v Knight** [2003] IRLR 140 at [15] and [17].

25. Mr Powell submitted that the claimant's application had explained why the disclosure sought was relevant to, and necessary to the fair determination of, the issues that the judge had referred to at [23] and [24]. In refusing it, the judge erred in law, or reached perverse conclusions, as follows.

26. It was wrong to say that whether the respondents had in fact committed wrongdoing as claimed was of little or no relevance.

27. Specifically, to the extent that it was the claimant's case that she had relied on documents she had seen – such as a spreadsheet in respect of furlough grant claims made to HMRC – these would be probative of the genuineness and reasonableness of her belief that her disclosures tended to show wrongdoing. It was similarly also wrong to hold that it made no difference whether information given to her by other employees was in turn based on documents they had seen. Sight of those documents would cast light on the truthfulness of the claimant's account of what those colleagues had told her.

28. The documents sought were also relevant to the claimant's case that her disclosures were reasonably believed by her to have been made in the public interest. She was not restricted in this regard to seeking sight only of documents which she had in fact seen and had in mind at the time.

29. It was also wrong to hold that evidence of wrongdoing was of limited relevance to the detriment issue, on the basis that it did not follow that someone who was innocent of wrongdoing was unlikely to subject an accuser to detriment. Rather, it is obvious that someone guilty of wrongdoing will be more likely to be motivated to act detrimentally towards the accuser. The respondents had advanced various positive cases as to the explanations for the alleged detrimental treatment.

30. The judge's general view that focussing on documents showing whether or not there had in fact been wrongdoing risked obscuring the real issues, and would not assist the tribunal to decide them, was therefore also wrong. The disclosure was necessary to a fair determination of those issues.

31. It was wrong to fault the claimant for failing to identify with sufficient precision which

particular individual documents she sought. The documents were solely in the possession or control of the respondents. She had sufficiently identified and explained the categories or classes sought and why disclosure of documents in those categories was relevant and necessary.

32. It was wrong to hold that the requests were too widely drawn and that to comply with them would involve disproportionate time and expense. As for the furlough-disclosure requests, these related not to 123 but to 6 employees. The documents were likely to be held electronically and the disclosure exercise should be easy. The mis-selling requests focussed on: the actions of 6 employees, in relation to requests 7 and 8; the communications of one person, the second respondent, in relation to requests 9 and 10; and a single email in relation to request 11. Even if it might be said that some of the requests were too wide, the judge was wrong not to consider them, category by category, and whether she should at least make an order in respect of some limited and specific categories or sub-categories of documents sought.

33. It was wrong to hold that the respondents were not asserting a positive case that there had been no wrongdoing. In various paragraphs in the amended grounds of resistance they asserted positive cases that there had been no furlough fraud, and disputing that a particular sale involving a misrepresentation was part of a trend, or that mis-selling was common practice. It was also their case that any matters raised by the claimant were raised in the course of her duties, rather than because she believed it was in the public interest to do so. There was a denial that these were matters of public interest. Mr Powell also referred to passages in the respondents' witness statements, which had since been served. In oral argument he accepted that these, of course, were not available to the judge when she decided the application, but suggested that the content showed that the first respondent was putting forward in evidence positive contentions about its conduct, without having been required to give the disclosure that would enable those contentions properly to be tested.

34. The judge failed to recognise that the respondents had failed to comply with their duties under

the 1 April disclosure order. The claimant had, on 12 July, identified to them the categories or classes of documents that should have been provided, but they thereafter refused to provide them. Against that background, and given the importance of the disclosure sought to the issues, the judge wrongly placed too much weight on the implications of making an order for the stability of the listed final hearing dates. That enabled the respondents to take advantage of their own wrongdoing.

Respondents

35. The judge's self-directions as to the law were all correct. That included, at [32], a correct analysis of **Chesterton**. The observation in that case that a tribunal might conclude that a belief that a disclosure was made in the public interest was reasonable for reasons which the worker did not have in mind at the time, does not enable claimants to embark on a general fishing expedition to look for documents that might assist them to run their case by introducing a new argument. Further, determination of the reasonableness of the belief that the disclosure tended to show wrongdoing, whilst judged objectively, "must be based on facts as understood by the worker": **Darnton** at [33]. The present judge fairly pointed out that the claimant had not identified which of the documents she sought were in the category of documents that she had seen, and hence which informed her belief in wrongdoing; and that many of the documents she sought post-dated the relevant claimed PDs.

36. As to the criticism that the judge wrongly took a global approach, the litigation history was important. The respondents' solicitors' first response to the initial request in July 2021 had been to suggest that the claimant provide a list of the specific documents that she considered were relevant and had been omitted, rather than what they described as a "fishing exercise of broad and speculative categories". They stated there that if such a revised request was provided, by reference to particular pleaded issues, the respondents would co-operate with it. The claimant did not respond positively to that invitation, but instead made her application shortly before the listed PH. This was in a context where the claimant was at that point in breach of the direction to respond to the draft list of issues.

37. This provided context to the task facing the judge at the PH. She properly took the view that she was faced with a wide-ranging and unfocussed application, considered the overriding objective, and fairly made the observations she did at [33] as to how her approach might have been different had the claimant made a more focussed application. In this context she was entitled to take the view that it would have been disproportionate to have attempted to deal with each category separately.

38. As to the claimant's case that she had relied upon documents that she had herself seen, or what others had told her, based on documents that they had seen, the judge fairly answered these points at [33] and [34], in light of how the claimant had actually pleaded her case. As to the furlough fraud allegation, the amended particulars of claim simply pleaded that during April 2020 the claimant "became aware" that the respondent was fraudulently claiming furlough grants without any further particulars of how she became aware, or specifically of what. Mr Powell's letter of 12 July had referred to a particular excel spreadsheet, but that spreadsheet was in the trial bundle.

39. The amended claim did not identify to which employees the disclosure was said to relate. Information was drip-fed. The 12 July letter named two employees who the claimant said she had worked with during the period when, according to the spreadsheet, they were on furlough, but the disclosure application of 30 July then inexplicably referred to four others. The protected disclosure was said to have been made on 30 April 2020, but the disclosure request extended to documents created in time windows ending on later dates, without explanation. This was properly regarded as unfocussed, disproportionate and a fishing expedition. The judge had not said at [33] that the claimant had to be able to give the individual dates of each of the documents sought. The criticism was that the claimant had not confined her application to specific *descriptions* of documents that she contended that she had actually seen and which influenced her particular claimed PDs.

40. Mr Bromige advanced a similar critique of the breadth of the requests relating to the mis-selling disclosures. They extended to two individuals not mentioned in the claimant's pleaded case

at all. They covered a period from the claimant's own start date through to 6 October 2020, which was in fact after she had left employment, without explanation. They extended to documents relating to any settlement of any claims (of mis-selling against the respondent) and pleadings in such claims, without explanation, in what was plainly a speculative fishing exercise.

41. As to the assertion that the respondents had in their pleading advanced a positive case, the claimant had made serious allegations of what could amount to criminal misconduct. She referred to fraudulently claiming furlough grants. It was unsurprising that the first respondent would wish to place on record its denial of such conduct. That was not the same as advancing, and relying upon, a positive case. The denial in relation to mis-selling was in the context of a pleaded dispute between the parties about whether the claimant made a particular disclosure in a particular conversation on 26 May 2020. The claimant's disclosure request, however, did not seek to identify which particular categories of documents might cast light on that specific dispute.

42. The judge's observations at [35] and [36] about the need for focus on the issues that the tribunal actually had to decide were in point. She rightly identified that the respondents were *not* advancing a positive case that they did not commit wrongdoing *in order to support their case that they did not subject the claimant to detriment because of the claimed PDs.* Rather, the specific detailed section of the grounds of resistance responding to the allegations of detrimental treatment, took issue with much of what the claimant said factually had occurred, advanced the respondents' case as to the true facts of what occurred, and denied that such conduct as did occur was because of the claimed PDs, and/or simply advanced positive explanations for it. In any event, the judge was entitled to weigh in the balance the degree of potential relevance of this aspect, and to conclude that it was, at its highest, of limited relevance.

43. Given the content of the claimant's pleading, and the way that the requests were framed, the judge was not wrong not to take the view that the respondents had failed to comply with the 1 April

order. The judge properly, in accordance with the test of necessity, had regard to the overriding objective, and considerations of proportionality. Having regard to the litigation history, and the way in which the requests had been framed, she properly took into account the implications for the then-imminent trial. Fair disposal of the issues includes prompt disposal of them. There had been formal, amended, pleadings. The claimant had professional assistance. She was not entitled to put the onus on the judge to sift through her application for individual elements that might be justified.

44. The respondents' witness statements were tabled in September 2021, and were not before the judge when she made her decision, for which the proper reference point was, in any event, the pleadings. It would be open to the claimant, as a separate matter, to make any further application she thought appropriate, if so advised, by reference to the contents of those statements.

Claimant's reply

45. Mr Powell's main points in reply were the following.

46. Even if Mr Bromige was right that the reasonableness test in respect of belief in wrongdoing, whilst objective, must still be applied by reference to the facts known to the worker at the time of the disclosure, evidence of later events could still be relevant to the question of reasonable belief in the public interest. Evidence of a pattern of continuing wrongdoing might also throw light on the question of motivation for continuing or repeated alleged detriments.

47. As for the furlough disclosure requests relating to six individuals, rather than just two, there were six people in all referred to in the spreadsheet that the claimant said she had seen, in the same category which included those who she said she had interacted with on work-related matters.

48. As to the suggestion that the claimant was engaged in a fishing expedition, all of the disclosure applications were founded on her existing complaints, not made with a view to advancing, or finding, complaints that were not yet pleaded, which was the relevant test. See: **Element** at [32].

The Law

49. The principles that apply to disclosure in the employment tribunal have been the subject of recent comprehensive review by Linden J in **Santander**, and Choudhury P in **Element**. In **Santander** Linden J held that the tribunal's powers to order disclosure are those set out in CPR 31. That, and the accompanying practice directions, contain clear and helpful statements of the principles to be applied in order to achieve a fair disposal of the issues in accordance with the overriding objective. After setting out the requirements of standard disclosure in CPR 31.6, he considered authorities which discuss that the test is not one of mere relevance, still less potential relevance, and indeed that there are degrees of relevance. He went on to note that the power to order specific disclosure in CPR 31.12 includes the power to order a party to disclose specified "documents or classes of documents".

50. Linden J went on to note, as confirmed in **Canadian International Bank of Commerce v Beck** [2009] IRLR 740, that the test is whether or not a disclosure order is "necessary for fairly disposing of the proceedings"; and that the document must therefore be "of such relevance that disclosure is necessary for the fair disposal of the proceedings."

51. After citing from **Flood v Times Newspapers Limited** [2009] EMLR 18 he continued:

> **"26. I entirely agree and note that these passages were adopted by the Employment Appeal Tribunal at paragraph 24 of its decision in Birmingham City Council v Bagshaw and others [2017] ICR 263.**
>
> > **a. There can be no order for specific disclosure unless the documents to which the application relates are found to be likely to be disclosable in the sense that, in a standard disclosure case, they are likely to support or adversely affect etc the case of one or other party and are not privileged. Similarly, if disclosure is sought in relation to a category of documents, it must be shown that the category is likely to include disclosable documents.**
> > **b. Even if this question is answered in the applicant's favour, specific disclosure will only be ordered to the extent that it is in accordance with the overriding objective to do so. The "necessary for the fair disposal of the issues between the parties" formulation in Beck, and the formulation in paragraphs 24 and 25 of Flood cited above, are shorthand for this second question.**
> > **c. Beck also effectively makes the point that the greater the importance**

> **of the disclosable documents to the issues in the case, the greater the likelihood that they will be ordered to be disclosed, but subject always to any other considerations which are relevant to the application of the overriding objective in the circumstances of the particular case and in particular the principle of proportionality."**

52. In **Element** Choudhury P made a number of the same points, and specifically concurred with Linden J's analysis of the earlier authorities. He went on to consider the position regarding requests for information. As to "fishing expeditions" he noted:

> **"32. As with disclosure, an order for information will not be made if the request amounts to a "fishing expedition". The White Book commentary at 18.1.13 states:**
>
> > **'Requests for further information which are merely "fishing" will not be allowed. These are requests for information in which a party is trying to see if they can find a case, either of complaint or defence, of which they know nothing or which is not yet pleaded.'**
>
> **33. The rationale behind this is clear: "fishing" will invariably involve the seeking of information about a matter that is not yet in dispute in proceedings, in that it does not form part of the pleaded case. …"**

53. Turning to the substantive law, I have already set out the relevant parts of the definition of a qualifying disclosure contained in the **1996 Act**. It is the words of that definition that must be kept in mind when considering the issues to which a given contested claim gives rise, the significance of the pleadings, and what specific disclosure of documents may be necessary to a fair disposal of those issues. I will start with some points about these provisions, some of which may now seem trite, but bear repetition, and have helped me to ground my consideration of the issues raised by this appeal.

54. The definition of a qualifying disclosure does not turn on whether a state of affairs amounting to wrongdoing of one of the kinds described in section 43B(1)(a) to (f) exists. It turns on whether, in the words of the preamble, there is a 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" those states of affairs. It follows that, if the reasonable belief tests of the preamble are satisfied, that will

suffice to that part of the definition, even though the belief or beliefs may be mistaken or wrong. See **Darnton**, and **Babula v Waltham Forest College** [2007] ICR 1026 at [41] and [75].

55. Next, the definition is concerned with what the worker believed at the time when they made the disclosure. That is clear from the present-tense formulations: "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. That directs attention to what the worker believed when they made the disclosure, not what they may have come to believe later on. The test of what they believed is also subjective inasmuch as it is about what they themselves believed. But, of course, it is still part of the task of the tribunal, if it is disputed, to decide whether they really did believe what they claim to have believed.

56. Next, the test asks whether the worker believes, when making the disclosure of information, that it "tends to show" wrongdoing within (a) to (f). They do not necessarily have to believe that the factual state of affairs described in the disclosure is itself true. What matters is what they believe the information "tends to show". This point is made in **Darnton** at [28]. As the EAT observed there:

> **"Circumstances that give rise to a worker reporting a protected disclosure will vary enormously from case to case. The circumstances will range from cases in which a worker reports matters which he claims are within his own knowledge, or have been seen and heard by him. At the other extreme will be cases where the worker passes on what has been reported to him, or what has been observed by other persons."**

57. That provides the context for what they go on to say at [29]:

> **" 29. In our opinion, the determination of the factual accuracy of the disclosure by the Tribunal will, in many cases, be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure. Thus if an Employment Tribunal finds that an employee's factual allegation of something he claims to have seen himself is false, that will be highly relevant to the question of the worker's reasonable belief. It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and extent of the Employment Tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by section 43B(1). We cannot accept Mr Kallipetis' submission that reasonable**

> **belief applies only to the question of whether the alleged facts tend to disclose a relevant failure. We consider that as a matter of both Law and common sense all circumstances must be considered together in determining whether the worker holds the reasonable belief. The circumstances will include his belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief."**

58. That paragraph simply makes the point that, in a certain type of case – where the worker claims to have been prompted to make the disclosure by personal sight of evidence of the state of affairs in question – evidence that the state of affairs did *not* in fact exist is liable to be relevant.

59. The specific point is captured in **Babula** at [82] in this way:

> **"…like the EAT in Darnton, I find it to difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false. In any event these are all matters for the Employment Tribunal to determine on the facts."**

60. But this is not a rule of law, and even in a case with those particular factual features, whether or how relevant it is, is still highly fact-sensitive: the worker may, for example, yet be honestly (and, I would add, reasonably) mistaken about what they believe they saw. The reference, in the second part of paragraph [29] of **Darnton**, to "all circumstances" does not broaden out the test of what facts or circumstances may be relevant to the qualifying disclosure issue.

61. In a similar way, I would add, if the worker's case is that they have direct knowledge of the state of affairs which they disclosed, evidence that it really *did* exist *may* be relevant to whether they truly held that belief. But again there is no rule of law that it always will be relevant, or as to how relevant, or probative, such evidence may be in relation to that question in the given case. It may depend, for example, on whether it supports their specific account of what they say they saw, or is of a more general nature. It is an evidential and fact-sensitive matter for the appreciation of the tribunal.

62. I turn to the test created by the inclusion of the word "reasonable" in the phrase "in the reasonable belief of the worker making the disclosure". This turns on whether the tribunal itself thinks that the belief is reasonable, not on whether the worker thought so, or thinks so. In that sense the test is objective. If authority be required: **Babula** at [41]. However, it is still a test of whether the belief actually held by the worker at the time was a reasonable belief, not of whether it would be

reasonable for someone, or anyone, to hold that belief, or to do so at any time.

63. This point, which I take to be a matter of ordinary construction of the words, is also discussed in the authorities. In **Babula**, where the issue was whether the worker reasonably believed that the information tended to show that there had been a criminal offence, his counsel referred to his characteristics and circumstances [63] and the purpose of the legislation to protect those who "make honest and reasonable disclosure". Accepting the policy argument, the Court said, at [80]:

> **"The purpose of the statute, as I read it, is to encourage responsible whistle-blowing. 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."**

64. The point is discussed explicitly in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 where the EAT observed at [62] that the reasonableness test requires "consideration of the personal circumstances facing the relevant person at the time". That might differ according, for example, to whether they are a lay person or an expert. So the test:

> **"of course involves 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 may 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 the material including the records before making such a disclosure. … Since the test is their 'reasonable' belief, that belief must be subject to what in their would reasonably believe to be wrong-doing."**

65. The words "is made in the public interest and" were inserted into the preamble of section 43B(1) in 2013. They have the effect of imposing an additional requirement that the disclosure must be one which, in the reasonable belief of the worker making it, is made in the public interest. Once again this requires the tribunal, first, to consider whether the worker who made the disclosure subjectively did believe, at the time when they made it, that it was made in the public interest. If so, the tribunal must also consider whether that belief was objectively reasonable.

66. In **Chesterton**, in the course of some preliminary remarks about the general architecture of the section, Underhill LJ said, at [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."**

67. Underhill LJ was, there, I think, simply making a point which flows from the fact that the test of reasonableness turns on the tribunal's own assessment, not on why the worker, at the time when they made the disclosure, thought that it was made in the public interest. Nor do I think that this passage affects the insight offered by **Korashi**. In relation to belief in public interest, as with belief that the disclosure tends to show wrongdoing, the worker must in fact hold the belief at the time of the disclosure. It would not be enough for the tribunal to conclude that, *had* they held belief, it *would* have been reasonable. While, again, the reasonableness test is objective, and may be satisfied by considerations that the worker did not *have in mind* at the time, the test is still whether their belief was reasonable when they formed it. As Underhill LJ put it in **Chesterton** at [27]:

> **"The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable."**

68. Mr Powell relied on Underhill LJ's reference in **Chesterton**, at [37] to "all the circumstances of the particular case" (in a paragraph with which Beatson LJ specifically concurred; Black LJ agreed generally with Underhill LJ). However, Underhill LJ was there speaking of the central issue in that case, namely the concept of "public interest" for the purposes of these provisions. These words do not support a general contention that the truth or not of the allegations of wrongdoing is part of the general circumstances of a PD claim, and therefore a relevant issue, in every case.

69. In **Santander** the employer specifically carried out an investigation in response to a dossier tabled by the claimant. Mr Powell referred to [12] where Linden J noted that, in light of **Darnton**, it was not disputed that any documents relating to that investigation which supported the claimant's case that her beliefs were reasonable would be disclosable. Again, I do not think that can be taken to mean that as a matter of law *any* documentary evidence going to the factual truth of the allegations must be relevant evidence that needs to be disclosed and considered in *every* PD case.

70. As to detrimental treatment, the general principles are well-established. If the tribunal finds that there was a PD or PDs, and that the conduct complained of did occur, it must then decide whether it amounted to subjecting the worker to a detriment "on the ground" of having made the PD(s). That requires a consideration of the conscious or subconscious motivation of the actor, and the test is satisfied if the making of the PD(s) materially influenced the conduct. That does not have to be the sole or principal reason. The position regarding the burden of proof was raised at points in the correspondence and by Mr Powell in submissions. As to that, section 48(2) provides that it is for the employer to show the ground on which the act, or failure to act, was done. In relation to unfair dismissal, the PD(s) must be the sole or principal reason for dismissal. In a case of constructive dismissal, the reason(s) for dismissal is deemed to be the reason(s) for the conduct amounting to the fundamental breach of contract. Where, as here, the employee does not have qualifying service, the burden of making good the proscribed reason or principal reason lies with them.

71. I would add that there is no rule of law, either that if an allegation is in fact true, the conduct of which the worker complains is more likely to have occurred because they made the PD, nor that, if it is not in fact true, that is less likely to be the case. It is easy to think of factual scenarios in which the reverse of either of these things might be the case. These matters are immensely fact-sensitive, and there is great danger in working from assumed paradigms. First intuitions can be a dangerous guide. The currency in which the tribunal must deal is evidence, findings of fact, and inferences or other conclusions properly drawn from those particular findings.

Discussion and Conclusions

72. As Mr Powell accepted, the judge fairly summarised, at [23] and [24], the issues to which he contended the requested documents were relevant and necessary to be disclosed. At [28] the judge gave herself a correct self-direction as to the law on disclosure, plainly grounded in the pertinent authorities. At [29] she correctly took the list of issues as her starting point. At [30] she fairly identified that the claimant was seeking disclosure of documents that she (the claimant) believed would or might show the fact of wrongdoing.

73. As to the passages dealing with the substantive law, the self-direction at [31] is correct as far as it goes. It might raise a concern, read in isolation, that the judge has overlooked the possibility that documents which the claimant claimed to have seen, showing wrongdoing, could be relevant to the issue of reasonable belief in wrongdoing; but any such concern is allayed by the judge picking up that very point at the start of [33]. The judge's observations in the first part of [32] about **Chesterton**

appear to me to be sound. The central point of [34] – which appears to me to be made in the last sentence – is also sound, being that where the information that is disclosed has been obtained from a third party, it matters not whether the third party believed it to be true (and, I add, *per* **Darnton**, the worker disclosing may not be in a position to form a view about that). What matters is whether the worker had the requisite reasonable belief about what the information tended to show.

74. As to the particular strands of challenge raised by the grounds of appeal, in approaching each I keep in mind that, as the judge plainly understood, she had to approach the application on the basis that relevance is a fact-sensitive matter of degree, that the material sought must at least be likely to be relevant to a live issue in the case, that relevance by itself would not be sufficient, the overriding test being necessity, and that her decision had to be informed by the overriding objective.

75. As to the first part of [35] the judge accepted that it can, potentially, be argued that if the allegations are true, that might give the employer a motivation to subject the employee to detriment. In observing that it does not follow that an employer is unlikely to subject an innocent employee to detrimental conduct, the judge was just, I think, making the point, correctly, that there is no rule of law either way. It is in that context that she then observed that evidence of actual wrongdoing is of limited relevance. I do not think she was there propounding a rule of law, or, reading this passage as a whole, that her use of the word "limited" is the smoking gun that Mr Powell takes it for.

76. More specifically, I do not think the judge erred by not considering that the disclosure requests were generally justified on the basis that, if the factual allegations of wrongdoing were true, the respondents were more likely to be motivated to subject the claimant to the detriments alleged because she had made the PDs claimed. It appears to me that the judge, at [36], correctly focussed on how these particular respondents were in fact putting their case in respect of the alleged detrimental conduct – whether it factually occurred, and, if so, why – and properly reached the conclusion that she did in the final sentence of that paragraph.

77. Did the judge err by not considering that the disclosure requests were justified in view of the positive cases advanced by the respondents in their grounds of resistance? I make the following preliminary observations. First, what the respondents asserted in their defence needs to be read in the context of the way that the claimant advanced *her* case in her pleading, to which the defence was, of course, a response. Secondly, both the pleadings, and the issues that the tribunal will in fact need to determine, and hence what disclosure was necessary, fell to be assessed in the context of the statutory framework. Third, the judge recorded, at [36], that Mr Bromige stated that the respondents' position

was that it would not be appropriate to determine whether there was in fact wrongdoing.

78. As to furlough fraud, there was one specific claimed disclosure, being that the respondent had claimed furlough grant in April 2020 in respect of certain employees who were in fact continuing to work. As fleshed out in the correspondence, this was based on the claimant's own claimed dealings with two employees (or three – see request 6) within a particular time window. The claimant also claimed that, when she raised the matter, the Head of HR confirmed that the FL1 category in which those employees fell, referred to six employees for whom furlough had been claimed, but who were continuing to work from home. The respondents disputed that the conversation had occurred. Their general denial of furlough fraud was part of their response to that particular claimed PD. In the correspondence they also referred to detailed aspects of the furlough scheme during this time window, including that the first furlough claim made by the finance department was on 24 April 2021.

79. Viewing the pleadings and correspondence as a whole, I do not think the tribunal was wrong not to regard the general denial of furlough fraud as pointing to the conclusion that it was necessary to grant requests 1 to 6 in the broad terms that they were framed. The tribunal was entitled to consider that the requests should have been focussed on the substantive claimed PD and dispute, which related to certain specific employees and a particular time window. The inclusion of that denial within the context of that substantive dispute did not mean that the tribunal was bound, applying the overriding objective, to treat it as necessary to grant the whole of these requests as framed.

80. In relation to the first claimed mis-selling disclosure, on 26 May 2020, this is said to have related to a particular sale, which the respondents agreed was discussed. The dispute was about the substance of the discussion and about what the factual position was regarding that particular sale and the steps which were or were not taken in relation to it. Once again, it is within the context of that specific dispute, that the claimant asserted that she had said that she believed that what had occurred reflected a sales trend, and the respondents denied that there was such a trend. Once again, the tribunal did not err by failing to consider that the inclusion of that denial necessarily meant that the full breadth of the mis-selling disclosure requests was justified, beyond the specific issues raised by that dispute.

81. The same general point applies in relation to the third claimed PD, on 12 June 2020. Again, it related to a particular customer transaction. The fact that the general allegation, in that context, that the mis-selling alleged in relation to that transaction was common practice in the sales department drew a general denial, did not mean that the tribunal was bound to conclude that the disclosure sought by the claimant, going beyond that which related to that particular claimed PD, was necessary.

82. Nor in my judgment, did the respondents' reliance on the claimant's job role as part of their defence, mean that the tribunal erred in its approach. The potential areas of dispute here would appear to me to be in relation to whether, when she raised certain particular matters, she was simply carrying out her job remit, or whether she was going beyond that; and, depending on the tribunal's findings, as to what the implications of the claimant merely raising something in the course of doing her job, might or might not be for whether doing so amounted in law to the making of a PD. I cannot see, however, that the respondent putting this aspect in issue points to any error by the tribunal in relation to any particular category of documents sought by these disclosure requests.

83. Finally, with regard to positive defences, I do not see how the fact that the respondents asserted positive cases as to reasons why certain of the treatment complained of had occurred, being nothing to do with the claimed PDs, meant that the tribunal erred by not taking a different approach to these particular disclosure requests than it did. Once again, this strand of the challenge on appeal seems to me to be, at heart, also predicated on the proposition that, if the wrongdoing alleged by the claimant was in fact true, the innocent explanations put forward by the respondents for certain conduct complained of would therefore be less likely to be true. But there is no rule of law to that effect, nor was the tribunal bound to treat that as necessitating that the general disclosure sought be granted.

84. Pausing here, it follows from what I have said so far, about both the law and the tribunal's approach, that I do not think the judge erred in her general approach to the relevance of the disclosure sought, to the question of whether the claimant both genuinely and reasonably believed in the alleged wrongdoing. Nor do I think that the judge erred in her general approach to its bearing on whether the claimant genuinely and reasonably believed that her claimed PDs were made in the public interest. As Mr Powell acknowledged in submissions, the focus of the challenge on appeal was principally on the wrongdoing-belief issues, not the public-interest-belief issues, as such. His reliance on **Chesterton** was as another legal source which, he contended, supported the need for the tribunal to consider "all the circumstances", including – on his submission – whether there was any wrongdoing of the type alleged, at any point whether before or after the claimed PDs occurred. I have explained in my discussion of the law, why such a broad-brush approach is not supported by the authorities.

85. I add that it does appear to me in any event that the main plank of the claimant's case that she reasonably believed her claimed PDs to be made in the public interest, is the proposition that the disclosures were of serious unlawful conduct by way of fraud on HMRC, and mis-selling, including the making of secret commissions, contrary to the regulatory regime. In other words, in this case the public interest dimension is said to derive from the inherent nature of the alleged conduct. This

reinforces my conclusion that the tribunal was not wrong not to consider that the wide-ranging disclosure sought was necessary to the resolution of this particular aspect.

86. I turn to whether the judge erred in her approach to the claimant's case that her claimed PDs were predicated on her, or colleagues of hers, having had sight of certain documents. I do not think that the judge erred by requiring the claimant to have identified individual documents, such as by date or parties, rather than by categories, and failing to recognise that she did not need to do so, and might now be unable to do so. That is not what the judge said at [33], and not, on a fair reading, what she can be taken to mean. Rather, reading that paragraph as a whole, it is a direct response to the claimant's case that at least some of her PDs had been prompted by her personally having seen documents at the time. The criticism that the judge made there is not that the claimant had failed to identify documents individually, but that she had failed to identify which of the specific disclosure requests related to documents which she had herself seen and relied upon in making her claimed PDs.

87. However, did the judge err in making *that* particular criticism? In relation to the claimed furlough fraud PD, the 2 April 2020 spreadsheet, which the claimant clearly said she had seen, was, I was told, already in the trial bundle. However, in addition, requests 5 and 6 related to emails to which the claimant was a party, and so would have seen at the time, albeit that she plainly could not have been claiming that such emails received after 30 April 2020 informed a PD made in April. I will return to these particular requests later on.

88. In relation to the claimed mis-selling PDs, while the claimant asserted in the correspondence that all of these, save for two, were based on her having personally had sight of documents, neither the correspondence, nor her application, explained which of the particular numbered disclosure requests under this heading, or sub-elements of them, were said to be supported on that basis. Certainly, I cannot see that the tribunal erred for that reason by not concluding that it was necessary to grant the generalised disclosure sought by request 7. Further, if it was the claimant's case that certain claimed PDs were informed by personal sight of documents concerning certain specific customer complaints or disputes, again the requests did not identify which they were, and the language of request 8 is, on a natural reading, general and speculative. Provision of particulars and explanations along these lines, correlating disclosure requests to claimed PDs, would not have required the claimant to be able to recall details of the individual documents which she had seen.

89. While request 11 related only to one email of which the claimant gave a description, this request appears to have moved, from the separate category of "other" in the initial document tabled on 12 July 2021, to be placed under the category of "mis-selling" in the request tabled to the tribunal

on 30 July. If this was deliberate, the claimant does not appear to have explained in her application why disclosure of this email was necessary to the claims in relation to the alleged mis-selling PDs. Further, in their reply the respondents' solicitors stated that they had searched for such an email, but found none. All of that being so, I cannot see that the tribunal was wrong not to grant request 11.

90. I turn to the assertion that the tribunal failed to take account of the fact that the claimant's case was that some of her PDs were based on information that other colleagues had provided to her, based on documents that *they* had seen. Mr Powell submitted that the judge did not engage with this point, whether at [34] or elsewhere. But it appears to me that this was never put as other than a generalised assertion that others had relied on such "materials", without any particulars at all, whether (even leaving aside the non-identification of the colleagues) as to which particular claimed PDs were based on information provided by colleagues who conveyed to her that they were drawing on documents that they had seen, or as to the nature of those documents. Once again, if it was her case that she had been given information which she understood to have been based on documents that her informants had seen, that in turn prompted one or more of her PDs, she could have been expected to have given *some* further particulars. Accordingly, I do not think the tribunal erred by failing to order disclosure on the basis of this generalised assertions that were in fact advanced in support of this aspect.

91. In light of all that I have said so far, I do not think the tribunal was wrong to take the general view that the application was unfocussed, and unjustifiably wide-ranging in a number of respects. The tribunal was entitled to take a view that the claimant could and should have presented a much more focussed application, which explained why each of the categories of disclosure sought was necessary in relation to one or more of the live issues relating to one or more of the particular claimed PDs, or otherwise relating to particular issues raised by her claims and their defence. Nor was it obviously wrong that, as framed, compliance with the requests would generate a very large number of documents and put the respondents to considerable time and cost. While many searches may be carried out electronically, the time needed to review and analyse the material generated must also be reckoned with. In general terms the tribunal was not, therefore, wrong to consider that these requests as framed, were too wide-ranging and would put the respondents to unjustified time and expense.

92. Did the judge err in having regard to the potential implications of granting the requests for the impending trial? The gravamen of this strand of the grounds was that the judge had wrongly prioritised the preservation of the scheduled trial dates over the granting of disclosure that was necessary to a fair determination of important substantive issues. But that is not what the judge did. Her remarks about the potential implications for the trial, at both [32] and [35], follow on from

remarks about the relationship, or not, of the documents sought to the central issues in the case, whether they were likely to assist in the determination of those central issues, and the proportionality of ordering disclosure on the scale sought. All of these were factors which had a bearing on whether the disclosure sought was necessary in accordance with the CPR 31 test and in light of the overriding objective, and the judge was properly entitled to include the impact on the trial in the mix.

93. Nor, it follows from all I have said, do I think that the judge wrongly failed to conclude that the fault lay at the door of the respondents for having failed to provide the disclosure sought as part of their general disclosure in compliance with the 1 April 2021 order. As I have noted, the judge correctly identified that all of the documentation was sought on the basis that it would show that wrongdoing of the kinds which the claimant claimed that her disclosures tended to show, had in fact occurred. Such an issue is not automatically in play in a PD claim. It was for the claimant to advance her specific requests and make out a reasoned case as to why the further documents sought were necessary to the fair determination of one or more specific issues thrown up by the pleadings.

94. Mr Powell submitted that, given the timing of general disclosure, the specific disclosure application could not, whenever tabled, have sensibly been considered prior to the August PH. However, the judge was entitled to take a view that the claimant could and should have produced a much more focussed and clearly-reasoned written application (as the respondents had suggested she do in their initial response to Mr Powell's first request), and that she had had sufficient time to do so.

95. That leaves the question of whether the judge nevertheless erred by refusing the disclosure requests as a whole, rather than taking them one by one, and considering whether each category of disclosure sought should have been granted, either in whole or in part.

96. As to that, first, as I have noted, despite the considerable length of the correspondence during July 2021, and the nature of the initial response from the respondents' solicitors, the claimant's application largely (though not entirely) itself consisted of generalised assertions about the disclosure sought, as a whole, and why it should be granted, rather than, itself, going through the requests paragraph by paragraph, or item by item, cross-referencing to the pleadings or draft list of issues, and explaining to which issue or issues each strand of the disclosure sought was necessary, and why. The generalised nature of the tribunal's response was, it seems to me, in large part a reflection of the way in which the application, and arguments in support of it, were presented.

97. Secondly, bearing that feature in mind, and while the judge's decision did not, itself, expressly go through the requests, item by item, I do not assume on that account that she did not give consideration to each request, and whether, in her judgment, and notwithstanding all the points that

she made, any one or more of them should be granted. On the contrary, the requests were specifically attached to her decision, and her careful reasoning, both as to the law and as to the substantive considerations informing her decision, suggest that she considered and engaged with the application and supporting arguments fully and with care. This is not, by any stretch, a decision dismissing an application in a peremptory, out of hand, or ill-considered fashion.

98. What matters ultimately is whether the judge's reasons in fact properly support her rejection of all parts of this application, in a manner that is not open to valid challenge by any of the grounds of appeal. Applying that approach, and drawing on my general conclusions so far, I have reviewed the eleven requests, and conclude as follows.

99. As to the claimed furlough PD, the key factual issues in essence, that might be said to support the disclosure requests, are whether the three employees identified by the claimant based on her own experience, were working during the period up to the end of April 2020, and whether she was told that the schedule signified that furlough grant had been claimed for them in respect of the same period. Accordingly, request 1 might have been warranted, had it been limited to (a) those three employees, and (b) any application for furlough grant in relation to any of them in respect of that period. Requests 5 and 6, which referred to emails with those three employees to which the claimant was a party, might also have been warranted, at least in so far as they related to that same period. The tribunal does not appear to have been given any explanation for why the claimant identified these requests as covering the period to 11 May rather than 30 April 2020.

100. However, a complicating factor is that much of the detail of the claimant's case in this regard came not in her amended particulars of claim, but in the July correspondence and application; and I note that this drew further detail from the respondents' solicitors in their reply to it. However, I consider that the tribunal should, rather than entirely rejecting these requests, have given further consideration, in light of the correspondence, to what was now factually agreed and where the area of factual dispute about the foregoing aspects now lay, or any further steps needed to clarify that, and to whether the making of *some* disclosure order, in some more limited version of requests 1, 5 and/or 6, was appropriate.

101. In all events, I do not think that the tribunal was wrong not to grant request 1 beyond the limited extent I have contemplated might have been potentially justified, nor requests 2, 3 or 4, nor that it was incumbent upon the judge to consider granting any of those requests in some wholly rewritten form. If, to the extent that there was a dispute as to whether the three named employees did work in the period to the end of April, or furlough grant was claimed in respect of them and that

period, specific disclosure were ordered directed to those issues, I cannot see that the tribunal would then have been bound to regard it as necessary *additionally* to order disclosure relating to the other F1 employees, or otherwise covered by requests 1 to 4, in order fairly to resolve the disputed issue about what the claimant said she was told was the meaning of F1, or any other issue.

102. Mr Powell made the point that requests 7 and 8 relate to only six employees, and requests 9 and 10 only to one. But request 7 is entirely generalised and covers a period up to 6 October 2020. The tribunal was fully entitled to regard it as far too broad, speculative, and a fishing expedition. As for requests 8, 9 and 10, as I have indicated, I can see that there *might* have been a basis for some different request in relation to documents, if not already disclosed, relating to the particular individual customer transactions said to have been the subject of the PDs on 26 May, 12 June and 31 July 2020, and, possibly, any customer complaint or dispute documents, that the claimant might have claimed herself to have seen or been told about by colleagues. But, if some part of these requests was intended to embrace such material, they should have been formulated and explained accordingly. Neither the requests nor the application did so, and the language of request 8, referring throughout to "any" customer claims, was, on its face, speculative. The tribunal was not obliged to seek further explanations or to attempt to rewrite these requests. It was entitled to reject them as they stood.

103. For reasons I have given earlier, the tribunal properly rejected request 11.

Outcome

104. I conclude that the tribunal did not err by rejecting requests 2, 3, 4, 7, 8, 9, 10 or 11, and I will dismiss this appeal in relation to them. In respect of request 1, the tribunal ought to have considered whether, possibly subject to some further clarification of the area of factual dispute, it should be partially granted in so far as it related David Watson, Paul Baxter and Taranvir Chatha, and the period up to 30 April 2020, and in respect of requests 5 and 6 it ought to have considered whether these should, subject to such clarification, be granted in respect of the period covered up to 30 April 2020. I will allow the appeal to that extent only. Following a request made when this decision was circulated in draft under embargo, and by consent, I have allowed counsel further time to make submissions as to the precise terms of the further order I should make by way of disposal of this part of the appeal.

Annex 1
Extract from the draft list of issues

10. Did the Claimant disclose information, which she believed, tended to show wrongdoing listed in s43B(1)(a-f) ERA 1996 as follows:-
…

d. During April 2020, the Claimant informed and disclosed information orally by telephone to the First Respondent's Head of HR, Chris Barnes that the First Respondent was fraudulently claiming furlough grants from HMRC's Coronavirus Job Retention Scheme for employees who were continuing to work for it from home; and that a criminal offence had or was being committed by the First Respondent or was likely to be committed by the First Respondent. Paragraph 22 and Further Particulars in Table Form.

e. On 26 May 2020, the Claimant informed and disclosed information orally to the Second Respondent that i) one of the First Respondent's employees had made fraudulent representations to a customer in order to induce the customer to enter into an energy contract, as a result of which the First Respondent was paid £104,890.27; and / or ii) that making such fraudulent misrepresentations was common practice among the sales department staff of the First Respondent; and that a criminal offence had or was being committed by the First Respondent or was likely to be committed by the First Respondent and / or that the First Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 23 and Further Particulars in Table Form.

f. On 12 June 2020, the Claimant informed and disclosed information orally to the Second Respondent that i) one of the First Respondent's employees had made deliberately misleading verbal representations to a customer in order to induce the customer to entering an energy contract, as a result of which the First Respondent was paid £4,971 and / or ii) that making such misleading representations and such mis-selling was common practice among the sales department staff of the First Respondent; and that the First Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 24 and Further Particulars in Table Form.

…

j. On 21 July 2020, the Claimant informed and disclosed information orally in a WhatsApp Video call to the First Respondent's Head of HR, Chris Barnes, that compliance was not being adhered to and as a result the Respondent was breaching the fiduciary duties it owed customers; and that the First Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 28 and Further Particulars in Table Form.

k. On 31 July 2020, the Claimant informed and disclosed information by email to the First Respondent's Head of HR, Chris Barnes, Head of Compliance, Adam Moslemi and to its directors that one of the First Respondent's employees had made deliberately misleading representations to a customer in order to induce the customer to enter into an energy contract; and that the First

Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 29 and Further Particulars in Table Form.

l. On 3 August 2020, the Claimant informed and disclosed information by email to the Second Respondent that the First Respondent's Head of Sale, Carl Thomas was still allowing his team to breach fiduciary duties owed to customers in order to make a secret and undisclosed commission; and that the First Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 30 and Further Particulars in Table Form.

m. On 11 August 2020, the Claimant informed and disclosed information by email to the First Respondent's Head of HR, Chris Barnes that the First Respondent's employees were mis-selling energy contracts and asked for it to be dealt with at the First Respondent's Board meeting; and that the First Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 30 and Further Particulars in Table Form.

n. On 13 August 2020, the Claimant informed and disclosed information by email to the First Respondent's Head of HR, Chris Barnes that i) the First Respondent's employees were still being allowed to mis-sell energy contracts, despite the concerns she had raised and ii) the First Respondent was deliberately failing to disclose evidence which proved the allegation of mis-selling; and that the First Respondent was failing, is failing and / or was likely to fail to comply with the legal obligations it was under pursuant to the contracts it had with customers, the duties it owed in tort to the customers and / or the obligations imposed by the Business Protection from Misleading Marketing Regulations 2008 and / or Ofgem's TPI Code of Practice. Paragraph 30 and Further Particulars in Table Form.

11. Did the Claimant hold a reasonable belief that the disclosure was in the public interest and that information she disclosed tended to show one the matters in Paragraph 10 above? For these purposes did the Claimant reasonably believe that her disclosures were in public interest, as opposed to or as well as simply conveying information and/or advising the First Respondent in the course of her employment?

Annex 2
Extract from claimant's application for disclosure

Furlough

The relevant employees are David Watson, David Wilson, David Swinhoe, Jack Hunter, Paul Baxter and Taranvir Chatha. In respect of each individual employee the Respondent should provide:

1. The application for a furlough grant under the Coronavirus Job Retention Scheme ("CJRS");

2. The agreement between the Respondent and the employee to being placed on furlough;

3. Documents concerning the payments / grants received by the Respondent under the CJRS in relation to the employee;

4. Documents concerning work undertaken by the employee in the period 23 March 2020 to 14 August 2020 (or the period of their respective alleged furlough). Work undertaken should include:
a. Emails;
b. Telephone call logs and records, including mobile telephone
call logs and records;
c. Letters;
d. Microsoft Teams meeting notes or records;
e. Outlook Diary Entries;
f. Electronic messages;
g. Notes / memorandum;
h. Advice;
i. Records of any monthly bonus payments;
j. Work Server or Cloud access.

5. Emails sent to, from or between:

a. Ami Dodd and David Watson
b. Ami Dodd and Paul Baxter
c. Ami Dodd and Taranvir Chatha

between 23 March 2020 and 11 May 2020.

6. Logs and records of the Microsoft Teams calls and conversations between:

a. Ami Dodd and David Watson
b. Ami Dodd and Paul Baxter
c. Ami Dodd and Taranvir Chatha

between March 2020 and 1 1 May 2020. There were several occasions in that period in which I had conversations with those employees whilst they were working. In particular, I recall requesting help and assistance from Paul Baxter, IT technician, on 25 April 2020 in order to join the senior management board meeting remotely. I recall liaising with David Watson on and before 30 April 2020 in relation to the terms and conditions of a recruitment agency named Pareda.

Mis-Selling/Misrepresentation Commission/Compliance

The relevant employees are Simon Moslemi, Chris Sloanes, Carl Thomas, Laura Charlton, Nick Taitt and Richard Wright.

7. In respect of each individual employee the Respondent should provide all internal and external correspondence, including emails and electronic messages, relating to the:

a. disclosure of commission;
b. implementation of terms and conditions;
c. implementation of consolidation calls;
d. implementation of fraud/anti-bribery training;
e. Ofgem regulation.

between 6 January 2020 and 6 October 2020.

8. Documents relating to the business, work and services provided to or in respect of VBites and/or Plant Based Valley and Kaltire, in particular:

a. Correspondence, including emails and letters to, from or between UKDBS and any representative of VBites and/or Plant Based Valley and Kaltire concerning any claims or threatened claims and any responses to such claims or threatened claims;
b. Documents relating to the commission and amount of commission and fees of UKDBS;
c. Documents concerning any settlement of any claims;
d. Pleadings in any claims.

9. Documents, including emails and electronic messages, between Simon Moslemi and the Managing Director of Utility Alliance and/or other documents regarding Stranton Social Club v Utility Alliance.

10. Documents (including electronic messages) regarding the disclosure of commission and/or Ofgem regulations between:

a. Simon Moslemi and the Managing Director of Utility Alliance
b. Simon Moslemi and the Managing Director of Northern Gas and Power
c. Simon Moslemi and the Managing Director of Great Annual Savings

11. Email from Tracy Cunningham to Rob McCluskey in February 2020 in which field sales employees are advised to pretend that they are from the chambers of commerce and to call suppliers and pretend to be the customer when entering into verbal contracts, and any documents relating to that, including reviews left online.