EMPLOYMENT TRIBUNALS

Claimant: Mr M Carr

Respondent: Bloomberg L.P.

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (by video (CVP))

On: **28 April 2021**

Before: Employment Judge Adkin (sitting alone)

Appearances

For the claimant: in person
For the respondent: Mr J Laddie QC, Counsel

JUDGMENT

(1) The Claimant's case that the following alleged disclosures amounted to "qualifying disclosures" within the meaning of section 43B of the Employment Rights Act 1996 ("ERA") have no reasonable prospect of success and are struck out pursuant to rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules"):

(i) Alleged protected disclosure (number **2**) dated 18 January 2011.

(ii) Alleged protected disclosure (number **3**) contained in an email sent by the Claimant on 20 January 2017.

(2) The Respondent's application to strike out or alternatively make a deposit order in respect of the following is refused in respect of:

(i) Alleged protected disclosure (number **1**) dated 20 May 2018.

(ii) Alleged disclosures (number **5**) made on 19 June, 3 July and 9 July 2019.

(iii) Alleged disclosure (number **6**) made on 29 August 2019.

The numbering above refers to the numbering used in the undated table produced by the Claimant's representatives containing further particulars.

WRITTEN REASONS

The Hearing

(3) Today's hearing was a preliminary hearing held by video (CVP).

(4) The Respondent pursued applications for strike out or alternatively deposit order confined to the alleged protected disclosures relied upon by the Claimant rather than the alleged detriments or dismissal.

Application for reconsideration

(5) Mr Carr requested that I reserve rather than give an oral judgment in order that I could read his application for a reconsideration of a decision made on 23 October 2020 of a decision of Employment Judge Hodgson made dismissing the Claimant's application for interim relief case number 2203206/2020. I understand that was, at least in part, because Mr Laddie was inviting me to consider Judge Hodgson's remarks about the low likelihood of one of the alleged protected disclosure satisfying the statutory test in support of the Respondent's position that those prospects were very low.

(6) I have read the application for reconsideration as well as Judge Hodgson's decision on that application, which has now been sent to the parties.

(7) I am making my own assessment of prospects in this case. The threshold tests that I am considering for strike out and deposit order which are set out below are completely different to the "likely" (clarified in the case law as being a pretty good chance of success) test which applies in the context of an application for interim relief. That test of likelihood as defined relates to protected disclosures being found to be the sole or principal reason for a dismissal. By contrast the exercise I am conducting relates to the prospect of specific protected disclosures satisfying the statutory definition of qualifying protected disclosures.

(8) One point of similarity between the exercise that I am carrying out and that carried out by Judge Hodgson is that both assessment of prospects are, somewhat unusually for the Employment Tribunal, being conducted in the absence of live evidence being heard, based on the case as it appears at a preliminary stage.

(9) Due to the differences in the nature of the exercises being carried out, I have not found Employment Judge's Hodgson conclusions to be of particular assistance to me. He was carrying out a different exercise.

(10) What has been of some use in his decision is his analysis of one of the protected disclosures, namely number 5, which he describes as "the Navex reports of 9 June, 19 June and 9 July 2019". The reason that this has been of

some assistance is that Judge Hodgson had the benefit of hearing submissions from counsel then acting for the Claimant at that hearing, some of which is reflected in his reasoning at paragraphs 70 – 83. I have considered this insofar as this helps me to understand the basis of the claim being brought.

Law

Strike out

(11) Rule 37(1)(a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") provides that a claim or a part of a claim may be struck out if there is *no reasonable prospect of success*. Appellate guidance suggests that strike out is a draconian step and Tribunals should be slow to strike out a claim brought by a litigant in person on this basis, particularly if the case has been badly pleaded or brought by someone whose first language is not English. Claims should ordinarily not be struck out if the factual basis is in dispute.

(12) In *Anyanwu v South Bank Student Union* [2001] ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

(13) In *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, CA, the Court of Appeal held that the same or a similar approach should generally inform protected disclosure ('whistleblowing') cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. (IDS brief)

(14) Mr Laddie drew a distinction in his submissions, which I accept exists, between striking out the whole claim and considering the strike out of an individual protected disclosure.

(15) Mr Laddie drew my attention to the attention of Linden J in *Twist DX Limited v Dr Niall Armes* UKEAT/0030/20/JOJ (V). In that case it was held to be wrong in law for an Employment Tribunal judge to fail to identify the actual information said to have been disclosed and consider whether the alleged protected disclosures in a "whistleblowing" case satisfied the statutory definition as part of consideration of a strike out application (see paragraphs 52 and 108). It was necessary to analyse whether disclosures had sufficient factual content or specificity to be capable of satisfying section 43B(1).

(16) Linden J carried out the strike out exercise himself, not confined to the pleaded case but also taking into account written evidence and other explanations. The judge struck out the majority of the alleged protected disclosures on appeal, but subject to the proviso that Dr Armes had the opportunity to apply to amend the claim before this took effect.

(17) The following summary was given in *Twist* case:

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

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

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

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

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

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

f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if

> so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see *Soo Kim v Yong* [2011] EWHC 1781.
>
> g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in *Hassan v Tesco Stores Limited* UKEAT/0098/16 and *Mbuisa v Cygnet Healthcare Limited* UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

Protected disclosures

(18) The Employment Rights Act 1996 provides:

> 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—
>
> …
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …
>
> (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.

(19) It is irrelevant whether the person to whom the disclosure is made is already aware of it.

(20) Specific guidance on alleged protected disclosures falling under section 43(1)(b) was provided by the EAT in *Blackbay Ventures Ltd (t/a Chemistree) v Gahir* 2014 ICR 747, EAT:

> 'Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.'

(21) In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy,

given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

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

Approach to the application

(22) In order for his claim to succeed, the Claimant would need to establish the following:

- (i) a. he made a disclosure of information,
- (ii) b. which he believed tended to show one of the species of wrongdoing in ERA, s.43B(1),
- (iii) c. which belief was reasonable,
- (iv) d. and which he believed was in the public interest,
- (v) e. which belief was reasonable,
- (vi) f. and which was made to his employer or other relevant person in accordance with ERA, s.43C-43H.

(23) I accepted Mr Laddie's submission that elements b, d and f above should be assumed in the Claimant's favour, but that a, c and e were capable of analysis at a preliminary stage, taking the Claimant's case at its highest.

(24) Mr Laddie submitted that the protected disclosures failed to satisfy these requirements. I have dealt with each protected disclosure below. He also posited a further requirement which he called "novelty" (a label which he acknowledged did not perfectly capture the point). As I understood it Mr Laddie's argument was that could not be reasonably thought that something was being raised in the public interest if it was so well known or very widely believed such that it was no more than a statement of the obvious. While it does not matter whether or not the recipient of a disclosure is already aware of the information contained within it, I see the force of the novelty submission as an aspect to consider when deciding might be thought to be reasonably in the public interest, although I would not elevate this to an additional requirement for a claim to succeed. Following *Frisbee* mentioned above, I do not consider that a strike out application is really the place to develop what is potentially a new point of law.

(25) Protected disclosures are contained within the Claimant's undated Further and Better Particulars document. This document was prepared by the Claimant at a time when he had legal representation and specifically, I am told, counsel with expertise in employment law.

(26) Additionally, I have had the opportunity in respect of alleged protected disclosures number 1 – 6 of reading the source emails, which are alleged to contain protected disclosures. These are in the Preliminary Hearing bundle.

Protected disclosure no. 1

(27) This was made by the Claimant to Lucy Mills HR on 20 May 2018 in an email entitled "Re: Appeal". The Further Particulars document dated contains the following:

> "As the climate crumbles, I was expressly told by Lars (Paulsson, team leader at the time) to write fewer carbon stories, but there was no clear direction about what I should otherwise do.
>
> The media companies that understand the wastefulness of spending $200.01 to cut emissions via offshore windfarms now when today that some would probably cut 10 times via a-to-gas-switch… Will become rich.
>
> Our coverage is too focused on fossil fuels without the important climate context and I believe we should be writing more about climate protection when pretty much all the governments and our clients are asking for carbon pricing… Publicly anyway."

(28) The context is an email about an appeal from a written warning dated 13 May 2016 given for performance concerns.

(29) The second two paragraphs of the extract above seem to me to be simply statements of the Claimant's opinion, and do not contain disclosure of information that would be likely to be found to be tending to show specific relevant failures in his reasonable belief.

(30) As to the first paragraph, I consider the first four words are in reality a rhetorical flourish, albeit one based on the Claimant's genuine concern about these matters. If there is "information" being disclosed here it is that Lars Paulsson told the Claimant to write fewer carbon stories.

(31) As to the claim under **section 43(1)(f)**, it might suggest that in the reasonable belief of the Claimant information tending to show that the environment was being damaged was being deliberately concealed. Considering the claim at its highest and taking account of the background context which the Claimant might conceivably be able to establish in evidence, this might succeed as an argument. I cannot say that there is no reasonable prospect of this succeeding, and accordingly will not strike it out. Neither can I say that there is little reasonable prospect of this succeeding. I will not make a deposit order. <u>This allegation can proceed</u>.

(32) As to the claim under **section 43(1)(e)**, i.e. that in the reasonable belief of the Claimant information tending to show that the environment was being damaged, I have found it harder to identify information tending to show this. Considering the claim at its highest and taking account of the background context which the Claimant might conceivably be able to establish in evidence, this might succeed as an argument, but I should say that prospects are poorer than for section 43(1)(f). I cannot say that there is no reasonable prospect of this succeeding, and accordingly will not strike it out. Neither can I say that there is little

reasonable prospect of this succeeding. I will not make a deposit order. This allegation can proceed.

Protected disclosure 2

(33) This alleged protected disclosure said to fall under sub-sections 43(1)(e) & (f) was contained in an email dated 18 January 2017 to John Miklethwait, the Editor-in-Chief with the heading "John – how better climate reporting will lift profits, cut risk":

> "the Paris climate deal effectively set a global carbon budget for the world because of its 2 degree C target. That emissions means that the world effectively already has a global carbon market.
>
> When companies, such as the big miners in Australia, proposed new fossil-fuel projects, we at Bloomberg News should insist reporters consider including the impact of those plans on the global carbon budget. It's like putting a warning label on cigarette packets. Unless we do this, will be open to criticism and reputational risk in the future because the information investors relied upon when spending their money omitted the relevant context. However woolly, this climate agreement now exists. We shouldn't ignore it…
>
> We need to cover the climate talks more comprehensively to help focus politicians' and envoys' minds. When progress isn't made, we need to better report why. Otherwise, these talks will continue to struggle."

(34) The context is an editorial "pitch" to place greater emphasis on environmental matters and a suggestion to highlight the environmental impact of commercial activity that was being covered. It also contains the following passage:

> "I argue we need to look further forward.
>
> I'm blowing this whistle because I reckon we are at risk of missing out on scores of millions of dollars in new revenue. We can extend our lead vs our rivals. That opportunity cost is much more difficult to measure than web hits, of course missing out is still messing up. History will show it."

(35) I have read the whole document to understand the context and the Claimant's written submissions at paragraph 93 as an aid to in understanding. In the further particulars table it is stated "the information tended to show that if Bloomberg failed to cover the claimant talked comprehensively there was a risk that climate talks would fail leading to further environmental damage".

(36) I have also considered the content of an application to amend his claim made by the Claimant by email on 24 May 2021. This application has not been decided, but I decided that in fairness to the Claimant I should read this amended claim in case it enabled me to see a basis for the claim, adopting the broad view of understanding a claim suggested by Linden J in the *Twist* case.

(37) Notwithstanding the reference to blowing a whistle, this is plainly a statement of the Claimant's opinion and a suggestion for an editorial approach.

(38) It is plain from the wording that the Claimant was expressing an opinion that the Paris climate agreement created a global carbon market. That is his analysis of a political situation and the economic consequences of it.

(39) The suggestion about putting warning labels on reports on fossil fuels is his initiative. It is an idea rather than a disclosure of information. The suggestion that failing to do this would leave the Respondent open to criticism, is in my view likely to be found to be an opinion, rather than the disclosure of information.

(40) The Claimant's suggestion that there should be more comprehensive coverage of climate talks again is simply a statement of opinion.

(41) This is not a situation as described in appellate authorities where key facts are in dispute, as might be the case where there is a dispute over causation of detriment or dismissal for example. The exact wording relied upon by the Claimant was contained in an email and was sent.

(42) I cannot identify particular any *specific* factual content with "information" about damage to the environment or the fact that this was being deliberately concealed.

(43) I consider there is no reasonable prospect of this alleged disclosure amounting to a qualifying disclosure in respect of either relevant failure (section 43(1)(e) or (f)).

(44) I have considered further whether I should exercise the discretion to strike out this part of the claim. I have considered whether I should give the Claimant a further opportunity to apply to amend this part of the claim. Given however that I have seen the claim form, the further particulars of this claim as set out by employment counsel, the whole of the original email containing the alleged disclosure and seen the recent proposed amended claim, I simply do not see how the Claimant is going to present this allegation in a way that satisfies section 43B. I do not see any other good reason to cause the Tribunal to spend time hearing evidence on a point which has no reasonable prospect of succeeding. This does not extinguish the Claimant's right to bring a protected disclosure claim, given that other protected disclosures may proceed to trial.

(45) Accordingly it is **struck out**.

Protected disclosure 3

(46) This was an email sent by the Claimant on 20 January 2017 to senior newsroom executives, namely Heather Harris, Stuart Wallace, Will Kennedy, Lars Paulsson and Andy Reierson under the email title "Re: Best ideas for market coverage". This is substantially similar to protected disclosure 2, but with some additional material relied upon:

> "the Paris climate deal effectively set a global carbon budget for the world because of its 2 degree C target. That emissions means that the world effectively already has a global carbon market.

> When companies, such as the big miners in Australia, proposed new fossil-fuel projects, we at Bloomberg News should insist reporters consider including the impact of those plans on the global carbon budget. It's like putting a warning label on cigarette packets. Unless we do this, will be open to criticism and reputational risk in the future because the information investors relied upon when spending their money omitted the relevant context. However woolly, this climate agreement now exists. We shouldn't ignore it…
>
> We need to cover the climate talks more comprehensively to help focus politicians' and envoys' minds. When progress isn't made, we need to better report why. Otherwise, these talks will continue to struggle.
>
> BNEF is far from the entire solution to our climate coverage. BNEF isn't as enmeshed in real-world markets as we are. Are we giving enough information to terminal and BNEF subscribers and making them fully aware of the ground shifting beneath them?
>
> When we write about countries' energy policy strategies, we should better include analysis about the direct carbon prices."

(47) I have read the whole document to understand the context and the written submission at paragraph 94 of the Claimant's written submissions. I have considered the content of the further particulars table "the information also tended to show that Bloomberg's newsroom practices and editorial direction risked damaging the environment because they were favouring fossil-fuel news and creating environmental damage. Clean energy solutions were not given a fair airing."

(48) Much of the content of this disclosure contains identical wording as alleged protected disclosure 2. The addition, regarding BNEF simply contains questions and suggestions about the Respondent's offering to its readership. In my assessment this adds nothing to the likelihood of it amounting to a qualifying disclosure.

(49) Again I cannot identify particular any *specific* factual content with "information" about a relevant failure.

(50) For the same reasons given above in respect of alleged protected disclosure 2, I consider that there is no reasonable prospect of this amounting to a qualifying disclosure within the meaning of section 43B(1).

(51) The same considerations as to the exercise of my discretion apply as for protected disclosure 2, set out above. For the same reasons I do not consider that there is any point in giving the Claimant an opportunity to provide a fourth version (i.e. beyond the claim, the further particulars, the recent amendment).

(52) Accordingly it is **struck out**.

Protected disclosure 4

(53) This is an email dated 13 March 2019 sent to Jignesh Ramji and Ken Cooper, who are characterised by the Claimant as Senior HR executives. The title of the email is "Call for office politics assistance". The email goes on for five pages under a variety of subject headings. The Claimant relies upon the following extracts:

> "For years I've been questioning whether Bloomberg News is to focus on the short-term status quo re-energy news. I realise BloombergNEF might have been too long-term focused in recent years, but now it's lifting its game and providing more analysis our customers can trade on in the frame of the next few months. I think someone from outside our management structure needs to assess whether we are now pivoting too much to the short-term – why did we shift away from carbon markets just as they came back? Are we moving away from energy market structure stories just as the market structure becomes crucial? Why are we setting limits on market structure stories when we note the existing market structure is not working well for anyone (except the status quo may be"?
>
> Why are we focused so much on the RESISTANCE to climate protection rather than what's happening with the new climate measures? Are biases/unconscious biases damaging our service?
>
> I think someone outside our management structure needs to check whether my managers have and against certain stories and themes; do we have biases against certain countries/for certain countries…?
>
> This issue about UN climate coverage is important because it deals with our impartiality/neutrality on these topics – HR may need to be MORE involved to make sure there are no unconscious biases or worse… And partly given Mike Bloomberg's roles as well as Bloomberg Philanthropies activities
>
> I get criticised for talking about this too much but I my manager now bringing up a UN story as an example in my 2018 evaluation of how my reporting gets bogged down (note I'm still on topww every two days despite apparently getting bogged down, filing almost daily wraps, undertaking weekly surveys, flashing headlines, handling gas outages). I think it's my management that gets bogged down. We were the only news organisation to definitively show why a key component of the climate talks stalled [link].
>
> My team leader now says that wasn't worth the effort! The UN level is an important element to focus on when you have multinational banks and companies holding sway over finance and spending and global funds managers struggling to solve a global problem. Energy politics are NOT only about national policies/govts.
>
> The stress in relation to UN climate News coverage has been evident in months/years. I do realise climate action is shifting toward markets and implementation from UN diplomacy after this year, so these issues will abate to some extent naturally. I will include as an

> appendix some issues I set out back in May last year. These concerns were discussed at the time (and I appreciate the time taken by my skipper manager), but not really acted on to my satisfaction. Appendix 3. Happy to provide more detail, too.
>
> I recognise that some of the words in my evaluation were helpful and there's still plenty of scope for improvement on my part, even after almost 20 years with the company. But I think "steady at the low end of what's expected" would shock many of our customers trading online news almost daily. Is it appropriate that my managers declined to reassess my 2018 evaluation after hearing my arguments? Do they have a bias against me, unconscious or otherwise? Are they may be threatened?
>
> Our company policies are to refresh team management, boost diversity and provide career progression. How is that happening in team structure?

(54) The final substantive paragraph of the email reads as follows:

> "I'm not meaning to downplay the high quality of our news coverage. I'm writing this email because I think it's the right thing to do -- because making my arguments and blowing the whistle mainly within my team structure as I have the past few years might not have been good enough. And I'm pretty sure it still hasn't yielded the best outcome for our customers...Im wanting fresh perspective on it. There are so many opportunity costs

(55) The context is a request for assistance from HR. The Claimant is concerned about a performance assessment "steady at the low end of what expected".

(56) The Further Particulars table contains the following "the information also tended to show specifically that the Respondent was deliberately concealing the extent of environmental damage by focusing on short-term fossil fuel stories at the expense of stories dealing with the carbon budget."

(57) Paragraph 95 of the Claimant's written submissions reiterates that his critique of the Respondent was that they focused on the short-term in their analysis of energy markets.

(58) The passage relied upon contains a series of opinions and a few questions. I have struggled to identify specific information that is being disclosed which tends to show the relevant failures alleged (section 43(1)(e) or (f)), notwithstanding the inclusion of the phrase "blowing the whistle".

(59) There is a reference to unconscious bias. The Respondent argues that if the reason for concealment is unconscious bias, this cannot be deliberate within the terms of section 43(1)(f). Mr Carr during submissions acknowledged the force in this argument.

(60) While I have significant doubts about whether this alleged protected disclosure does satisfy the statutory requirement, there seems to be a clear thread in this passage that the Claimant's reporting has been restricted with regard to

environmental damage specifically the release of carbon through the use of fossil fuels. There is a specific reference to the content of the Claimant's 2018 review. That reference to him being "bogged down" might be seen as a reference to him focusing on environmental damage which his manager was trying to dissuade him. There may be, when viewed properly in context, enough to satisfy the statute under **section 43B(1)(f)**, although I think this is somewhat doubtful. Given these reasons I do not find that there is no reasonable prospect of this succeeding.

(61) I am even more doubtful that this contains any qualifying disclosure falling under **section 43B(1)(e)**. For two reasons however I will not make a strike out order in respect of this argument. First, the sheer length of it and the number of matters to which refers in my mind raises the possibility that some background or context might give it some meaning which brings it within section 43B(1)(e). Secondly, the Tribunal will in any event hearing evidence of this disclosure and the causation alleged by the Claimant by reference to section 43B(1)(f). It may be that the two alleged failures are intertwined. In that context I cannot see that arguments about section 43B(1)(e) will significantly add much other than a few questions in cross-examination and some legal argument.

Protected disclosure 5

(62) This relates to a series of communications dated 19 June, 3 July and 9 July 2019 which have been submitted by an HR "hotline". These have been described as Navex reports. The Claimant relies upon the following:

> "I'd like to highlight possible problems in the culture, including behaviour by managers that potentially contradicts company policies, including rules that prevent retaliatory conduct.
>
> Behaviour of some managers that need to be investigated:
>
> • **Culture of retribution; I've attempted to do the right thing and point out flaws in our news sense and focus to higher-up managers**
>
> • **After doing so I received unfair performance evaluations that downplay key metrics.** In full-up meetings with managers I find managers evasive and I'm willing to engage properly; address key issues (they are helpful to some extent)
>
> • needs to be looked into whether there is a culture of bad news story management that's retaliatory… Potentially designed to frustrate reporters and lower the work satisfaction, potentially even prod them to move teams or resign
>
> • Yes man culture: people who speak out are potentially hounded to dissuade them from speaking out
>
> 19 June:

Big picture is I've been blowing the whistle on Bloomberg's failure to tackle the climate change story properly for years. It needs to be investigated whether my higher ups don't like it and are continuing to retaliate against me. Last week, I challenged a senior manager about the inadequate quality of our climate coverage. A few hours later a group email was sent by Reed to our team about a new team member, it will be perhaps be focusing on green issues. This is a good thing. That I was never asked if I'd like to do that job. I'd like someone completely neutral to look into how clever this communication was, and whether it of a retaliatory pattern. It might be incompetence, to, which perhaps I put up with for two long.

June 19:

The possible retaliatory behaviour I'm experiencing might be related to the fact that I'm pushing my managers to report the climate action story in a better way… And the retaliatory behaviour follows my assertion to senior managers that the Financial Times seems to have overtaken us on this front and is doing a better job than us.

I've spoken to a few people about my situation and it seems that instead of management and HR may be attempting to BEEN THE STORY to focus on My Performance.

Months ago, my double skipper manager said he may replace my team leader, yet it has not happened. Meantime, the retaliatory behaviour toward me seems to be ramping up. Is it too much to ask for the retaliatory behaviour to stop and high-quality management installed?

19 June continued:

– Improved coverage of the UN climate talks (or is this difficult given Mike Bloomberg's roles in helping to replace US funding for the UNFCCC?). Climate protection will only work if it global. It puzzles me that we are not describing the process better for our readers. Every pension fund in the world is grappling with the energy transition and is wanting to know how UN rules and guidelines might shape future national policy for all nations. It's not reader numbers that are important here. It's quality of readers. I.e. if one hundred of our pension fund customers want a story, surely its worth doing even if it only gets 100 hits.

– We need to do more market structured stories because it is the structure of energy markets (and others) that will determine how investors make money/lose money during the climate transition over time. I'm a bit shocked that my managers still argue against this. – Improved coverage of banking, insurance, pension funds, Prudential regs and finance and their role in enabling the climate crisis… And potentially their role in enhancing the energy shift. (Maybe Mike Bloomberg's roles in the Targets Force on Climate-related Financial

Disclosures is also making this difficult. If so, why is this not being more openly discussed and addressed within Bloomberg News?) Senior Executive Editor John Fraher says he has been looking into expanding the finance team to include climate – he's been doing this for many months.

I've already pushed our oil team to include the climate frame in their stories. While I've had some success, the retaliatory behaviour seems to continue/get worse. I thought this sort of behaviour from a senior reporter would be rewarded, but it appears to me that it's punished. This is despite the fact that we very consistently get told to "do the right thing."

9 July:

It's against Bloomberg' News Journalistic Code of Conduct policy to cause Bloomberg to disseminate news for the sole purpose of affecting securities prices.

It needs to be investigated whether certain managers (maybe not those listed above) are doing this to boost the value of oil companies and other fossil fuel companies, against the interests of customers that do not benefit from fossil fuel money/profits and against the interests of the company founder's philanthropic efforts.

It is also against the code to campaign on behalf of a particular issue in a way that could give rise to the appearance of partiality.

It needs to be investigated whether Bloomberg managers have campaign for fossil fuels and delayed climate action even though they knew the world struck a deal in 2015 to limit greenhouse gas emissions. It needs to be investigated whether those who spoke out against the apparent campaign and its potential harm to customers (e.g. pension funds) been harassed and retaliated against.

Also it needs to be investigated whether – instead of rationally listening and responding to fair suggestions and criticisms – the managers sought to distract from their failings by inventing performance problems in those calling out their bad behaviour.

July 9 on some of the **retaliation** against the Claimant:

Bad 2018 evaluation after I went to senior management with concerns about the Financial Times beating us on the climate story. Please read my evaluation to see how much nonsense is contained in it. Where is the mention of my search in the exclusives and to pww play… Helped by some very kind and talented team members to be sure?

Please read emails sent to me by John Fraher, Will Kennedy … And not just the recent ones… Check out the ones from more than a year ago pertaining to climate talks in Bonn (emails that apparently had the magic quality of coming back after disappearing)

> Managers turn other managers and reporters against reporters they don't like
>
> Stories can be edited with a pro-US bias?
>
> Do managers get work colleagues to send coded messages to reporters down the pub? Do managers seek to entrap reporters by getting contacts to make unethical requests?
>
> I write these words with some regret, because it underpins my inability to address this stuff better directly with management. I really do just want to do the right thing. I hope Bloomberg does too, but I'm beginning to doubt it.
>
> [emphasis added]

(63) Much of this alleged protected disclosure is a combination of statement of opinion and questions, rather than containing disclosures of information tending to show relevant failures.

(64) There is clear allegation of retribution as a result of the emphasis in the Claimant's reporting on coverage of climate change, i.e. that the environment is being damaged. He specifically references his 2018 review. It seems to be that this allegation potentially engages sections 43B(1)(b) and (f).

(65) Starting with **section 43B(1)(b)**, I acknowledge the Respondent's point that if this related to the Claimant's treatment by the Respondent, this is personal to him and not in the public interest. There is however a comparatively low threshold to establish reasonably in public interest set out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979. In that decision Underhill LJ did not rule out the possibility that even a disclosure of a breach of a particular worker's contract could be in the public interest. The Claimant plainly sees himself as a campaigner for environmental coverage. Any attempt to silence or disadvantage him as a result might be reasonably believed by the Claimant to be in the public interest.

(66) There is a continuation of the thread in this passage that the Claimant's reporting has been restricted with regard to environmental damage. There may be, when viewed properly in context, enough to satisfy the statute under **section 43B(1)(f)**.

(67) I am doubtful that this contains any qualifying disclosure falling under **section 43B(1)(e)**. For two reasons I have made no order in respect of this argument. First, the sheer length of it and the number of matters to which refers in my mind raises the possibility that some background or context might give it some meaning which brings it within section 43B(1)(e). Secondly, the Tribunal will in any event hearing evidence of this disclosure and the causation alleged by the Claimant. It may be that the two alleged failures are intertwined. In that context I cannot see that arguments about section 43B(1)(e) will significantly add much other than a few questions in cross-examination and some legal argument.

(68) **I make no order in respect of this alleged qualifying disclosure under section 43B(1)(b), (e) & (f), which may continue to a final hearing**.

Protected disclosure 6

(69) This relates to an email dated 29 August 2019 entitled "re outcome of "grievance" sent to two people in HR and a grievance investigator. There seems to be a similar theme to protected disclosure 5, and there are similar considerations from my assessment of prospects. The Claimant relies on the following:

> "**Did you investigate the motive for "verbal warning" I got for insubordination – July 23? Who was behind that? Was it retaliatory? It happened after I was denied whistleblower protection**"
>
> "the better stories I write the more retaliatory my management seems to get"
>
> "Even though I submitted information via Navex, my concerns don't just amount to concerns about ethics breaches. I was seeking an investigation that would look into whether the management behaviour is against customer interests. Or whether you found examples of management doing the wrong thing instead of the right thing. Did you look at whether some of the behaviour seems to go against customer interests… Or big-groups-of customers interests, or not?"
>
> "Global cooperation under the credibility of the UN is the only way the world has a chance to meet the target implied in the Paris Climate deal, economists say. This is something Mike Bloomberg seems to understand.
>
> My view Bloomberg's climate coverage is not that we don't do it, it's that we don't do it as well as we know we should, For instance, we don't cover the market structure element of the story properly that's crucial to adjusting capital allocation in the global economy."
>
> "So did you read the comments on my 2018 evaluation on limiting coverage of UN climate negotiations… And using your clear eyes and gut… Do you agree these topics are too weedy for the world's leading (?) Media company to cover?"

(70) I consider that, viewed in context, it might be seen that the Claimant is disclosing information which might tend to show "retribution" of himself, which a Tribunal might find in the context amount in the Claimant's reasonable belief, to a breach of a legal obligation and deliberate concealment of damage to the environment. I make no order in respect of this allegation under section 43B(1)(b) and section 43B(1)(f), which may continue to a final hearing.

(71) As to section 43B(1)(e) I cannot identify any disclosure of specific information tending to show that the environment has been, is being or is likely to be damaged. There is a discretion as to whether to strike out a claim or a part of a claim. Given that protected disclosure 6 is proceeding in respect of the other elements, I am not going to strike out this aspect of it, given that it is unlikely to add very much to the hearing evidence and submissions. The Tribunal is going to be hearing evidence on this point in any event.

(72) **I make no order in respect of this alleged qualifying disclosure under section 43B(1)(b), (e) & (f), which may continue to a final hearing**.

Protected disclosure 7

(73) This relates to an oral discussion dated 21 September 2019 which the Claimant had with John Fraher, Senior Executive Editor and others. He relies upon the following:

> The Claimant said to Mr Fraher that in order to get final agreement on the rules of the Paris climate deal, would need to be reporting on how to settle the crucial dispute between rich and poor nations.
>
> Boiling it down, the essential reason why the world has not agreed a biting [binding] climate deal is because 1 billion of the world's population have gotten rich ruling the climate of the world's remaining 7 billion people. The USA is the nation with the most responsibility for climate change, yet has only 4% of the world's population. Bloomberg is based in the New York.
>
> Fraher told a meeting the dispute between rich and poor nations is not a story that Bloomberg climate talks in big-picture terms, especially if there was an agreement.
>
> That news policy is effectively concealing the political problem, maybe lowering the chance the UN climate agreement will finally be finished, the claimant said he was thinking at the time. (He didn't spell it out at the time.) That policy is damaging the climate/environment.

(74) Even taken at its highest, I have struggled to identify a *specific* disclosure of information tending to show that the environment has been, is being or is likely to be damaged or concealment thereof. There are merely opinions offered in respect of this.

(75) Bearing however that this took place in the context of an oral discussion, it is somewhat more difficult for me to be categorical about the context and the content. To the extent that this suggests a degree of doubt, I give the benefit of the doubt to the Claimant and accordingly <u>do not strike out this allegation</u>.

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Employment Judge Adkin
8 June 2021

Sent to the parties on:

09/06/2021

For the Tribunal: