Appeal No. UKEAT/0058/17/DA
UKEAT/0229/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23-25 May 2017
Judgment handed down on 19 July 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

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(1) INTERNATIONAL PETROLEUM LIMITED — APPELLANTS
(2) MR FRANK TIMIS
(3) MR ANTONY SAGE

(1) MR ALEXANDER OSIPOV
(2) DR STUART LAKE
(3) MR SERGEY MATVEEV — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR SIMON FORSHAW (of Counsel) Instructed by Clyde & Co The St Botolph Building 138 Houndsditch London EC3A 7AR
For the First Respondent	MR BRUCE CARR QC (One of Her Majesty's Counsel) Instructed by Brahams Dutt Badrick French LLP Monument Place 24 Monument Street London EC3R 8AJ
Second and Third Respondents	MR SIMON FORSHAW (of Counsel) Instructed by Clyde & Co The St Botolph Building 138 Houndsditch London EC3A 7AR

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

VICTIMISATION DISCRIMINATION - Protected disclosure

VICTIMISATION DISCRIMINATION - Detriment

VICTIMISATION DISCRIMINATION - Dismissal

UNFAIR DISMISSAL - Compensation

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

1. Wide-ranging grounds of appeal and cross-appeal were raised in relation to judgments in the Claimant's favour to the effect that he was subjected to detriments for whistleblowing and ultimately dismissed for that reason.

2. The appeals were dismissed save in respect of a point (conceded subject to the cross-appeal) concerned with the liability of the Second Respondent. The liability or otherwise of the Third Respondent is remitted for reconsideration.

3. A number of points raised by way of cross-appeal concerning remedy were successful and sums reflecting these points are to be substituted in the award of compensation made.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. These appeals and the cross-appeal involve wide-ranging challenges to judgments of the London Central Employment Tribunal (comprised of Employment Judge Lewzey, Mr Simon and Mr Grant) promulgated on 6 April 2016 ("the First Judgment") with a further judgment promulgated on 5 December 2016 ("the Second Judgment"). In those judgments the Employment Tribunal found in favour of the Claimant that he had been subjected to detriments on the grounds of protected disclosures made by him and that this was the reason or principal reason for his unfair dismissal.

2. I refer to the parties as follows: Mr. Osipov is referred to as the Claimant, International Petroleum Limited is referred to as the Respondent, while the other individuals are referred to by name, but all collectively are referred to as the Respondents.

3. Before the Employment Tribunal the Respondents appeared by Mr Damien Brown QC, and the Claimant by Mr Bruce Carr QC. Before me Mr Carr QC continues to appear for the Claimant but the Respondents are now represented by Mr Simon Forshaw.

4. Unless otherwise stated, the references below to paragraphs in the First Judgment are as follows: [paragraph no.]. Where I refer to the Second Judgment I will make that clear.

Background and overview of proceedings

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5. The Claimant was employed by the Respondent, an Australian domiciled oil and gas exploration and production company, from 23 February 2011 until his summary dismissal which took effect on 27 October 2014.

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6. The Respondent's principal activity at the material time centred on four production sharing contracts ("PSCs") relating to four "blocks" in the Republic of Niger within which it wished to finance exploration operations. Financial difficulties by early 2013 interfered with this aspiration and the Respondent failed to pay fees due under the PSCs to the Government of Niger (in excess of $1m) putting the licences in respect of the Niger blocks at risk of being withdrawn by the Niger Ministry. The Tribunal found that this made the situation with the Niger Ministry difficult, a situation that pre-dated the Claimant's appointment as CEO: [27].

C

D

7. Following the resignation of Chris Hopkinson as the Respondent's CEO in June 2014, the Claimant was offered the post of CEO by Frank Timis. Mr Timis is a Non-Executive Director and majority shareholder of the Respondent. Despite his attempts to deny personal responsibility for the actions of the Respondent, the Employment Tribunal found that his actions were those of a de facto Executive Director who regarded himself as entitled to exercise executive authority in relation to the day-to-day running of the Respondent because of his significant investment in the business: [96]. Another Non-Executive Director of the Respondent, Mr Sage, attended Board meetings of the Respondent and as the Employment Tribunal found, "was clearly exercising managerial functions" notwithstanding his denial that this was the case: [97].

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8. So far as the other two individual respondents are concerned, Dr Lake (a geologist with experience in the oil and gas sector) is the CEO of African Petroleum Corporation Limited ("APCL"). Prior to 31 July 2014, Dr Lake assisted the Respondent as a favour to Mr Timis and because the Respondent owed money to APCL that he wished to recover. From 31 July 2014 APCL provided services to the Respondent under an agreement entered into on that date, the Non-Executive Advisory Agreement (referred to as "the Advisory Agreement" below).

9. Mr Matveev is a consultant in Niger, Chad and possibly other countries in West Africa. He provided consultancy and advisory services in West Africa to companies owned by Mr Timis, and operated under a consultancy agreement to do so in relation to the Respondent dated 1 March 2013: [93].

10. The Claimant's employment as CEO of the Respondent was (as the Employment Tribunal found) governed by a Term Sheet dated 9 June 2014 (notwithstanding the Respondent's denial, at the outset, and maintained in evidence, that the terms set out in the Term Sheet were binding on the Respondent or had been approved by the Board of Directors). This contract of employment is referred to below as "the Term Sheet".

11. The cases presented by each side to the Employment Tribunal about what happened between mid-June and October 2014 were diametrically opposed.

12. The Respondents collectively argued that the Claimant failed to comply with his contractual and fiduciary duties and was intent on causing disruption to the Respondent's business for his own personal motivation. This led it was said, to an irretrievable breakdown in

trust and confidence, and the decision to dismiss was taken by Mr Sage and Mr Timis as Board Members of the Respondent, between 24 and 27 October 2014, following the irretrievable breakdown in trust and confidence which arose on 24 October 2014. The pleaded case relied on a number of matters in support of that decision:

(i) the Claimant's actions as CEO in failing to engage with the relevant officials within the Niger Ministry making his position untenable;

(ii) significant failings in the Claimant's experience and skill set to perform as CEO of the Respondent;

(iii) the letter dated 24 October 2014 sent by the Claimant to Dr Lake on behalf of APCL terminating the Advisory Agreement. The Respondents relied on the terms of the letter as raising unsubstantiated allegations and undermining the sale of the Respondent's Niger assets; and on the Claimant's actions in unilaterally terminating this contract, as "unwarranted and against the wishes of the Board" leaving them no option but to terminate the Claimant's contract of employment with immediate effect;

(iv) the Claimant's failure to act as a fiduciary by seeking to place his own personal interest in priority over the interests of the Respondent in relation to the sale of certain Russian assets and subsequently by approaching Hannam & Partners and asking for a personal commission;

(v) a further matter was relied on in the course of evidence by Mr Sage, namely the fact that the Claimant did not visit Australia and did not deal with the relisting issue or raise other funds as requested by the Board.

13. The Claimant's case by contrast (which was broadly accepted by the Employment Tribunal) was that within days of his appointment as CEO, it became apparent to him that

individuals at the highest level of management within the Respondent (Mr Timis and Mr Sage) and parties related to the Respondent (Dr Lake and Matveev) were prepared to engage in serious wrongdoing and he began experiencing pressure and inappropriate interference in his role and function as CEO. This started with Dr Lake's promotion of a geophysical contractor, ARKeX Limited ("Arkex"), as a preferred party to conduct a high value experimental full tensor gravity (FTG) survey in the Respondent's Niger blocks. The Claimant contended that he made a series of protected disclosures about Arkex and other related matters, as a result of which he was excluded from the major part of his role within days of appointment. He was undermined and humiliated, excluded from information relating to Niger, and ultimately, summarily dismissed without any form of process, having properly identified that Dr Lake had breached the terms of the Advisory Agreement. He argued that the matters relied on by the Respondents collectively as affording proper grounds for dismissal were unsupported by evidence and/or false.

14. The Claimant pursued claims before the Employment Tribunal:

(i) that he was subjected to detriments by all Respondents on the ground that he made protected disclosures contrary to s.47B of the Employment Rights Act 1996 ("ERA 1996");

(ii) that he was unfairly dismissed for the principal reason that he made protected disclosures contrary to s.103A ERA 1996;

(iii) that in any event, he was unfairly dismissed contrary to s.94 and s.98 ERA 1996.

15. He relied on 19 pleaded protected disclosures (with an additional protected disclosure introduced by amendment in the course of the hearing). The Employment Tribunal found in the

First Judgment that a large number of the disclosures relied upon by the Claimant were not, in fact, protected disclosures, but accepted that there were four protected disclosures made by the Claimant as follows:

(i) emails he sent in the period 10 to 14 June 2014 to Dr Lake relating to a proposed contractor, Arkex ("the Arkex Disclosure") (see [103 to 104]);

(ii) a letter sent to the Respondent's Board of Directors dated 9 October 2014 ("the 9 October Letter") (see [110 to 112]);

(iii) emails sent to Dr Lake on 13 October 2014 relating to certain data held in a dataroom ("the Data Disclosure") (see [113 to 114]);

(iv) emails sent to Dr Lake and/or his PA relating to a meeting which was held between Dr Lake and another company, United Hydrocarbon ("the UH Disclosures") (see [117]).

16. Having found that the Claimant made these protected disclosures, the Employment Tribunal found in the First Judgment that the Claimant was subjected to a number of detriments contrary to s.47 ERA 1996 and unfairly dismissed contrary to s.103A ERA 1996. The Employment Tribunal found that Dr Lake and Mr Matveev were not agents or workers of the Respondent: [89 to 95]. The Employment Tribunal also found that the Claimant was unfairly dismissed contrary to s.98 ERA 1996. There is no appeal in respect of that finding as the Respondent now accepts that the Claimant was dismissed without due process and that, therefore, the dismissal was unfair. It maintains, however, that it had good and lawful cause to dismiss the Claimant.

17. A Notice of Appeal challenging the First Judgment on 19 grounds was filed by the Respondents collectively with the Employment Appeal Tribunal on 18 May 2016 and a Respondent's Answer and Cross-Appeal was filed by the Claimant on 30 August 2016.

18. The matter came back before the Employment Tribunal on 24 November 2016 to address a number of issues including issues relating to costs and remedy, and the extent to which Messrs. Sage and Timis were to be regarded as being jointly and severally liable for the award made by the Employment Tribunal. The Employment Tribunal also considered how the provisional award it made in the First Judgment should be 'grossed up' to account for the Claimant's liability to tax.

19. By the Second Judgment the Employment Tribunal held that Mr. Timis and Mr. Sage were "jointly and severally liable for the award in respect of the judgment that the Claimant was subjected to detriments for making protected disclosures under section 47B Employment Rights Act 1996 up to the point of dismissal.". The Employment Tribunal also held that the Claimant's award should be grossed up to £1,744,575.56, to take account of his liability to pay UK tax on the award he received.

20. A second appeal was filed by the Respondents collectively in respect of the Second Judgment on 13 January 2017, and this too is resisted by the Claimant as appears below.

21. The following issues arise from the appeals and cross-appeal for present consideration:

(a) whether the Tribunal erred in its approach to the question whether the Claimant made protected disclosures: grounds 1-8 but not 7 which was withdrawn ("the Protected Disclosure Issues");

(b) whether the Employment Tribunal erred in its approach to causation for the purposes of s.47 ERA 1996: grounds 10-12 ("the Causation Issues");

(c) whether the Employment Tribunal erred in its approach to the burden of proof and inference drawing: grounds 13-14 ("Burden of proof and Inference drawing");

(d) whether the Employment Tribunal erred in finding that Mr Sage bore individual liability for detriments (a) and (m): ground 15 ("Liability of Mr Sage");

(e) whether the Employment Tribunal erred in finding that the Respondent, Mr Timis and Mr Sage are jointly and severally liable for awards made by the Tribunal ("The Joint and Several Liability Issue").

(f) whether the Employment Tribunal erred in failing to find that Mr Matveev and Dr Lake were workers or agents of the Respondent: grounds 1 and 2 of the cross-appeal ("the Status Issue");

(g) whether the Employment Tribunal erred in its approach to the determination of certain remedy issues: grounds 17 to 21 of the appeal and grounds 3 to 6 of the cross-appeal. (Ground 17 which relates to the **Simmons & Castle** uplift was not argued and the parties sensibly agreed to be bound by the imminent Court of Appeal judgment on this issue) ("Remedy Issues").

22. A further issue, arising out of various challenges by the Respondents to the Employment Tribunal's approach to the grossing up exercise it carried out, was adjourned in the course of the appeal hearing. It became clear that there was insufficient time within the time allocated to

A the hearing of these appeals to address it and the hope was expressed (in particular by me) that some form of indemnity or other mutually satisfactory arrangement would be explored by the parties, that would ensure that the award was grossed up appropriately and in accordance with the relevant rules of the taxing state and not otherwise. A further hearing to address the tax issues, if agreement cannot be reached, has been listed in July 2017.

23. Against that background, I turn to consider each of the issues in turn dealing more specifically with the findings made by the Employment Tribunal when I come to address the issue to which the findings relate.

The Protected Disclosure Issues

24. The starting point for considering the protected disclosure issues is the statute. Section 43A ERA 1996 provides that a protected disclosure is a qualifying disclosure, as defined by s.43B ERA 1996, made in accordance with any of ss. 43C to 43H. Section 43B(1)(b) provides (so far as relevant):

> "**43 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 if 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, or is likely to be deliberately concealed."**

Section 43C(1) provides:

> **"43C Disclosure to employer or other responsible person**
>
> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure…**
>
> **(a) to his employer, or**
>
> **(b) where the worker reasonably believes that the relevant failure relates solely or mainly to**
>
> **(i) the conduct of a person other than his employer, or**
>
> **(ii) any other matter for which a person other than his employer has legal responsibility,**
>
> **to that other person**

These provisions have been the subject of extensive consideration in the case law and the following (broadly uncontroversial) guidance of relevance to this case emerges**.**

25. The first requirement is that there must be a disclosure of information. A mere allegation will not suffice: see **Cavendish Munro Professional Risks Management v. Geduld** [2010] ICR 325. However, as the Employment Appeal Tribunal (Langstaff J) observed in **Kilraine v. London Borough of Wandsworth** [2016] IRLR 422, reality and experience suggest that very often information and allegation are intertwined so that the dichotomy, which is not one made by the statute itself, is more apparent than real. The statutory question is simply whether the disclosure is a disclosure of information. If it is also an allegation, that is neither here nor there. Whether the words used amount to a disclosure of information will depend on the context and the circumstances in which they are used and ultimately the decision is one of fact for the tribunal which hears the case.

26. The worker must have a reasonable belief that the information disclosed tends to show that a relevant failure has occurred, is occurring or is likely to occur; and a reasonable belief

A that the disclosure "is made in the public interest". The test for belief in each case is subjective and there is a low threshold for establishing that the worker had a belief in the relevant matters. The belief does not have to be proved to be correct. There is also an objective element: the belief must be reasonable. What is reasonable involves consideration of what a person in their position, with their knowledge would reasonably believe: see **Korashi v. Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4.

C 27. What is in the public interest for these purposes was considered in **Chesterton Global Limited v. Nurmohamed** [2015] ICR 920. The Employment Appeal Tribunal (Supperstone J) considered Parliamentary materials that showed the words "in the public interest" were D introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. It was accepted that a relatively small group might be sufficient to satisfy the E public interest and accordingly the Tribunal in that case was entitled to conclude that disclosures relating to the significant misstating of accounts and directly affecting the bonuses of 100 senior managers and potentially a wider class of persons (such as the shareholders in the company) did satisfy the public interest requirement, albeit recognising that the person the F claimant was most concerned about was himself. Although in writing Mr Forshaw challenged the correctness of this reasoning, that challenge was not pursued and he accepts for present purposes that **Chesterton** is correct (while nevertheless maintaining that the pre-existing case G law on the concept of "public interest" should have been considered relevant).

H 28. There is a preliminary point (relevant to all the protected disclosure grounds) to address before considering the detailed challenges to the findings of protected disclosures made by the

Tribunal. Mr Forshaw criticises the Employment Tribunal for failing to adopt the structured approach to the consideration of whether or not a protected disclosure was made identified by the Employment Appeal Tribunal in **Black Bay Ventures Ltd v. Gahir** [2014] ICR 747 at paragraph 98. It is right to say that the Tribunal did not adopt the **Gahir** approach but the mere failure to do so does not (of course) amount to an error of law.

29. The approach adopted by a tribunal to the issues to be addressed in a particular case is inevitably context driven. There was a lengthy set of agreed issues identified before the hearing started, to be addressed in this case, as set out at paragraph [2] of the First Judgment. In relation to each of the asserted protected disclosures the questions were:

(i) whether the Claimant made the disclosure alleged;

(ii) whether in his reasonable belief the disclosure tended to show one or more of the matters set out in s.43B(1); and

(iii) whether those disclosures were made in the public interest (though question (iii) should have been phrased as whether in his reasonable belief the disclosure was made in the public interest).

30. The hearing took eight days with much oral and documentary evidence considered. On the final day, each side produced detailed written submissions that were exchanged and supplemented orally. The Respondents, collectively represented by Leading Counsel, Mr Brown QC, relied on lengthy written submissions (referred to below as "the Respondents' Closing Submissions") in which the outline legal framework applicable to qualifying and protected disclosures is set out, followed by the basis upon which each disclosure relied on by the Claimant was challenged. Whereas at the beginning of the hearing all three questions were

in issue in relation to each asserted protected disclosure, by the end of the hearing, having had the benefit of hearing the evidence tested, it is apparent from the Respondents' Closing Submissions that the issues had narrowed and an informed decision about which points to pursue appears to have been taken so that not all questions remained in issue in relation to each protected disclosure.

31. The nature and extent of the specific challenge made by the end of the hearing is important as it clearly informed the content of the First Judgment. Many of the arguments now advanced by the Respondents seek to attack the Employment Tribunal's reasoning and the absence of certain findings by reference to points which Mr Forshaw accepts were not all apparently argued below. I return to this point below.

The Arkex Disclosure

32. The Employment Tribunal reached its conclusions on the Arkex Disclosure at [103] to [104] of the First Judgment. Those conclusions cannot be read in isolation and must be considered in the context of at least the following relevant findings made earlier in the First Judgment:

(a) Dr Lake was employed by APCL as their CEO at all material times. Mr Timis was a founder and major shareholder of APCL, and APCL and the Respondent occupied the same premises in London until January 2014. When Dr Lake joined APCL, one of his first priorities was to raise money as staff were on reduced salaries because of limited funding that was then available.

(b) FTG was a new technology that had been used with considerable success in other African rift valleys in Uganda and Kenya. Dr Lake recommended FTG for use by

A the Respondent in Niger. There were three companies carrying out FTG: Arkex, Bell Geospace and CGG.

(c) On 5 June 2014, the Claimant emailed Dr Lake asking for his opinion as to whether there was any potential for hydrocarbon exploration in two of the Respondent's blocks in Niger. Dr Lake replied advocating the use of FTG technology and on 7 June 2014, Dr Lake emailed him about the use FTG and said that "The plane [needed to carry out the work] is available in July": [35]. This was a reference to a plane owned or operated by Arkex.

(d) On 8 June 2014, the Claimant emailed Dr Lake stating (inter alia) that FTG was not currently listed in the Respondent's contractual work programme and that changes would be needed to the terms of its licences with the Niger Government to enable this work to be done. His firm position in relation to the use of FTG was that the work should be put out to tender: [25].

(e) Dr Lake replied on the same day setting out the reasons why he was supporting the Respondent in relation to the licenses in Niger: [36].

(f) By an email to Dr Lake dated 10 June 2014, the Claimant stated that there was a need to "conduct a transparent tender process, guaranteeing equality of tenderers for any supplies of services exceeding $1m for exploration operations": [40].

(g) At [41] and [42] the Employment Tribunal referred to a series of emails between the Claimant and Dr Lake as follows. By email dated 12 June 2014, the Claimant told Dr Lake:

> **"…since we are required to conduct a tender, I think we should request similar proposals from Fugro [or CGG] and BellGeo to get competitive bids… Shall I contact them or have you already talked to them?"**

Dr Lake responded by email of 13 June 2014:

> **"Suggest we discuss after feedback from Frank's visit to Niger, not all are aligned with your view to tender"**

The Claimant's views on tendering were passed on to Mr Timis (and Mr Matveev) in an email sent by Dr Lake on 12 June 2014 which stated that:

> **"Alex noted that the contract states that we must tender this work however with only two contractors doing the work we should use the best one – Arkex. We will need Government support to waive the tender and get the right permits as we want to start in August".**

Attached to that email was a presentation which again set out the Claimant's view on the need for tendering (set out in appendices he had prepared for the purposes of the presentation) and giving what Dr Lake said were his reasons for not wanting to go down the "tender route".

The Claimant emailed Dr Lake again on 14 June stating that competitive bids should be obtained from others even if the Niger Government could be persuaded to dispense with a tender. Dr Lake responded on 15 June stating:

> **"For clarity who calls the shots makes the decisions and spends the money on IPL [ie Mr Timis]. Your route makes sense in the world where you have delivered on promise. In the real world you're 2 years behind. So moving faster is a better idea"**

(h) These emails showed the Claimant's concern that tendering should take place being rebuffed by Dr Lake and Mr Timis. The Claimant maintained that there was in fact no reason why tendering should not have taken place since the Claimant was himself in contact with BellGeo and by 19 June, that Company had indicated that it was ready and willing to conduct an FTG survey for the Respondent:[47].

(i) By email of 7 July 2014 [54], Mr Bakaev (who worked for the Respondent based in Niger) emailed the Claimant stating that they needed to find out what had taken place at a meeting the previous Thursday (which had been arranged without their knowledge) and saying that:

> **"Contractually we**
>
> **1. Must approve the work programme with the management committee prior to any work done;**
>
> **2. Conduct a tender since the amount is above the limit;**

> **3. Finish the transfer of the licences to IPL Niger and get all the tax exemption docs. Otherwise we could be liable for TVA as well.**
>
> **Not doing this according to the contract would be a VERY bad move and would expose the Company to completely unnecessary risks…".**

33. In assessing the reasonableness of the Claimant's belief in relation to each of the asserted protected disclosures, the Tribunal expressly took account of the following matters. First, the fact that the oil and gas industry is a high-risk jurisdiction for bribery and corruption issues and Niger is itself a high-risk jurisdiction for corruption. Secondly, there was evidence that reinforced these general concerns in relation to the Respondent, in cash payments being made to the Niger Ministry and payments for "legal help" being paid into an account with no apparent connection to the Niger Government. Thirdly, the unchallenged evidence of the Claimant was that when he was appointed to the post of CEO "he told the Board that he wished to restore proper corporate governance to [the Respondent]. He was criticised by Dr Lake and other witnesses for being pedantic and wishing to do matters by the rules": [99] and [100].

34. By the end of the hearing, the respective submissions made by each side in relation to the Arkex Disclosure can be summarised as follows. The Claimant's case was that Dr Lake (supported by Mr Timis) was pushing for a contract with Arkex without any tender process in relation to work that was outside the scope of the contractually agreed programme of works reflected by the PSCs with the Niger Government. This was being done without prior approval from the Management Committee. It exposed the Respondent to the risk that such approval would not be forthcoming and without any good reason for doing so. The Claimant was entitled to be both suspicious and concerned by this.

35. The Respondents' case in relation to all three questions for decision by the Employment Tribunal on the Arkex Disclosure (as shown by paragraphs 59 and 60 of the Respondents' Closing Submissions which simply referred back to paragraph 47 of the document) was:

> **"Mr Osipov contacted CGG Airborne, Bridgeporth and Bell Geospace in connection with the work in Niger. He decided to contact these companies without Dr Lake's knowledge and then informed the directors of IPL of the best bid he had received on completion of that tendering process. On 19 June 2014 Mr Osipov received a call from John McFarlane, Executive Vice-President of Bell Geospace who confirmed that Bell Geospace were ready and willing to conduct a survey for IPL."**

36. Having referred to critical extracts from the emails at [103] the Employment Tribunal held at [104] :

> **"The Tribunal is satisfied that these emails from Mr Osipov are a disclosure of information, namely the failure to obtain a tender made in the public interest, and in the reasonable belief of Mr Osipov they tend to show a failure to comply with the legal obligation. They fall under Section 43C(1)(a)(i). The disclosure is made to Dr Lake and the relevant failure in the reasonable belief of Mr Osipov was the failure of Dr Lake to obtain a tender. Mr Brown's argument is that Mr Osipov presented Dr Lake with a partial opinion on the PSCs and did not mention that there was no need to tender if the management committee waived the requirement and that there was no need to tender the reconnaissance flight because of the value. Mr Carr's argument is that Dr Lake appeared to be pushing a contract with Arkex and that it was potentially extremely serious for IPL not to hold a tender process as it could have found itself in a position of having the management committee rejecting the note of the tender option and thus, being left with no tender and no position to proceed with Arkex. It is also notable that Mr Bakaev's view (2/669) on 7 July 2014 says there should be a tender process because,**
>
> > **"not doing this according to contract would be a very bad move"**
>
> **Mr Carr also argues that the fact that IPL appeared to be taking an apparent risk is an indication of possible bribery/corruption as it would only make sense to proceed down the Arkex only route if the company had certainty that this would be approved by the Niger Government. That certainty was not available until September 2014, two months after Mr Osipov raised his concerns. The Tribunal is satisfied that Mr Osipov did make a protected disclosure in respect this issue."**

37. Mr Forshaw submits that the Employment Tribunal's analysis is flawed by a wholesale failure to engage with the fact, as was common ground between the parties, that no contract had been entered into with Arkex by 14 June 2014. As such it was beyond sensible dispute that no existing legal obligation to obtain a tender had been breached, and at most the Employment Tribunal was dealing with a potential future breach of a legal obligation and should therefore have considered whether, as at 10 to 14 June 2014, the Claimant had a reasonable belief that it

was more likely than not that there would be an unlawful failure on the part of the Respondent to conduct a tender exercise (see **Kraus v. Penna**), but undertook no such analysis. Mr Forshaw submits that read fairly the Respondents' Closing Submissions made clear that they were arguing that there was no reasonable belief in the breach of an existing obligation by reference both to the possibility of a waiver and the value of the contract in question. The point was accordingly taken and the Tribunal failed to deal with it, applying the wrong legal test.

38. It seems to me that the point now taken by the Respondents is a new point not taken below, and in any event, fails to reflect the reality presented by the emails and the evidence accepted by the Tribunal. The fact that no contract had actually been entered into is neither here nor there in context, and in light of the evidence and findings. It would have been obvious to all concerned that the concern being expressed by the Claimant concerned the legal risks arising from entry into a contract without proper authority or a proper tendering process.

39. Significantly, in response to expressions of concern raised by the Claimant in relation to Dr Lake's push for Arkex to be the preferred contractor, none of the Respondents sought to allay his concerns in any way, whether by saying that there would be a tender process for the main contract or by reassuring him that no contract would be entered into until a waiver and approvals for an extension to the PSCs had been properly obtained. Rather he was told "not all are aligned with your views to tender" and "who calls the shots makes the decisions and spends the money…".

40. Against that background, and read fairly, paragraph 47 of the Respondents' Closing Submissions advanced no argument based on a likely future breach but invited the Employment

Tribunal to find that there was no disclosure of information at all, but merely the communication by the Claimant of his opinion, and moreover, a partial opinion that omitted material facts. That was rejected by the Tribunal at [104] where it found that there was a disclosure of information in these emails which (in the reasonable belief of the Claimant) tended to show a failure to comply with the legal obligation to obtain a tender. The Claimant communicated the fact that both the contract and good corporate governance required a tender and the Respondents were intent on avoiding this. That was a finding open to the Tribunal on the evidence and not arguably in error of law.

41. Mr Carr further submits that a fair reading of [104] demonstrates that the Tribunal also found that the Claimant had a reasonable belief that his disclosure tended to show possible bribery or corruption. He points to the fact that the Tribunal noted Mr Bakaev's view that not proceeding in accordance with a contractual tender process would be "a very bad move" and then made express reference to his submission that the fact that the Respondent appeared to be taking an apparent risk (in proceeding without a tender process or Management Committee waiver) was an indication of possible bribery/corruption as it would only make sense to proceed down the Arkex only route if the Respondent had certainty this would be approved by the Niger Government. That certainty was not available until September 2014, well after the Claimant raised his concerns.

42. Mr Forshaw submits that the only failure found by the Tribunal at paragraph [104] related to obtaining a tender and thereby comply with the legal obligation to obtain it. The Tribunal simply recorded Mr Carr's submission in relation to bribery and corruption without making any finding.

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43. While I accept that the Tribunal reached its conclusion that there was a disclosure of information tending to show a failure to comply with a legal obligation by reference to the failure to hold a tender process, it seems to me that the Tribunal accepted that to take the risk of being left with a contract with Arkex without approval was in the belief of the Claimant, an indication of possible bribery and corruption. This formed part and parcel of the Employment Tribunal's finding that there was a protected disclosure. I cannot see any reason otherwise for the submission to be recorded in the way it was at [104] and it relates back to the matters the Employment Tribunal said it would have regard to in this respect at [99] and [100]. It seems to me that the Tribunal relied on this in reaching its conclusion that the Claimant held the necessary reasonable beliefs. In other words, the push for a contract with Arkex without a tender process (or prior approval of the Niger Government of either the 'no tender route' or the use of expensive FTG technology) indicated in the Claimant's mind that bribery or corruption might be in play. As he put it in his witness statement (at paragraph 160) "a transparent tendering process was fundamental to the prevention of corruption and bribery".

44. The Employment Tribunal's holding at [104] is also challenged by the Respondents on the basis that the Tribunal adopted an erroneous analysis in concluding that the disclosure was a qualifying disclosure under s.43C(1)(b)(i) (ignoring the error in referring to s.43C(1)(a)(i)) because it was made to Dr Lake and related to his failure to obtain a tender. Mr Forshaw contends that, as a matter of fact, the complaint related to the failure to conduct a tender and since the obligation to conduct a tendering exercise fell on the Respondent and not Dr Lake, the relevant failure related solely or mainly to the conduct of the Respondent, not Dr Lake, so that the disclosure had to be made to the Respondent to qualify for protection under the ERA 1996.

45. Mr Forshaw accepts that this is a new point but contends the point is obvious and can be determined as a matter of law without further evidence. Moreover he points to the fact that the claim form does not refer to s.43C ERA 1996 at all and submits that the first time it was referred to was in closing submissions. In those circumstances the Respondents should be afforded some leeway.

46. I do not accept these submissions. First, it is unsurprising that no argument was advanced based on s.43C(1)(b)(i) given that the Claimant contended that Dr Lake was a worker/agent for these purposes. Secondly, and in any event, although the legal responsibility for obtaining a tender may have been the Respondent's, this was a complaint about Dr Lake's conduct as the Employment Tribunal expressly found: it was Dr Lake who was pushing for a contract to be concluded with Arkex without a tender process. The Tribunal was accordingly entitled to find, as it did, that the Claimant reasonably believed that the relevant failure related solely or mainly to Dr Lake's conduct. Thirdly, and in any event, this is not a pure point of law or an obvious issue of fact as to which further evidence is unnecessary. As Mr Carr demonstrated, the emails (between 10 and 14 June) containing the Claimant's disclosure about the need for a proper tendering process included communication with the Respondent and Mr Timis; and indeed, the Tribunal found that the Claimant's views on tendering were communicated to Mr Timis – in the form of the slide deck – and within days of those views being communicated, he was removed from dealing with the Niger Ministry as he was regarded by the Respondent as "an obstacle": [120]. These are all matters that would have to be explored further and findings would have to be made on these issues. For all these reasons the first two grounds of appeal challenging the Arkex Disclosure fail.

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The 9 October Letter

47. The 9 October Letter is dealt with at [110] to [112] of the First Judgment as follows:

> **"110. The next potential protected disclosure is:**
>
> > **"6G On 9 to 10 October in relation to the Claimant's aforementioned concerns including the Fourth and Fifth Respondents improper interference, lack of proper corporate governance and the Fourth Respondent unlawful assumption of control of the First Respondent's operations (paragraph 40-41)".**
>
> **This relates to Mr Osipov's letter to the Board of Directors of IPL dated 9 October 2014 (3/974 to 977)**
>
> **111. Mr Carr argues that there can be no serious argument that this letter is not a protected disclosure. Mr Brown argues that the request at the end of the letter is that Mr Osipov's rights as a CEO are restored, that non-IPL persons should be prevented from what he described as interfering with IPL's business and his salary paid. Mr Brown argues this does not reach the public interest threshold.**
>
> **112. What is stated at the end of this letter (3/977) is**
>
> > **"I ask the Directors of the company to restore proper corporate governance of International Petroleum Limited as required by the Public Company Law, Corporate Constitution, Stock Exchange Regulations and other applicable legislation in particular…I am eager to continue performing my functions as the CEO of the company in accordance with my employment contract and for the benefit of International Petroleum Limited and all of its shareholders".**
>
> **The Tribunal is satisfied that this amounts to a disclosure of information and that Mr Osipov had a reasonable belief in that information. As far as the public interest element is concerned, Mr Osipov makes the disclosure for the benefit of IPL and all of its shareholders. The Tribunal takes into account the public interest test in Chesterton Global Limited (t/a Chestertons) v Nurmohamed UK EAT/0335/14 paragraphs 28 and 35 of which state:**
>
> > **"28 I agree with Ms Mayhew that the question for consideration under section 43B(1) of the 1996 Act is not whether the disclosure per se i n the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest.**
> >
> > **35 In my view the Tribunal properly asked itself the question whether the Respondent made the Respondent at the time that it was in the interest of the 100 senior managers and that that belief was reasonable. There is now no challenge to the finding that the Respondent had a reasonable belief that he was making protected disclosures "**
>
> **The authority states that it is not necessary to show that the public as a whole are affected, but that only that a small section of the public will be directly affected by the disclosure. In the present case the shareholders are affected. We are satisfied that this disclosure meets the public interest test. It would also cover potential shareholders and investors in the company. It is therefore the unanimous judgment of the Tribunal that the letter dated 9 November does amount to a protected disclosure."**

48. Three grounds of appeal are pursued by the Respondents. First, it is said that the only passage of the 9 October letter identified by the Employment Tribunal did not disclose any information at all, but simply disclosed a request by the Claimant that what he perceived to be

proper corporate governance should be restored. At best this was an allegation that the Respondent was not engaging in proper corporate governance, but disclosed no information. Secondly, the Employment Tribunal's reasoning does not consider whether the information disclosed tended in the Claimant's reasonable belief to evidence a breach of a legal obligation. In particular, the Employment Tribunal stated that the Claimant had a reasonable belief in the information disclosed, without setting out why that was so, and in so doing, applied the wrong test. The question was not whether the Claimant had a reasonable belief in the information disclosed, but whether the Claimant had a reasonable belief that the information disclosed tended to show that there had been a breach of a particular legal obligation. This issue was not addressed at all by the Employment Tribunal, which made no attempt to identify the legal issue in question, nor to assess the basis on which it could be said to have been breached.

49. Thirdly, the Respondents contend that the Employment Tribunal failed to ask whether the Claimant had a reasonable belief that the disclosure of information was in the public interest, but instead, simply asserted that "the shareholders are affected" and that *"*it would also cover potential shareholders and investors in the company*"* and that, therefore, "this disclosure meets the public interest test". That involved the application of the wrong legal test. Had the correct test been applied, the Employment Tribunal would have had to address the Respondents' case that in truth the Claimant was merely seeking restoration of his own rights as CEO and could not have reasonably believed that disclosure was in the public interest; and would or should have concluded that the Claimant could not have had a reasonable belief that any more than a very small fraction of the public could have had any interest in the matter (let alone be affected by the matter in the sense referred to in the public interest authorities) and that

therefore, the Claimant could not have reasonably believed that there was any public interest in making the disclosure.

50. For the reasons that follow I do not accept that the Tribunal made the errors relied on by Mr Forshaw or any errors here.

51. The first ground proceeds on an unduly narrow reading of the First Judgment. The Tribunal did not find that the disclosure of information was limited to the passage cited at [112]. Rather [110] makes clear that the Employment Tribunal addressed the whole letter as constituting the disclosure, and set out the extract at the end of the letter because it was addressing the question of the Claimant's reasonable belief as to what the information disclosed showed and Mr Brown's only argument in the Respondents' Closing Submissions (see paragraph 53) that the public interest threshold was not engaged.

52. Secondly, in the light of the case that was put to the Employment Tribunal on behalf of the Respondents, it seems to me that the Employment Tribunal was entitled to proceed on the basis that the only matter that remained in issue was the public interest question. I accept Mr Carr's submission that no suggestion was made to the Employment Tribunal that the disclosure relied on did not contain "information". Had such a point been taken, and bearing in mind the fine distinction between allegations and information, it seems to me that the letter clearly contains information, including the following facts:

(i) The Claimant's work as CEO was "seriously affected by improper actions of certain individuals" who "organised a very aggressive campaign directed by interference with my executive functions at IPL".

(ii) Mr Matveev interfered with the Respondent's business and the Claimant's executive functions in such a way as to cause Mr Sage to prohibit him from going to Niger, even though his visit to the country had been agreed with the authorities there.

(iii) Meetings were organised over the period 25-28 June of which the Claimant had no knowledge and which resulted in "exorbitant bills" being presented to the Respondent for payment in the sum of $58,916. A further meeting with government officials was arranged in August/September 2014 without the Claimant's knowledge and "without any proper service agreement in place".

(iv) On 17 September, Mr Matveev wrote to Mr Timis demanding that the Claimant be released from all of his Niger duties. Dr Lake supported the wrongful actions of Mr Matveev and made "discrediting statements about myself and my past work in Niger… and suggested my dismissal and appointment of the 'ex Tullow guy' as the new CEO".

(v) As a result the Claimant was "removed from the Management Committee".

(vi) Dr Lake insisted that the Respondent conduct an FTG study in relation to the Niger blocks licensed to the Respondent and "overzealously promoted a specific FTG contractor named Arkex. When I pointed out that, even if such work would have to be done…we would need to conduct a tender among potential contractors…he responded in emails dated 13 and 15 June 2014 that "not all are aligned to your view to tender" and that "who calls the shots makes the decisions and spends the money in IPL" making it clear that I should refrain from conducting a tender".

(vii) Further, in a conversation with Dr Lake, the Claimant told him that his actions were inappropriate and that he should stop interfering with his management functions. However, Dr Lake continued to discredit him in an email dated 24 September 2014 stating that the Claimant's attitude was unhelpful.

(viii) On 26 September Dr Lake made a false statement that the Claimant was delaying the signing of a contract with Arkex.

(ix) This business interference culminated in Mr Timis writing an email to Mr Sage telling him to release the Claimant from his job.

(x) Dr Lake was de facto managing the Respondent, meeting with potential investors without the Claimant's knowledge and had been giving instructions to the CFO regarding the Respondent's programme and budgets and was incurring financial liabilities for the Respondent. He was also conducting the Respondent's business in secrecy and isolation from the Claimant, its CEO.

53. Ground two was also not pursued below by the time the evidence was complete, and this no doubt explains why the Employment Tribunal dealt so shortly with the Claimant's reasonable belief regarding the information disclosed. It is correct as Mr Forshaw submits, that the Employment Tribunal stated that the Claimant "had a reasonable belief in that information" ([112]) and did not follow the full statutory language. This is unfortunate but I do not accept that it betrays any error of law. The Tribunal had the statutory language clearly in mind and adopted the correct approach where the issue was actually pursued by the Respondents (as can be seen for example at [102], [104], [108] and [109] where the question of reasonable belief that the information disclosed tended to show a relevant failure was squarely and correctly addressed in response to the point being raised in the Respondents' Closing Submissions). The

Employment Tribunal used shorthand at [112] but it is clear from that paragraph and the extract from the letter set out by the Employment Tribunal that it was satisfied that the Claimant reasonably believed that the information he provided in the letter tended to show breaches of legal obligations (derived from company law, Stock Exchange Regulations and other applicable legislation) in relation to proper corporate governance.

54. As for the third ground and the public interest test, again, I accept that the Tribunal's holding is not as clearly expressed as it could have been. However, the Tribunal plainly had the correct test in mind and set out the relevant passages from **Chesterton**. Moreover, the extract from the end of the letter expressly stated that the Claimant was seeking to restore proper corporate governance "for the benefit of IPL and all of its shareholders" and the Employment Tribunal found that the Claimant made the disclosure for their benefit (or in their interests). Once the context is properly understood, that finding of fact involved an implicit rejection of the Respondents' case that the Claimant was **only** seeking restoration of his own rights as CEO and could not have reasonably believed that there was any public interest in making the disclosure.

55. Given the judgment in **Chesterton** (which I find persuasive and with which I agree) that the words "in the public interest" were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications, and the Employment Appeal Tribunal's acceptance that a relatively small group might be sufficient to satisfy the public interest, I can see no error of law in the Employment Tribunal's approach. The letter was itself evidence of the Claimant's belief in the public interest of his disclosure, and his desire for good corporate

governance to be reinstated in the interests of a wider group than just himself. The Employment Tribunal was entitled to accept that evidence, as it plainly did. Moreover, the Respondent is a public company listed on the Australian Stock Exchange, and even if trading in its shares was suspended, discussions about a sale or merger were then in progress and engaged the interests of a wider group than just the Claimant and the Respondent.

The Data Disclosure

56. The Employment Tribunal dealt with the Data Disclosure at [113] to [114] of the First Judgment. Its earlier findings are at [75] where the Employment Tribunal referred to a series of emails passing between Dr Lake and the Claimant on 13 and 14 October 2014.

57. The first email referred to by the Employment Tribunal is a response by the Claimant to an earlier email from Dr Lake in which he asked:

> **"Have you checked the data room contents and are you happy with whats in it".**

The Claimant replied stating that he had seen "maps and files" that he was not familiar with and continued:

> **"Under the Niger Petroleum Code, we have the right to obtain for licenses or permits have expired. Such legacy data along with data which we legally acquired (like Getech) can only be in the data room. I do not authorise any other data in the data room, for which proper rights cannot be established. So, please make sure that such data, if any, is deleted.**
>
> **Ultimately, as it is APCL's obligation to prepare the data room for IPL under the advisory agreement, I will rely on your professional knowledge and experience in that respect".**

Dr Lake responded. There is nothing in the Tribunal's findings to suggest that he disagreed with the Claimant's understanding of the Niger Petroleum Code as reflected in his email, nor did he suggest that the Respondent had the legal right to the data. Instead he said:

> **"you need to talk to Frank [Timis] re. CNPC information if he wants that in the data room".**

A This was a reference to the China National Petroleum Corporation and data it owned relating to its adjacent block or blocks.

B 58. The Claimant responded that he would not have data in the data room for which the Respondent had no legal right or authority. Dr Lake responded to the effect that without the "wider data" there was little that could be shown in relation to the Respondent's four blocks as there was "little data" and accordingly,

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> **"if you will not allow it to be in the data room then we are not setting IPL for a successful farm out"**

(or in other words, a successful sale).

D 59. Against those findings of fact the Tribunal concluded at [113] of the First Judgment that the Claimant had disclosed that

> **"he had seen some unfamiliar maps and files in the data room and that he did not authorise any data for which proper rights could not be established" and that "unless he had authorisation from the Ministry he would not take the data".**

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Further at [114] the Employment Tribunal found:

> **"that Mr Osipov had a reasonable belief that IPL was holding unlawful data of CNPC in the data room. He disclosed this information to Dr. Lake who referred him to Mr. Timis. The data was unlicensed and accordingly its disclosure is in the public interest".**

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60. Mr Forshaw contends that those findings are replete with errors: the only information disclosed, as identified by the Employment Tribunal at [113] was that the Claimant had seen unfamiliar maps in the data room which does not tend to show any breach of a legal obligation

G (let alone a criminal offence) whether in the Claimant's reasonable belief or otherwise. The remainder of the Claimant's emails merely set out his position as CEO and what he was prepared to accept in the data room. There was no analysis of the legal obligation engaged; nor

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did the Tribunal assess the reasonableness of the Claimant's belief both in relation to the disclosure and/or that the disclosure was in the public interest.

61. I disagree. First it is clear from the fuller description of the emails at [75], extracts of which are at [113], that the Claimant disclosed that data belonging to CNPC was held in the data room, and that he believed this to be without lawful authority and in breach of the Niger Petroleum Code. That was a disclosure of information and the Tribunal was entitled to reject the only argument advanced by Mr Brown in the Respondents' Closing Submissions relating to this disclosure; that it involved no disclosure at all but simply stated the Claimant's role in the data room.

62. The remaining points give rise to no error of law but reflect attempts to reargue the merits of points not argued below. The whole thrust of the email chain is inconsistent with any argument that the data had been lawfully obtained and no submission to that effect was made by Mr Brown. Although at [65] the Tribunal recorded Dr Lake's evidence to it, that the CNPC had relinquished their rights to the Chinese data, there is no evidence identified or finding to suggest that he said this contemporaneously to the Claimant and it is inconsistent with the contemporaneous emails. Furthermore, I do not accept Mr Forshaw's characterisation of Mr Matveev's evidence at paragraph 58 of his witness statement. To my mind, this paragraph confirms that permission is required to collect another company's data but nowhere suggests that such permission had been obtained. The legal obligation said to have been breached is dealt with expressly in the Claimant's email referred to at [75], consistently with his pleaded case, namely the Niger Petroleum Code. This is confirmed by the Tribunal's finding at [115]. It seems to me in light of the email chain and the findings made by the Tribunal at [75] that it

was amply entitled to conclude that the Claimant had a reasonable belief that the data held in the data room belonged to a third party, was unlicensed and was therefore unlawfully there.

63. So far as the public interest is concerned, Mr Brown made no submission to the effect that the public interest threshold had not been passed in relation to this disclosure (in contrast to the express submission to that effect in relation to other asserted disclosures). The Tribunal found that the disclosure satisfied the public interest test. Mr Forshaw criticises this finding on the basis that it merely asserts that the "disclosure was in the public interest because the 'data was unlicensed' (whatever that means)" without any attempt to consider the extent to which disclosure related to an issue which affected the public or a class thereof. I disagree and consider that there is an air of unreality about that submission, which was not pursued below. In the context of a data room designed to attract potential purchasers of the Respondent's blocks, the Claimant disclosed the fact that there was unlawfully held commercial data relating to potential oil exploration in Niger belonging to a Chinese national company in relation to a different block or blocks without which the Respondent would have little data and would not be set up "for a successful farm out" or sale. This would plainly be of interest to CNPC, even if the Respondent's own shareholders and potential purchasers had no such interest. I agree with Mr Carr that it cannot sensibly be said that there was no basis for the Claimant to believe that there was a public interest in this disclosure or to put it another way, that this disclosure was limited to the private interests of the parties and insufficiently important to warrant disclosure.

64. Finally, Mr Forshaw contends that given that the only way in which the case was put below was that the Respondent committed the relevant breach, and given that the Employment Tribunal found that the Respondent was "holding unlawful data", the Employment Tribunal

was bound to find that any qualifying disclosure was not a protected disclosure for the purposes of s.43C ERA 1996 because the disclosure was not made to the Respondent but was made to Dr Lake.

65. Here again, it seems to me that the starting point is that this point was not taken by the Respondents. Had it been I do not agree with Mr Forshaw that the Employment Tribunal would have been bound to make the finding advanced by him. Section 43C(1)(b) allows for qualifying disclosures to a third person where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of that third person or to any other matter for which that third person has legal responsibility. The test is a subjective one and the focus is on what the worker believes so that provided there is a rational basis for the worker believing that a third person is solely or mainly responsible, that is likely to be sufficient, whether or not the belief is correct. On the evidence and findings it did make, the overwhelming likelihood is that the Employment Tribunal would have concluded that the Claimant reasonably believed that the failures related solely or mainly to the conduct of Dr Lake as CEO of APCL, which had contractual responsibility for preparing the data room pursuant to clause 2.2(c) of the Advisory Agreement, or to him as the person with legal responsibility for preparing the data room.

66. In any event, as Mr Carr submits, the disclosure relied upon relating to the presence of un-recognised data and the need to comply with the provisions of the Niger Petroleum Code with regard to such data, was forwarded by Dr Lake to Mr Timis and Mr Sage on 14 October 2014, and accordingly was also a disclosure made to them on this alternative basis.

67. For all these reasons I can detect no error of law in the conclusions reached at [114]. These were supported by evidence and findings of fact the Tribunal was entitled to make, and adequately reasoned.

The UH Disclosures: the email of 24 October 2014 and second email of 24 and 25 October 2014

68. This refers to the two emails of 24/25 October 2014 addressed by the Employment Tribunal at [117]. I take the grounds relating to these two emails together because the arguments advanced by Mr Forshaw are the same, and the Employment Tribunal itself addressed these two disclosures together. I note that there was a successful application to amend the Claimant's details of claim in relation to the second email to add the words "this was a protected disclosure" (see [7]) but in the event, the second email was not separately addressed by Mr Brown in the Respondents' Closing Submissions.

69. Again, before addressing the grounds of challenge advanced against the Employment Tribunal's conclusions as expressed at [117] it is necessary to refer to a number of material findings made earlier in the First Judgment as follows:

(i) At [62] and [63] the Tribunal found that the Claimant felt APCL was not providing sufficient advisory support to the Respondent under the Advisory Agreement and contacted other financial advisers, including Hannam & Partners, who suggested a willingness to effect an introduction to a potential investor, United Hydrocarbon. However as they were listed as "Potential Investors" in Appendix A to the Advisory Agreement between APCL and the Respondent, an amendment would be necessary to enable Hannam & Partners to effect this introduction. An amendment to the Advisory

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Agreement was duly executed and United Hydrocarbon was removed from the list at Appendix A.

(ii) At [78] the Employment Tribunal found that in response to an email from Dr Lake's secretary inviting him to a meeting that Dr Lake intended to have with United Hydrocarbon, the Claimant disclosed that under the terms of the Advisory Agreement, APCL could not meet with United Hydrocarbon as it had been specifically excluded from its scope.

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70. The following day (but by email dated 24 October 2014), the Claimant made a further disclosure to Dr Lake setting out various breaches of the Advisory Agreement which he contended had been done by Dr Lake/APCL.

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71. Against that background and the submissions made to it at the hearing by the Respondents (to the effect that there was no disclosure of information, and in any event, any belief held by the Claimant was unreasonable because the Advisory Agreement permitted APCL to represent the Respondents to United Hydrocarbon), the Employment Tribunal found at [117] that:

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> **"These emails do amount to the disclosure of information. The Tribunal is satisfied that Mr Osipov did have a reasonable belief in the disclosures. It does amount to a disclosure in the public interest because it goes to corporate governance and the use of the data as set out above…"**

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72. Mr Forshaw contends that this analysis is replete with errors because the language quoted by the Employment Tribunal as used by the Claimant ("I don't think APCL can represent IPL to United Hydrocarbon") amounts to nothing more than an assertion as to the Claimant's view of the legal position; and the Employment Tribunal made no attempt to analyse whether or not the Claimant had a reasonable belief that any information disclosed

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tended to show that a criminal offence had been committed or there was any breach of a legal obligation, instead merely stating that the Claimant "did have a reasonable belief in the disclosures…".

73. The reliance by Mr Forshaw on the language quoted by the Tribunal results in an unduly narrow reading of the First Judgment which I reject. The email referred to at [117] (stating "I don't think APCL can represent IPL to United Hydrocarbon") is a partial quote. It cannot be taken in isolation and was not taken in isolation by the Tribunal. The Employment Tribunal expressly referred to the further email in which the Claimant explained more fully the position. Taking the two together it is clear that the conclusion that the two emails disclosed information was based on the disclosure that United Hydrocarbon was expressly excluded from the potential investors listed at appendix A; and this meant APCL could not introduce United Hydrocarbon consistently with its contractual obligations under the Advisory Agreement. The legal obligations invoked are obvious and required no further explanation. Moreover, the Claimant warned that a proposed meeting between Dr Lake and United Hydrocarbon would amount to a breach of the Advisory Agreement and in his second email, after the meeting had taken place, set out the precise basis on which he contended that specific and identified terms of the Advisory Agreement had been breached. Although the Respondents argued below that any such belief could not be reasonable because the Claimant did not "appear to have checked the agreement" (an argument not pursued by Mr Forshaw), the email chain makes clear that United Hydrocarbon had been expressly excluded from the scope of the Advisory Agreement by the time the Claimant sent the relevant emails, and the Tribunal was amply entitled to give short shrift to this argument. In those circumstances, the fact that Mr Timis might have wished Dr Lake to meet United Hydrocarbon makes no difference. Moreover, on the Tribunal's findings,

there was a meeting between Dr Lake and United Hydrocarbon notwithstanding the change to the Advisory Agreement.

74. Mr Forshaw contends that there was a failure by the Tribunal to explain how the Claimant's belief could be reasonable, given that Dr Lake's account was that the purpose of the meeting was unrelated to any proposed investment in the Respondent. That was not an argument even advanced by Mr Brown in the Respondents' Closing Submissions (see paragraph 57). However, Dr Lake did as Mr Forshaw submits, state at paragraph 149 of his witness statement that:

> **"Had [the Claimant] attended he would have not misinterpreted the meeting as he did and he would have been reassured we were not in breach as we did not discuss any possible transaction with United Hydrocarbons and IPL"**

75. It seems to me that by the conclusions it reached in relation to this protected disclosure, the Tribunal implicitly rejected this ex post facto explanation, and would have been amply entitled to do so in light of the submissions made and evidence heard. Neither the account of what Dr Lake said in the hearing (see [78] last few lines) nor the contemporaneous emails support this explanation. First, the email of 24 October from Dr Lake's secretary (Gail Murray) makes clear that he had requested a confidentiality agreement between the Respondent and United Hydrocarbon. The terms of the Advisory Agreement required a confidentiality agreement to be procured before a prospective purchaser was provided with confidential information (see clause 2.5 quoted by the Employment Tribunal at [56]), and that was accordingly an obvious reason why he requested this before having the meeting. Moreover, following the meeting, by email timed at 12.38 on 24 October, Dr Lake told the Claimant (again referred to at [78]):

> **"We have had a good meeting and they [United Hydrocarbon] are now aware of the opportunity presented by IPL and will revert…"**

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76. That email (read with the earlier one) cannot sensibly be read in any other way than as indicating that Dr Lake did discuss a possible transaction between United Hydrocarbon and the Respondent. In other words, the Claimant's warning and fear that the Advisory Agreement was being breached were confirmed by Dr Lake's email.

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77. Given the fact that the public interest point was not taken at all by the Respondents in relation to this disclosure, it seems to me that the Employment Tribunal's conclusion that there was a public interest in the disclosure because it went to "corporate governance and the use of the data as set out above" adequately addressed the issue (albeit expressed in undesirable shorthand) and was supported by the evidence and findings. In particular, at paragraphs 357 and 358 of the Claimant's witness statement (expressly referred to by the Employment Tribunal at [117]) the Claimant explained his belief that data held illegally in the data room (belonging to CNPC) was showed to United Hydrocarbon by Dr Lake in the meeting in breach of the Advisory Agreement. The basis for that belief was the emails and what he saw, namely maps and seismic profiles of data belonging to the Chinese company being shown to representatives of United Hydrocarbon.

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78. The mere fact that the disclosure related to breaches of a commercial agreement between two contracting parties does not self-evidently mean there could be no public interest as Mr Forshaw submits. In addition to the corporate governance/data concerns the Claimant expressed (and which appear to have been accepted by the Tribunal) the interests of at least three other commercial entities were engaged here: Hannam & Partners who wished to effect an introduction of United Hydrocarbon (and no doubt receive some form of success or introducer's

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fee), United Hydrocarbon itself which was by then excluded as a potential investor to be dealt with by APCL, and the CNPC which owned the data that was made available to United Hydrocarbon unlawfully and/or in breach of licensing arrangements.

79. In these circumstances, it seems to me that had the Tribunal been invited by the Respondents to approach this issue in the manner now suggested by Mr Forshaw, it would have been amply entitled to reach the conclusion it did on the basis of the Claimant's reasonable belief that the disclosure went beyond his own private interests and was in the public interest.

Ground 9: the Respondent's liability for actions of Dr Lake and Mr Matveev

80. Ground 9 is conceded by the Claimant subject to his cross-appeal. Since the Employment Tribunal held that neither Dr Lake nor Mr Matveev were workers or agents of the Respondent, the Respondent could not be liable for their actions having regard to s.47B(1)(b). Nonetheless at paragraphs 125, 126 and 130 of the first judgment the Employment Tribunal held the Respondent liable for detriments (d), (e), (f) and (k) which were acts done by Dr Lake and/or Mr Matveev. That was an error of law accordingly, and the Respondent's liability for these detriments can only be sustained if the Claimant succeeds in his cross-appeal on this point. This is dealt with below under the heading Status Issues.

The Causation Issues

81. The test of causation in s.47B ERA 1996 is:

> **"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure" (emphasis added).**

82. It is common ground that "s.47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower": see **Fecitt v. NHS Manchester** [2012] IRLR 64, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer's treatment of employees and workers.

83. The words "on the ground that" were expressly equated with the phrase "by reason that" in **Nagarajan v. London Regional Transport** 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment.

84. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy **Kuzel v. Roche Products Ltd** [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure.

85. By grounds 10, 11 and 12, Mr Forshaw contends that the Employment Tribunal failed to apply the proper test for causation in assessing the detriment claims, adopting an erroneously wide test in paragraphs 125, 126 and 128. He relies on the wrong language used by the Employment Tribunal in those paragraphs (when the Employment Tribunal talked about whether the detriment "arises out of" or "arose from" the protected disclosure, or whether there

was a sufficient link) as betraying a fatal mis-direction (adopting the reasoning in **London Borough of Harrow v. Knight** at paragraph 15). This misdirection in relation to causation, he submits, infects the entirety of the Employment Tribunal's reasoning in relation to each of the detriments upheld by the Tribunal, and the findings that certain detriments arose out of other earlier detriments at [124] and [131] are also flawed for that reason.

86. By way of example, Mr Forshaw criticises the approach at [124] of the First Judgment as follows:

(a) the Claimant's complaint was that he was not told that Dr Lake and Mr Matveev were conducting business negotiations in Niger at the Respondent's expense in September 2014;

(b) the Employment Tribunal found "that lack of knowledge follows the instruction that he was not to visit Niger on 19 June" and "the detriment flows from the earlier detriment". So the Employment Tribunal found the Claimant was not told about the activities of Dr Lake and Mr Matveev in Niger in September 2014 because he had in June 2014 been instructed not to visit Niger himself and not to contact the Niger authorities. In essence, the finding is that the Claimant was not told about the activities because he was no longer at the centre of matters vis-à-vis the Niger authorities;

(c) however, the Employment Tribunal then found that the detriment in question "arises out of the protected disclosure";

(d) accordingly, a very loose test of causation which was, essentially a version of a 'but for' test was impermissibly adopted.

He submits that the error was repeated at [125], [126], [128] and [131] and critically, that the Tribunal failed in each of these paragraphs to make the necessary examination of the mental

processes of the putative discriminator. He cautions against adopting an approach of inferring that merely because there was some correct use of language, it is safe to conclude that the correct test of causation was applied notwithstanding the obviously wrong language used by the Employment Tribunal.

87. Although I regard the use of wrong language as unfortunate and accept that it can in some cases betray a misdirection or misapplication of law, it is necessary to look at the substance of the conclusions reached by the Tribunal in their full context to determine whether such an error has occurred, and wrong simply to assume that the use of wrong language is indicative of error. Further, I bear in mind the often expressed observation, repeated by Lord Hope in **Hewage v. Grampian Health Board** [2012] ICR 1054 at paragraph 26: "…that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis".

88. Here, it seems to me that the starting point in considering these grounds of appeal is [2] of the First Judgment where the Employment Tribunal set out in full issue 9 and the correct test to be applied: "Was the claimant subjected to detriments… on the grounds that he made protected disclosures, in particular were those disclosures a material factor in the decision to subject the claimant to the detriments?..".

89. The Tribunal made reference at [82] to the written submissions it received from Leading Counsel on both sides, albeit not repeating them. However, I note that there was no dispute as

to the correct test for causation which was referred to expressly in both sets of submissions. At [83] the relevant statutory provisions are fully set out.

90. At the beginning of the section dealing with the detriment and causation issues (headed Detriments and Automatic Unfair Dismissal, mirroring the approach of the Respondents' Closing Submissions) the Tribunal set out the issue to be addressed namely, whether the Claimant "was subjected to the detriments set out on the grounds that he made the protected disclosures that we have found …". Having done so, the Tribunal then turned to address the first and following detriments.

91. Those passages all suggest that the Tribunal gave itself a correct self-direction in law and had the correct test in mind when it began to consider causation at [120]. Moreover, it is accepted by the Respondents that on the face of the Tribunal's reasoning, the correct test was used in relation to the first and final detriments (at [122] and [132]) albeit that the Respondents argue that these paragraphs are to be treated as infected by the erroneous approach in the middle paragraphs they rely on.

92. So far as these (and [129] and [130] which are the two other paragraphs not directly challenged) are concerned, at [122] the Employment Tribunal held:

> **" On the evidence before the Tribunal [the Claimant] was an obstacle to progress with the Niger authorities and had made the protected disclosure on 10 to 14 June and it was for this reason that he was removed from the trip to Niger and prohibited from further contact with the Niger authorities. The Tribunal is satisfied that [the Claimant] has demonstrated he was subjected to the detriment <u>because</u> he made the protected disclosure." (Emphasis added)**

These conclusions were reached against the background of other findings, including at [121], that the Claimant having been appointed CEO with effect from 9 June 2014, was being

encouraged by Mr Timis to visit Niger (and there are contemporaneous emails to which I was referred indicating positive preparations being made by the Niger Ministry for his visit once the necessary outstanding payments had been made). The Tribunal continued: "Yet eight days after Mr Osipov's appointment as CEO he was told he was being removed from the proposed trip to Niger and prohibited from contacting the Niger authorities and that all future contacts would be undertaken by Mr Majid."

93. In these circumstances it is unsurprising that the Tribunal concluded that something changed between 9 June and 16 and 19 June by which time on the evidence the Tribunal found that he was viewed as an obstacle to progress with the Niger authorities. The only intervening event was the Arkex Disclosure. The Tribunal was accordingly satisfied that the Claimant demonstrated that he was subjected to the detriment because or on the grounds that he made the protected disclosure.

94. The Employment Tribunal had earlier stated at [120] that the first detriment "can only relate to the first protected disclosure". However, I do not read this as betraying an erroneous approach to causation. Read in context, the Employment Tribunal was simply identifying (as the approach in **Gahir** suggests it should) which disclosure was or could be in play: as a matter of timing, since the detriment was between 16 and 19 June, it could only be the Arkex Disclosure.

95. At [129] the Employment Tribunal referred to the detrimental email dated 30 September 2014 from Mr Timis to Mr Sage (but erroneously sent to the Claimant) which stated:

> **"Release Alex from his job and appoint Anya to manage any future deals. This is currently very costly and is causing many obstacles".**

96. It found that the email was "explicit in stating that Mr Osipov was regarded as an obstacle". That amounted to a rejection of evidence given by Mr Timis (as reflected at [69] that "Mr Osipov was not causing obstacles…"). The Tribunal rejected the explanation given by Mr Timis that this was merely a reference to the Claimant's Niger role and not to his position as CEO, given that the Niger role had already been removed in June. The Tribunal had earlier (also at [69]) identified the unsatisfactory, inconsistent evidence given by Mr Timis in this regard and the extent to which there were inconsistencies between what Mr Timis and Mr Sage were saying.

97. The Tribunal concluded that "the reason for this detriment is <u>because of</u> [the Claimant's] protected disclosure". In other words, the reason or ground for Mr Timis' email instructing Mr Sage to dismiss the Claimant was the protected disclosure.

98. At [130] the Employment Tribunal said the detriment alleged (that on or about 30 October Dr Lake demanded that the Claimant be sacked) related to Dr Lake's email of 8 September (addressed earlier in the findings at [59]) purporting to record the adverse views of the Niger Ministry about the Claimant many months after he had ceased to have a role there. The Tribunal referred at [59] to Dr Lake's evidence that the expression "new CEOs" used in that email by him referred to "Chief Exploration Officers" (not Chief Executive Officer) and his denial by implication that he was seeking to remove the Claimant as Chief Executive Officer, and the unsatisfactory nature of this evidence which it made clear at [125] that it did not accept. The evidence was also rejected at [130] where the Tribunal drew the inference from the email that Dr Lake was recommending the Claimant's removal as Chief Executive Officer. The

Tribunal concluded that "the reason for this recommendation is because of the protected disclosure in June concerning Arkex".

99. At [132] the Employment Tribunal dealt with the final detriment which was the instruction or recommendation to dismiss. It held:

> **"The decision to dismiss was that of Mr Timis who instructed Mr Sage to dismiss Mr Osipov. There has been no clear explanation by Mr Timis of why he decided to dismiss Mr Osipov and the Tribunal draws an inference that the reason for the dismissal..and instructions given to effect that were because of the protected disclosures." (Emphasis added).**

100. Having dealt with the passages that reflect causation conclusions which are consistent with the correct legal test having been applied on the face of the reasoning, I turn to address the passages challenged as reflecting an erroneous approach by the Respondents.

101. At [124] the Tribunal addressed the third detriment. The Employment Tribunal had already found that the Claimant was excluded from a role in Niger in June because, having made the Arkex Disclosure, he was viewed as an obstacle to progress with the Niger authorities. This detriment concerned his being further sidelined in relation to business negotiations in a trip to Niger in early September which were conducted without his knowledge or authorisation as CEO in charge of the Respondent. The Tribunal found that there was a (secret) meeting in Niger on 2 September 2014 between Dr Lake, Mr Matveev, Mr Ian Timis and Christian Richards of Arkex together with Niger Government officials: see [58]. The Tribunal accepted the Claimant's case that he was not told about this meeting in advance and only discovered it had occurred afterwards: see [124].

102. The Tribunal did not find as Mr Forshaw suggests they could have, that this was simply because he was no longer at the centre of matters vis-à-vis the Niger authorities, but rather there was no reason why he should not be told and no explanation as to why the Claimant was not told in his capacity as CEO about this business trip. Moreover, at [60] the Tribunal found that following Dr Lake's return from Niger, there was a meeting between the Claimant and Dr Lake on 15 September as described at paragraph 249 of his witness statement ([60]), where the Claimant describes telling Dr Lake that his actions were totally inappropriate in going to Niger secretly on behalf of the Respondent to promote a single contractor (Arkex) and that he should stop making false allegations and stop interfering in his management functions. He described Dr Lake as surprised and embarrassed.

103. The link between the two detriments was an obvious one to make on the facts and the Tribunal was undoubtedly entitled to have regard to it. That to my mind explains the Tribunal's reference to this detriment 'flowing' from the earlier one. The Tribunal concluded that the third detriment "arises out of" the Arkex Disclosure. This is an incorrect statement of the test but having regard to the earlier self directions in law and the reasoning at [120] to [122], the clear and obvious connection between the two detriments which involved the Claimant's exclusion from involvement in Niger because he was seen as an obstacle to progress in Niger because of the Arkex disclosure, lead me to conclude that it does not betray any error of law, nor is there anything to suggest that a 'but for' test was applied.

104. Two linked detriments are dealt with at [125] both relating to Dr Lake's email of 8 September, addressed earlier in the findings at [59] (as set out above). The email purported to contain criticisms of the Claimant reported by the Niger Government (Mr Gbaguidi) and went

on to talk about bringing in a "new CEO". I reject Mr Forshaw's contention that since Dr Lake sent a contemporaneous email reporting the content of the meeting with the Niger Ministry and its view that the relationship with the Claimant had broken down, it might have been thought his reasons for sending the email were simply to report the discussion he had had. Although it was argued that the allegations were conveyed by the Niger Ministry to Dr Lake as recorded in the minutes, Dr Lake was denying that he was referring to the Claimant's position when he talked about finding the right person for the Respondent longer term.

105. Moreover, there was a challenge to the truth of what was said to have occurred in the meeting on 2 September (at which the adverse comments were said to have been made). The minutes produced by the Respondents to support their case suffered from a number of difficulties described by the Employment Tribunal at [58]. These included that the meta data for the documents was not produced despite an order by the Employment Tribunal requiring this. There were different versions of the minutes, signed by different people without any satisfactory explanation being given as to why there were different versions. The date was wrong and Dr Lake agreed "that there was a striking difference between his email of 8 September and the minutes". Although no clear conclusion is expressed at [58], the Tribunal plainly had doubts as to the veracity of those minutes. Moreover, so far as the criticisms of the Claimant and relationship breakdown Dr Lake purported to report are concerned, the Tribunal appears to have been sceptical. It found that there had been no mention of performance failings in relation to the Claimant until the Tribunal hearing and I infer that this included no mention by the Niger Government either. The Claimant had been excluded from his role with the Niger authorities almost as soon as he took up office as CEO in June, and when he took up the role with effect from 9 June, the Tribunal found that Mr Timis' evidence was that he was

encouraging the Claimant to visit Niger after his appointment ([121]) – a surprising approach if the Claimant's relationship with the Niger Ministry had by then broken down as a result of his earlier poor performance or behaviour.

106. At [125] the Tribunal made clear that it rejected Dr Lake's evidence that he was referring to Chief Exploration Officer. In other words, the Tribunal found his account to be false. It also found, as indicated, that there had been no mention until the Tribunal hearing of failings in the Claimant's performance and implicitly, that there was no substance in the criticisms made by Mr Sage of the Claimant's failure to visit shareholders in Australia (and other linked matters). The Tribunal concluded that "the reason for these allegations and instructions by Dr Lake arose from the protected disclosure…". Again, although incorrect language is used here and ought not to have been, I do not consider that this indicates a wrong test of causation or a version of a 'but for' test being adopted. Contrary to Mr Forshaw's submissions, the Tribunal was focused on the reasons Dr Lake had for reporting the allegations in an apparent attempt to justify giving an instruction to remove the Claimant as CEO which he subsequently denied. Having rejected his explanation as it did, and made the other findings it did, I am satisfied that the Employment Tribunal found that Dr Lake regarded the Claimant as an obstacle to progress with the Niger authorities because of the Arkex Disclosure. This was the reason for the detrimental treatment as the Employment Tribunal was entitled to and did find.

107. The Tribunal's conclusion at [126] is even more compressed and plainly could have been better expressed. Having dealt in more detail with the earlier detriments it appears to have

adopted an even more shorthand approach. This is to be discouraged, but does not in my view, indicate an erroneous approach to causation.

108. The detriments contained in the 17 September email from Mr Matveev to Mr Timis and Dr Lake (incorrectly referred to as the 23 September email) were his request that the Claimant be released from all Niger duties and a subsequent letter from Dr Lake to the Niger authorities appointing a representative to the Management Committee without the Claimant's knowledge or approval. The Tribunal made findings about the email at [61] and recorded the Claimant's evidence to the effect that the email from Mr Matveev purporting to explain why he did this, was fabricated and that he knew nothing of Mr Mahamadou of PAM who was referred to in it. It is unhelpful that the Tribunal did not expressly state whether or not it accepted the Claimant's case that this was fabricated; but I note that the Employment Tribunal did not accept Mr Matveev's explanation and at [67] the Tribunal referred to an email from Mr Bakaev to the Claimant and Ms Belogortseva, setting out an extract from it, which attached the conclusion of a tax expert which supported the statement made by Mr Bakaev that all the talk about people "getting arrested, crying, company shutdown … are nothing but lies aimed to discredit our work". This appears to be a reference to Mr Matveev's email, though again, the Tribunal did not expressly say one way or another what its view of this was.

109. Mr Forshaw criticises the absence of any finding that Mr Matveev even knew of the Arkex Disclosure and says more importantly, that it is unclear how the Tribunal reached the conclusion it did. Although the Tribunal made no express finding that Mr Matveev knew of the Arkex Disclosure, the suggestion that he did not is utterly unrealistic in light of the evidence and findings. He was a recipient of Dr Lake's email of 12 June discussing the Claimant's views

in relation to the need for a tender in relation to Arkex: [42]. Further, days later Mr Matveev sent Dr Lake an email, not copied to the Claimant, dated 17 June in which he stated:

> **"For the new team Frank asked to introduce Ian and Guy to the Minister and asked me to fully assist you, not Alex (Osipov) or IPL, in getting all obstacles out of your way on the ground so the survey can be conducted quickly. This is my current modus operandi" :[45] (My emphasis).**

Subsequently, Mr Matveev attended the secret meeting in Niger on 2 September at which a representative of Arkex was present, and was a recipient of Dr Lake's 8 September email. There was accordingly ample evidence to support a conclusion that he knew about the Arkex Disclosure and that his detrimental actions were done in order to remove the Claimant who was an obstacle because of the Arkex Disclosure.

110. It is also clear that the Tribunal regarded the detriments relied on by the Claimant as a series of detriments culminating in his dismissal on 27 October 2014. It said that it reached that conclusion because of the nature of the disclosure and the detriments and the consistency of the people involved: see [143]. In these circumstances and notwithstanding some concern about the way [126] is expressed, I am not persuaded that the Tribunal failed to apply the correct causation test here. I am fortified in reaching that conclusion by [127] where the Tribunal found the detriment from the instruction kept secret from the Claimant despite his role as CEO, that Mr Matveev should deal directly with the new representative was done "because of the protected disclosure".

111. Mr Forshaw relies on incorrect language used at [128] where the Tribunal dealt with the Respondent Board's failure to act in response to his protected disclosure. The Employment

Tribunal recorded Mr Brown's argument that Mr Matveev and Dr Lake were simply conveying the responses of the Niger Ministry. Implicitly rejecting that, the Tribunal held:

> **"The Tribunal accepts that [the Claimant] was regarded as an obstacle. The protected disclosure on 10 to 14 June 2014 relates to Arkex which is the substance of the discussion in Niger at the relevant period. IPL did not wish to cause further difficulties with the Niger Government. The reason for that was because of the known objection by [the Claimant] to the failure to tender in relation to Arkex which is the substance of the first protected disclosure. [The Claimant] has demonstrated a sufficient link"**

Although the language of "sufficient link" is used, the Tribunal plainly considered the reason for the detrimental treatment and concluded that it was "because of the known objection to the failure to tender". I do not consider that the language used by the Employment Tribunal betrays an error of law here.

112. Finally at [131] a similar criticism is made by Mr Forshaw of the Employment Tribunal's compressed conclusion and the phrase "arises out of" which it used. The Tribunal recognised that the detriment here (an instruction that all Niger -related activities had to be approved by Dr Lake and Mr Matveev and an instruction that the Claimant should apologise to Dr Lake for allegations of improper data use) post-dated a number of further disclosures made after the Arkex Disclosure. By the time it came to deal with the detriment at [131] the Tribunal had already made a series of cumulative findings. First, the Claimant was excluded from his role in Niger. Then he was sidelined in relation to Niger business negotiations which was the only substantive business then being conducted by the Respondent. He was subjected to a phantom dismissal and recommendations for his dismissal as CEO had been made. As the Employment Tribunal found, these were all done on the grounds of the protected disclosure or disclosures he made.

113. In the circumstances and for similar reasons to those I have given above, notwithstanding the language used by the Employment Tribunal at [131] or its compressed reasoning, I am not persuaded that the Tribunal erred in the causation test it applied. Rather the Tribunal was amply entitled on the evidence to conclude, and I am satisfied did conclude, that this detriment was done not only because of the Arkex Disclosure but also because of the disclosures (not detriments) concerning the data room (which is clearly what the Tribunal had in mind).

114. In the case of each detriment, I am satisfied that the Employment Tribunal conducted an adequate examination of why the putative victimiser acted as he did, and there is nothing to suggest that it applied a 'but for' or other erroneous test. The use of short-hand or poorly chosen language does not in the context of this case and in light of the self-direction in law (together with other findings where causation was properly expressed and addressed) cast doubt on its approach to causation. These grounds are all accordingly dismissed.

Burden of proof and inference drawing

115. Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so

inferences may be drawn against them: see **London Borough of Harrow v. Knight** at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

116. In a s.103A ERA 1996 case, the correct approach to the burden of proof was set out in **Kuzel v. Roche** at paragraphs 58-60 as follows:

(a) the employee must produce some evidence to suggest that his dismissal was for the principal reason that he made protected disclosure.

(b) The burden then shifts to the employer to show that the dismissal was for a potentially fair reason.

(c) If the employer fails to show the reason for the dismissal, then the employment tribunal may draw an inference (where such inference is appropriate) that the true reason for the dismissal was that suggested by the employee.

(d) However, at paragraph 60 of **Kuzel v. Roche** the CA held:

> **"As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason".**

117. Ground 13 challenges the Tribunal's findings that the Claimant was subjected to detriments on the ground that he made protected disclosures and contends that the Tribunal failed to adopt the correct approach to the burden of proof and inference drawing. The Employment Tribunal is criticised for simply rejecting the Respondents' evidence or case without considering whether the Claimant had proved a prima facie case and/or provided

sufficient evidence to justify the drawing of adverse inferences. Mr Forshaw particularly relies, in advancing this argument, on [127] and [132].

118. I have addressed the Tribunal's conclusions in relation to disclosure and detriment at [120] to [131] above. In some cases, the Tribunal made positive findings based on the evidence and inferences drawn without resort to the burden of proof. For example in relation to the first detriment (removal from contact with the Niger authorities) the Tribunal found that this occurred within days of the Claimant being appointed as CEO and after he had been encouraged by Mr Timis to visit Niger. Yet with the only supervening event of the Arkex Disclosure made on or about 12 June 2014, the Claimant was abruptly removed by Mr Timis from any further contact with the Niger authorities: see [121] to [123].

119. The Tribunal considered the evidence given by the Respondents about the reason for the Claimant's abrupt removal in the circumstances. It found:

(a) Mr Matveev emailed Dr Lake on 17 June to tell him that Mr Timis had asked him to assist Dr Lake "in getting all obstacles out of your way on the ground so the [Arkex] survey can be conducted quickly…":[45];

(b) Two days later, by email dated 19 June 2014 Mr Sage advised the Claimant that Alex Majid had been appointed with immediate effect and would be responsible for all contact with the Niger authorities. He instructed the Claimant not to go to Niger himself even in the event of an urgent need to deal with issues in Niger:[49];

(c) In cross-examination Mr Timis said it was not his decision to appoint Mr Majid who was his nephew: [49], and that the Claimant agreed to the appointment (as to which the Tribunal found there was no evidence);

(d) Mr Sage described this as an appointment to help the Claimant in an area in which he was not sufficient: [49];

(e) However, in his witness statement at paragraph 25 Mr Sage said "…IPL had no alternative but to remove Alex from his position in relation to Niger" and his evidence was that the decision was that of Mr Timis: [121];

(f) The Tribunal observed that this was a mere eight days after the Claimant's appointment as CEO, and that Mr Timis had been encouraging the Claimant to visit Niger after his appointment:[121].

The Tribunal concluded that the accounts given by Mr Sage and Mr Timis in relation to this decision were both inconsistent (there is a grammatical error in the last sentence of [121]) and, it is to be inferred unreliable, and rejected them by implication, finding that Mr Timis made the decision because the Respondents viewed the Claimant as an obstacle to progress with the Niger authorities having made the Arkex Disclosure: [122]. There was obvious evidence to support that finding in Mr Matveev's email of 17 June and Mr Timis' own subsequent email of 30 September in which he explicitly referred to the Claimant as "causing many obstacles": [129].

120. I agree with Mr Carr that once those findings that the Claimant was regarded as an obstacle to progress in Niger because of the Arkex Disclosure had been made, they necessarily informed the Employment Tribunal's approach to further Niger-related disclosures made by the Claimant and the further Niger-related detriments to which he was subjected. So for example at [124] there was no explanation at all given to the Tribunal as to why the Claimant, who continued to be CEO of the Respondent company, should not be told about business

negotiations conducted by Dr Lake and Mr Matveev on a business trip to Niger at which Arkex was present in early September. In the absence of any explanation and given the earlier finding that the Claimant was seen as an obstacle because of the Arkex Disclosure, there was an obvious inference available to be drawn that this was the reason he was not told about the secret meeting. The same is true of subsequent paragraphs.

121. By the point at which the Employment Tribunal addressed the 26 September 2014 detriment at [127], the Employment Tribunal had found that the Claimant had been subjected to a series of cumulative, connected detriments as a result of making the Arkex Disclosure. This detriment concerned the instruction in an email from Mr Sage (on behalf of himself and Mr Timis) that Mr Matveev should deal directly with Ms Belogortseva, and not with the Claimant, thereby removing his authority. The Tribunal found that the Claimant was not told about this, despite still being the CEO and that no explanation was given for not telling him. The Tribunal's reasoning appears to have been that if there was a good lawful reason for this instruction, the Claimant would have been told about it. Although I have some sympathy with Mr Forshaw's criticisms of the way this paragraph is expressed, read in context and in light of the earlier findings, I am persuaded that the inference was one the Tribunal was entitled to draw in light of the cumulative findings it had already made, and for the reasons it gave.

122. The other paragraphs that are particularly challenged under this ground and ground 14 are [132] and those paragraphs where the Tribunal dealt with the reason for dismissal and found that the Claimant was unfairly dismissed pursuant to s.103A ERA 1996 ([134] and [136-139] of the First Judgment); all of which Mr Forshaw submits, reflect a wholesale disregard for the proper approach to the burden of proof and inference drawing.

123. At [132] the Employment Tribunal held in relation to the instruction to dismiss:

> **"This can only refer to the instruction to dismiss and not the decision to dismiss itself. Dr Lake and Mr Matveev were not involved in the decision to dismiss. The decision to dismiss was that of Mr Timis who instructed Mr Sage to dismiss Mr Osipov. There has been no clear explanation by Mr Timis of why he decided to dismiss Mr Osipov and the Tribunal draws an inference that the reason for the dismissal of Mr Osipov and the instructions given to effect that were because of the protected disclosures."**

At [134] the Tribunal held:

> **"In the light of our findings the Tribunal is satisfied that the principal reason for Mr Osipov's dismissal was the making of the protected disclosures. It is therefore the unanimous judgment of the Tribunal that the claim of detriment for making protected disclosures succeeds and the claim of dismissal for making protected disclosures succeeds. Mr Osipov was automatically unfairly dismissed pursuant to s.103A ERA 1996."**

Further, albeit in the context of ordinary unfair dismissal, at [136] to [139] the Tribunal held:

> **"136. The reason for dismissal was because Mr Osipov had made protected disclosures, and as already found, the dismissal is automatically unfair. Even if that were not the case, the Respondent failed to adopt any procedure and have failed to demonstrate a reason for dismissal before this Tribunal. Mr Brown argues that the reason for dismissal was Mr Osipov's refusal to withdraw and apologise for his letter to Dr Lake. Mr Sage sought to rely on Mr Osipov's performance and a misrepresentation that he was a lawyer, although this was never pleaded, or relied upon by Mr Brown. There is no evidence that Mr Osipov ever claimed to be a lawyer. His CV shows that he did a module in private law at Kiev State University between 1982 and 1987 where the focus was International Economics and Private Law 93/1120 AK). Mr Brown argues that the matter is straightforward as Mr Osipov wrote the letter and refused to withdraw it and apologise. He argued that there has been no suggestion that there was any need for any further investigations and that the Claimant was the Chief Executive Office and there is an element of practicality that has to be taken into account when disciplining and removing such a senior person from post. Mr Brown relies on the Claimant's decision to delete his mail box upon dismissal as evidence of the damage that he was able to do to the business.**
>
> **137. Mr Carr argues that Mr Osipov has been very poorly treated by being excluded from major part of his role within days of appointment, being undermined and humiliated by Dr Lake's decision to set up an alternative line of communication with Arkex, and being excluded from information relating to Niger and from the appointment of Mr Magid and then Miss Belogortseva to the Management Committee. Mr Carr submits that Mr Osipov's cries for help to the Board on 26 September and 9/10 October were effectively ignored, he was subjected to a phantom dismissal by Mr Timis on 30 September, and he was then summarily dismissed without any form of process whatsoever, let alone an ACAS process, having properly identified that Dr Lake had breached the terms of the Advisory Agreement.**
>
> **138. Mr Brown concedes that IPL did not follow the ACAS Code. He relies to the fact that Mr Osipov was the most senior member of staff and that his relationship with Dr Lake had deteriorated and also that the IPL was a small employer with limited HR resources. They also rely on Mr Osipov's conduct in detailing his mailbox and removal of confidential material and subsequent refusal to return the data which it is argued should be taken into account as factors of contributory fault and reduction.**
>
> **139. The Tribunal accepts Mr Carr's submission. Even if the Tribunal is wrong on the claim of automatic unfair dismissal it is the unanimous judgment of the Tribunal that Mr Osipov was unfairly dismissed."**

124. Mr Forshaw contends that there were clear reasons advanced for the Claimant's dismissal which are not dealt with by the Tribunal. He relies on a finding that the Claimant was reluctant to go to Niger [28]; the criticisms expressed by the Niger Ministry as reported by Dr Lake in his email of 8 September; and the finding that there was an acrimonious relationship between Dr Lake and the Claimant. He also relies on passages in the witness statements of Mr Timis and Mr Sage dealing with the reason for the Claimant's dismissal. In particular, Mr Timis said that the Claimant's letter of 24 October 2014 cancelling the Advisory Agreement between APCL and the Respondent without Board approval was a misuse of power, inappropriate and unprofessional. It contained serious unsubstantiated allegations against a major shareholder of the Respondent and caused major damage to the relationship between the Respondent and its shareholder. The Claimant was asked to retract the letter but refused. Mr Timis also said that the Claimant failed to demonstrate the skill set required to perform as CEO and that he found it impossible to work with him. Further, Mr Timis said that the Claimant placed his own personal interests above those of the Respondent in contradiction to his role as a fiduciary and ultimately, there was no alternative to a summary dismissal. Mr Sage's witness statement is in very similar terms (at paragraphs 50 to 53).

125. Faced with that material, Mr Forshaw contends that the Tribunal was bound to analyse the Respondents' case with care in deciding whether to draw adverse inferences and if so in determining what inferences could properly be drawn. Mr Forshaw submits that the failure to engage adequately with the Respondents' case is all the more worrying given the complexity of what the Employment Tribunal was being asked to do. The Claimant's case was that he was dismissed for having made protected disclosures, including the United Hydrocarbon Disclosures. The Respondents' case was that in the email of 24/25 October 2014 (which itself

was found to be one of the United Hydrocarbon Disclosures) the Claimant had purported to terminate the Advisory Agreement and had then refused to retract the purported termination and refused to apologise to Dr Lake. The Employment Tribunal was therefore required to analyse this factual issue with great care in order to separate these matters which appeared in the 24/25 October 2014 email from the United Hydrocarbon Disclosures (which appeared in the same email) in order to determine the principal reason for the Claimant's dismissal. He contends that the Employment Tribunal failed to do so and erred in law.

126. I do not accept those submissions. It is true to say that the Tribunal's fact-finding is not as clear as it should and could have been. Nevertheless, for the reasons given below, when the judgment is read as a whole, as it must be, the Employment Tribunal's findings are adequately identified. Moreover, while some criticism is justified of the compressed reasoning in the Tribunal's conclusions, the full impact of the earlier findings cannot be ignored. It is also important to bear in mind that findings recorded in a judgment cannot convey more than an imprecise impression of all the evidence that was heard.

127. Significantly in my judgment, the Tribunal found the Respondents' evidence to be internally inconsistent and contradictory: [15]. Mr Timis and Mr Sage gave inconsistent evidence about the Claimant's suitability for appointment as CEO, and about his relationship with the Niger Government: [37]. There was a stark conflict of evidence in relation to the way in which the Claimant's contract was drawn up and then approved, with both Mr Timis and Mr Sage giving evidence that was directly contradicted and undermined by the documents: see findings at [38] and [39]. The Tribunal rejected the evidence of both Mr Timis and Mr Sage in relation to the Term Sheet expressly approved by the Board, as reflected in the Board minutes

(where it was recorded that Mr Timis had identified the Claimant as a suitable appointment as CEO). For example having found that Mr Timis himself changed the wording of the Term Sheet, the Tribunal recorded Mr Timis' written evidence as being that he did not accept that the terms set out in the Term Sheet were legally binding because they did not reflect the position agreed and were unusual and represented action by the Claimant that was inconsistent with his fiduciary duties. That sworn evidence was then rejected. Mr Sage also claimed that the contract was not approved but was presented with a document that had his signature on it. His evidence was also rejected on this issue.

128. Having appointed the Claimant as CEO, the Tribunal found that Mr Timis encouraged the Claimant to visit Niger, yet within days of his appointment he was removed from having anything to do with the only real business that the Respondent was engaged in, the business in Niger: [121]. The actions thereafter, aimed at containing and reducing the Claimant's ability to have involvement in Niger were taken (on the Tribunal's findings which rejected other explanations where offered by Dr Lake, Mr Matveev, Mr Sage or Mr Timis) because he insisted on proper contractual and corporate governance processes and so was perceived as creating obstacles, first in relation to the tender process and later in relation to the data room for the Niger blocks. Those actions started with merely removing him from involvement with the Niger authorities and then by incrementally excluding him from involvement in all the business discussions and negotiations with those authorities, as the Employment Tribunal found ([122]-[128]) and concluded with a collective view that the Claimant was "an obstacle that needed to be dismissed": [128].

129. Importantly on the Employment Tribunal's findings, those actions, which included the so-called phantom dismissal by Mr Timis in the email of 30 September 2014, and the view reached by the Respondents (that the Claimant was an obstacle who needed to be dismissed) all predated the Claimant's letter terminating the Advisory Agreement.

130. Moreover, having considered the explanations put forward by the various Respondents, the Tribunal's findings demonstrate that those explanations did not stand up to scrutiny:

(i) at [69] the Tribunal referred to Mr Timis' own email in which he described the Claimant as a very costly problem causing many obstacles, but even in the face of this email, Mr Timis sought to deny it and suggest he was simply seeking to remove the Claimant from responsibility for Niger. It is clear on a fair reading of [69] and [129] that the Tribunal rejected (as neither credible not reliable) Mr Timis' evidence and explanation for his actions.

(ii) At [81] the Tribunal described the evidence of Mr Timis as "completely confused and contradictory".

(iii) At [97] the Tribunal set out concerns about the credibility and reliability of the evidence given by Mr Sage. Further, although he denied doing so (presumably to avoid responsibility), it found that he was exercising managerial functions in relation to the Respondent.

(iv) At [121] the Tribunal referred to significant inconsistencies between the evidence given by Mr Timis and Mr Sage about the decision to remove the Claimant from the trip to Niger and the prohibition on him contacting the Niger authorities.

(v) At [129] the Tribunal expressly rejected Mr Timis' evidence in relation to the phantom dismissal in the 30 September email.

131. The Tribunal dealt with the issue of the final detriment (the instruction to dismiss) and the dismissal email at [81] as follows:

> **"81 By an email dated 27 October to Mr Osipov (3/1103G), copied to Mr Timis and Ms Belogortseva Mr Sage states:**
>
> **"Alex Frank and I have both tried to contact you.**
>
> **Your email was unwarranted and against the wishes of the Board. Your conduct has undermined the sale of the Niger assets and you have caused undue distress to several staff within the Group. As such you have left us no option but to terminate your employment to be effective immediately.**
>
> **Please pass on all information to Anya, hand in your company laptop and office keys asap"**
>
> **In cross-examination Mr Sage said, when asked what he was saying that Mr Osipov had done, that Mr Osipov was told his job was to sell the assets, come to Australia and get IPL back in the Australian stock exchange. In his witness statement Mr Sage said that Mr Timis had telephoned him and stated that the situation with Mr Osipov was untenable and that he felt his employment should be terminated. Mr Sage's evidence was that, after problems in the preceding months, he agreed. In cross-examination Mr Sage said that for the whole period that Mr Osipov was CEO he was asked on many occasions to visit Australia because IPL was suspended and the CEO was needed in Australia to talk to the shareholders. That is a new assertion that is not pleaded. Mr Timis' evidence was that he requested the dismissal, but did not himself dismiss Mr Osipov. Mr Timis said that Mr Osipov made a series of unjustified allegations accusing Dr Lake of favouring Arkex and interfering with Mr Osipov's position. He also referred to allegations of breach of contract in connection with the meeting with United Hydrocarbon and the allegations about the data in the data room. Mr Timis' evidence was confused. He said in cross-examination that he did not dismiss Mr Osipov for the allegations and, had he been doing so, he would have dismissed him three years previously. He suggested that there had been a major breakup between Mr Osipov and the Niger Government and that therefore Mr Osipov was stopped from going to Niger and that Mr Timis had had to undertake bridge-building. He also said that he had always liked Mr Osipov until Mr Osipov disappointed him. In an answer to a question that the relationship with the Niger Government was not the reason for dismissal, Mr Timis said that, "By himself Mr Osipov was great, but that he could not delegate". Mr Timis observed that he thought Mr Osipov was honest. The evidence of Mr Timis was completely confused and contradictory."**

132. It is clear from this paragraph that the cross examination of Mr Timis and Mr Sage about the reason for the detrimental treatment drew starkly different reasons for their actions from those set out in their witness statements. In particular:

(i) The Tribunal found that Mr Sage's expressed concern about the Claimant's performance related to his failure to go to Australia and get the Respondent back in the Australian Stock Exchange listing. This was not mentioned by anyone else and not part of the pleaded case. He also relied on a false claim of misrepresentation by the

Claimant who, he said, claimed to be a lawyer ([136]). Mr Sage agreed that the Claimant should be dismissed after the "problems in the preceding months".

(ii) Mr Timis denied dismissing the Claimant himself, evidence the Tribunal rejected (see [96] where the Tribunal found that he took the final decision to dismiss rather than simply making a recommendation).

(iii) Further the Tribunal found:

> **"Mr Timis said that Mr Osipov made a series of unjustified allegations accusing Dr Lake of favouring Arkex and interfering with Mr Osipov's position. He also referred to the allegations of breach of contract in connection with the meeting with United Hydrocarbon and the allegations about the data in the data room".**

(iv) Although the Tribunal recorded Mr Timis' evidence in cross-examination that he did not dismiss the Claimant for the allegations, he said that had he been doing so he would have dismissed him three years previously. This answer plainly made no sense to the Tribunal in light of the factual context, and must have been rejected.

(v) Mr Timis' evidence was that the relationship with the Niger Government was not the reason for the Claimant's dismissal. The Tribunal recorded him saying "by himself Mr Osipov was great, but that he could not delegate".

133. These findings demonstrate that the Tribunal did not, as Mr Forshaw suggests, fail to consider the evidence of Mr Timis and Mr Sage. To the contrary, having considered their evidence following cross-examination, the Tribunal did not find that the conduct they purported to rely on in writing for dismissing the Claimant (namely the fact that the Claimant unilaterally terminated the Advisory Agreement and refused to retract his email or apologise) was the real reason in their minds. Indeed, it found that a raft of different, sometimes conflicting or contradictory reasons were given. It is unsurprising in all these circumstances that the Employment Tribunal was not persuaded by the evidence it heard from Messrs Timis and Sage

and concluded that no clear explanation was given by Mr Timis as to why he decided to dismiss the Claimant: [132].

134. Read in context, the cumulative findings of detriment done on the ground of protected disclosures, which the Tribunal regarded as connected given the nature of the disclosures and the detriments, and the consistency of the people involved, constituted at the very least, a prima facie case that the dismissal itself was for the principal reason that the Claimant made protected disclosures. Indeed the Tribunal held that this was a series of detriments culminating in the instruction to dismiss and the Claimant's dismissal: [143].

135. The Tribunal was entitled to conclude (albeit without saying so expressly) that the burden therefore shifted to the Respondents to show that the dismissal was for a potentially fair reason. However, the findings indicate that they failed to do so to the Employment Tribunal's satisfaction. The Respondents' evidence did not stand up to scrutiny. The explanations given for earlier detriments were rejected, either because the evidence given by the four individuals was rejected as not true or credible, or as completely confused and contradictory. The same is true in relation to the explanations given for the instruction to dismiss and the decision to dismiss itself.

136. The Tribunal's conclusions in relation to the instruction to dismiss and the dismissal itself are rolled up together at [132] and [134]. The reasoning is, once again, compressed. However, read in light of the earlier findings and conclusions, I am quite satisfied that the Tribunal did not draw inferences on an automatic basis or simply because it rejected the explanations given. To the contrary, in my judgment the inferences drawn are justified by the

facts as found. It was open to the Tribunal to find on a consideration of all the evidence and the findings (including those summarised above) that the principal reason for dismissal (and the reason for the instruction to dismiss) was the protected disclosures which meant that the Claimant was regarded as a costly "obstacle that needed to be dismissed".

137. Further, the Tribunal did engage with the Respondents' case based on the Claimant's letter of 24 October at [136] to [139], albeit in the context of its findings on ordinary unfair dismissal. Having set out the pleaded case and the Respondents' submissions that this was a straightforward dismissal for writing the letter and refusing to withdraw it and apologise, that required no investigation and an element of practicality in relation to the actual dismissal given the Claimant's seniority, the Tribunal expressly rejected that case and accepted Mr Carr's submissions. These were to the effect that within days of his appointment as CEO and immediately after the Arkex Disclosure, he was seen as an increasingly difficult obstacle by the Respondents because of the protected disclosures he was making which involved his insistence on doing business in a way that he reasonably believed did not involve breaches of legal obligations or criminal offences being committed. Mr Carr argued that the Claimant was for that reason (or principal reason) sidelined, excluded from information relating to Niger, replaced by others, ignored, and then subjected, first to a phantom dismissal and then to an actual dismissal without any form of process at all, having properly identified in the 24 October letter that Dr Lake had breached the terms of the Advisory Agreement. The Tribunal was entitled to accept that case and those submissions as it did, and made no error of law in doing so.

138. These grounds accordingly fail.

Liability of Mr Sage (ground 15)

139. Ground 15 challenges the Employment Tribunal's finding at [133] of the First Judgment that Mr Sage was liable for detriments (a) and (m). Mr Forshaw relies on earlier findings of the Employment Tribunal that: (i) Mr Timis made the decision in relation to detriment (a) (see [121] of the First Judgment); and (ii) Mr Timis made the decision to dismiss and instructed Mr Sage to carry it out (detriment (m) dealt with at [132]). Mr Forshaw contends accordingly that the Employment Tribunal's conclusion at [133] is an error of law and cannot stand. There is no finding that Mr Sage bore responsibility for the implementation of the dismissal and merely carrying out an instruction (here Mr Timis' instruction to dismiss) could not be a detriment.

140. Subject to the issues raised in the next section, I do not consider that any error of law is disclosed by this ground, and prefer the submissions of the Claimant on this issue. In relation to detriment (a) whilst the Employment Tribunal found that the decision to remove the Claimant from his proposed trip to Niger was that of Mr Timis, it was Mr Sage who implemented the instruction by sending the email of 19 June 2014 instructing the Claimant that he was being replaced with immediate effect by Mr Majid. Mr Sage sought to provide his own justification for this instruction and did not simply act as messenger. He gave his justification which the Tribunal rejected, and was found to have acted for the real reason that the Claimant made protected disclosures (see [122]).

141. The same is true in relation to detriment (m). Mr Sage could have said that he was not exercising any independent judgment of his own (if this was the case) but was simply acting on instructions from Mr Timis. He did not do so, but instead gave his own false reasons for his

actions. It seems to me in these circumstances that the Tribunal was entitled to reach the conclusion it did on both detriments. The Employment Tribunal found (at [132]) that Mr Sage implemented Mr Timis' instructions, having already found (at [81]) that he agreed with the decision to dismiss. So, although Mr Timis was the originator of both decisions, Mr Sage was not simply a messenger acting on instructions. He put forward false reasons for doing what he did. These were rejected. The Tribunal found instead that he acted as he did because of the protected disclosures. I can detect no error of law in these conclusions.

The Joint and Several Liability Issue (Grounds 16 and 21 of the First Appeal and ground 1 of the Second Appeal)

142. Having found at [132] that Mr Timis instructed Mr Sage to dismiss the Claimant and that instruction amounted to a detriment actionable pursuant to s.47B ERA 1996, at [179] and [180] the Employment Tribunal made awards for unfair dismissal, injury to feelings and a netted down sum for unpaid salary. It described the total provisional sum identified as damages for claims of unfair dismissal for making a protected disclosure and detriment for making a protected disclosure. It did not address what was payable by whom.

143. This issue (with others) was considered at a further hearing on 24 November 2016 and the Second Judgment was promulgated holding:

> **"The First, Second and Third Respondents are jointly and severally liable for the award in respect of the judgment that the Claimant was subjected to detriments for making protected disclosures under section 47B Employment Rights Act 1996 up to the point of dismissal."**

The conclusion that the First, Second and Third Respondents are jointly and severally liable for the whole award, is challenged as wrong in law by the Respondents for the following reasons in summary:

(a) an award could only be made against Mr Timis and/or Mr Sage at all under s.49 ERA 1996;

(b) no award could be made against Mr Timis on the basis that he had given instructions to dismiss the Claimant. Such a detriment (involving dismissal) could not be an independent detriment by reason of s.47B(2) ERA 1996;

(c) in any event, damages arising out of or post-dating the Claimant's dismissal could not be recovered in any detriment claim by reason of the statutory scheme as interpreted in **Royal Mail Group Limited v. Jhuti** [2016] IRLR 854 and **Melia v. Magna Kansei Limited** [2005] EWCA Civ 1547.

144. Since there is no dispute that any award against Mr Timis and/or Mr Sage must come within the confines of s.49 ERA 1996 or cannot be made at all, the real questions here concern the scope and extent of the provisions governing individual liability in a protected disclosure detriment case, and what compensatory award could properly be made against them. The starting point for considering these arguments is the recognition that there are two parts to the statutory protection provided to whistleblowers: that contained in s.47B of Part V on the one hand and that contained in s.103A of Part X ERA 1996 on the other (described by Chadwick LJ in **Melia** at paragraphs 7-21). Mr Forshaw submits that **Melia** is particularly important, and that the proposition that dismissal damages cannot be obtained in relation to detriment claims has been authoritatively determined both by **Melia** and by the judgment of the Employment Appeal Tribunal in **Jhuti.**

145. Section 47B ERA was inserted into the existing statutory framework in the ERA (by s.2 of the Public Interest Disclosure Act 1998) and in its original form provided:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker had made a protected disclosure.**
>
> **(2) Except where the worker is an employee who is dismissed in circumstances in which by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where –**
>
> **(a) the worker is an employee, and**
>
> **(b) the detriment in question amounts to dismissal (within the meaning of that Part."**

As Mr Carr submits, the reference to s.197 ERA 1996 is to a provision that excluded dismissal from employment under a fixed term contract of one year or more from Part X where (inter alia) the dismissal consisted only of the expiry of that contract without renewal. So while in general detriments amounting to dismissal were excluded from the scope of s.47B, those relating to expiry and non-renewal of a fixed term contract for protected disclosure grounds stayed within s.47B as detriment claims.

146. Further in its original form an employee could claim under s.47B against his employer only (and not against fellow employees or co-workers); and could do so for detriments (not including dismissal) pursuant to s.47B in Part V, and for dismissal claims pursuant to s.103A in Part X (which deals with general unfair dismissal). By contrast, for workers, who did not qualify as employees (with the ability to pursue unfair dismissal claims under Part X), detriments including dismissal could be pursued under s.47B (notwithstanding the different threshold test to be applied namely, whether the detriment of dismissal was "on the ground that" instead of "the reason or principal reason" for the dismissal).

147. In **Melia** (a decision made well before the section was amended to enable claims to be made against co-workers) Chadwick LJ described the parallel elements as intended to be complementary in the sense that Parliament did not intend to confer rights under Part V for the

protection of whistleblowers in circumstances where the worker (being an employee) would have a right under Part X in relation to the same loss or detriment (see paragraph 15). What he was saying in other words, is that the two species of claim against the employer were mutually exclusive: a claim against the employer in relation to detriment other than dismissal fell under Part V whereas a detriment related dismissal claim against the employer fell under Part X. The employee would be compensated for Part V detriments under Part V and for Part X detriments under Part X and not otherwise. Contrary to Mr Forshaw's submissions, in my view, the judgment says nothing about the scope of claims against individuals, not least because such claims could not be pursued at that time. Moreover, the clear divide between detriment claims on one hand and dismissal claims on the other did not exist then (and does not exist now) in relation to claims by workers who are not employees: they can only bring detriment claims under Part V but nobody suggests that those detriment claims cannot include detriments amounting to dismissal.

148. In **Fecitt v. NHS Manchester** [2012] IRLR 64 the Court of Appeal recognised that there was a lacuna in s.47B as it stood in 2012: there was no scope for bringing a whistleblowing detriment claim against a fellow worker. This was in contrast to the anti-discrimination legislation where fellow workers could be personally liable for their acts of victimisation of those who do protected acts. But the Court concluded that any remedy for this must lie with Parliament (paragraph 61). The Court of Appeal also recognised the "anomaly" produced by the legislative scheme in the different threshold test for establishing a detriment of dismissal claim brought by a worker under Part V (rather than unfair dismissal under Part X which is not available to workers) but held that this was simply the result of placing dismissal

for this particular reason into the "general run of unfair dismissal law" (see Elias LJ at paragraph 44).

149. The Enterprise & Regulatory Reform Act 2013 ("ERRA") introduced new provisions designed to address this gap making fellow workers liable for detriments by amending the existing scheme and adding the following relevant provisions. First s.47B (1A) which provides:

> **"A worker ("W") has the right not to be subjected to any detriment by any act, or deliberate failure to act, done:**
>
> **(a) by another worker of W's employer in the course of that other worker's employment, or**
>
> **(b) by an agent of W's employer with the employer's authority."**

Where this happens, the act or failure to act in question is treated as also done by the employer – see s.47B(1B) which provides:

> **"Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer."**

Although s.47(1C) provides that this is so whether or not the act or omission occurred with the employer's knowledge or approval, the employer is afforded a statutory defence (akin to the employer's defence in anti-discrimination legislation) if it can be shown that the employer took all reasonable steps to prevent the other worker from doing the thing in question or from doing anything of that description: see s.47B(1D).

150. Section 49(1) which deals with remedies and enables tribunals to make awards of compensation to be paid by the employer in respect of well-founded claims, was amended so as to apply to claims brought under s.48(1A) pursuant to which workers can bring a complaint of detriment in contravention of s.47B. The fellow worker or agent may be liable for the detriment as well as the employer: see s.48(5)(b).

151. No change was made to s.47B(2) which continues to place dismissal for protected disclosure claims (within the meaning of Part X) into the general run of unfair dismissal law. In its current form, s.47B(2) provides that the protection for workers against detrimental treatment in s.47B(1) does not apply where –

> **"(a) the worker is an employee, and**
>
> **(b) the detriment in question amounts to dismissal (within the meaning of [Part X])."**

152. Mr Forshaw submits that the obvious intention of Parliament in enacting this legislation was to make a complete distinction between (i) the pre-dismissal detriment regime; and (ii) the dismissal regime, and this has been preserved by subsequent amendments. In relation to the latter, claims must be pursued under s.103A ERA 1996 and can only be pursued against an employer. In relation to the former, claims can be pursued under s.47B ERA 1996 against workers and agents in addition to the employer. However, he submits that the obvious purpose of s.47B(2) is to stop dismissal claims being pursued as detriment claims, and to ensure that there is an interlocking code of protection where one cause of action does not trespass on the other.

153. This issue turns on the proper interpretation of the words in s.47B(2):

> **"s.47B(1) does not apply where….(b) the detriment in question amounts to dismissal (within the meaning of Part X)".**

The express purpose of the whistleblowing legislation is to protect individuals from victimisation. In its amended form, the legislation provides employees and workers with protection from the prohibited acts and deliberate omissions of employers and fellow workers or agents of the employer. That being the mischief at which the legislation is directed, it is

appropriate to construe this provision, so far as it can properly be construed, to provide protection, rather than deny it.

154. The starting point is to construe all the words used in light of that intended purpose, including the words in brackets in s.47B(2)(b) which qualify the extent of the disapplication. The provision does not seek to exclude all claims for detriment amounting to dismissal as it could have done. Rather, Parliament has chosen to limit the disapplication to those detriments amounting to dismissal within the meaning of Part X; in other words, to detriments amounting to unfair dismissal claims necessarily against the employer. The effect of Mr Forshaw's submissions is to ignore the words in brackets, which are redundant on his approach.

155. Furthermore, there is nothing in the express words of s.47B(2) that relieves a fellow worker or agent of his or her liability for a detriment amounting to dismissal not within the meaning of Part X. The distinction drawn by s.47B(2) turns on whether or not the detriment in question amounts to an unfair dismissal claim (because it is within the meaning of Part X) which must necessarily be brought against the employer. It maintains the distinction between claims against the employer of detriment other than dismissal falling under Part V, and claims for detriment amounting to dismissal within the meaning of Part X, which can only be pursued under s.103A in Part X. These claims are mutually exclusive. However, just as a worker who is not an employee has always been able to pursue detriment claims against the employer where the detriment in question amounts to dismissal (but cannot be pursued under Part X because the worker is not an employee) under s.47B in Part V, the amendments to s.47B introduced by the ERRA create a framework for individual liability of a fellow worker for detriments without restriction. There is nothing in the wording of s.47(B)(1A) that limits the detriments caught by

A the provision or that excludes from individual liability detriments amounting to termination of the working relationship.

B 156. This construction does not strain the meaning of the legislation, and to my mind creates a coherent approach. It puts employees in the same position as workers who never lose their right to make claims against individuals for detriments amounting to dismissal and ensures that employees are given the same protection as workers who are subjected to the most serious C detriments and not put in a worse position than those workers. It is likely to be an unusual case where an employee will wish to pursue a claim and seek a remedy against a fellow worker for a whistleblowing detriment amounting to dismissal, rather than pursuing the claim against the D employer, but I can see no principled reason for excluding it.

157. Nor is there a principled reason for making fellow-workers personally liable for losses caused by detriments short of dismissal but relieving them from individual liability for the E consequences of what are likely to be the most serious detriments (such as an instruction or a recommendation that the complainant's employment or contract be terminated) and that have the potential to cause the most substantial losses. Although the statutory framework for F victimisation based on protected disclosures and the anti-discrimination legislation in the Equality Act is different, given that Parliament decided that individuals should have unlimited liability for all aspects of unlawful discriminatory treatment under the Equality Act, I cannot G see any rational basis for a difference in approach to whistleblowing claims that means fellow workers or agents should be protected from liability for the consequences of the most serious detriments to which they subject others. The scheme of compensation under Part V is in more or less identical terms to that provided for in relation to Part X claims (compare s.49(2) – (6A) H

with s.123(1) to (6A)). The "reasonable steps" defence is available to an employer in relation to Part V detriment claims attributed to the employer: see s.47B(1D).

158. Moreover, to construe the legislation as Mr Forshaw argues it should be is liable to produce other unjust results. For example, in a "tainted information case" which results in a finding that the unlawful act of the victimising manager cannot be attributed to the employer (and therefore does not "amount to dismissal"), the reasoning in **CLFIS v. Reynolds** would apply with the result that losses would be recoverable from the person responsible for the detriment short of dismissal. This would include losses flowing from a consequential dismissal subject only to any legally applicable limitation on such losses. On that basis the worker responsible for the victimisation would remain liable to pay full compensation under s.49(1)(b) ERA 1996. On the other hand, where the victimising manager's rationale or recommendation is attributed to the dismissing officer and so is treated as the employer's reason for dismissal, the worker responsible for the unlawful conduct escapes liability. Further, complainants may be left without any remedy at all even in a clear case in which dismissal results in part from a detriment done 'on the ground that' a protected disclosure was made: where the victimising manager responsible for the detrimental recommendation leading to dismissal is relieved of liability because his act "amounts to dismissal" putting the case within s.103A ERA 1996, the employer might be able to argue that even if the protected disclosure was material to the decision to dismiss, it was not the "reason or principal reason" for the dismissal.

159. Nor am I persuaded by the "exclusion zone" for which Mr Forshaw contends, preventing individuals from being liable to pay compensation for losses flowing from the most serious detriments to which a complainant can be subjected. He relies by analogy on the

exclusion zone identified in **Johnson v. Unisys** but this is very different. In **Johnson** the courts held that it would not be appropriate to develop an unrestricted common law right to compensation for unfair dismissal that would operate in parallel with the statutory scheme Parliament has prescribed. There is no question here of developing a common law remedy in parallel to the statutory scheme for losses flowing from pre-dismissal or dismissal related detriments. The statutory scheme exists in s.47B ERA 1996. On any view it allows workers to claim for pre-dismissal and dismissal related detriments, and the losses that flow from both. The exclusion zone reasoning has no application here.

160. I accept, as Mr Forshaw submits, that the result of this construction is that there is a different threshold test for detriment amounting to dismissal not within Part X and those that must be considered under Part X. But that anomaly has always been there, as Elias LJ recognised in **Fecitt.**

161. I have considered whether the other authorities relied on by Mr Forshaw cause me to take a different approach and concluded that they do not. I have already dealt with **Melia** above; although the two regimes in Part V and Part X are mutually exclusive insofar as claims made against the employer are concerned, this decision does not begin to address the scope of a claim against a worker or agent, not least because no such claim could be pursued at that date.

162. In relation to **Jhuti** which is relied on as authoritatively determining the question whether the financial consequences of dismissal can form part of the remedy for a detriment claim, although at paragraph 28 of the judgment, the Employment Appeal Tribunal (Mitting J) was critical of the Tribunal's approach to compensation because of its conclusion that "earlier

A acts of victimisation [could] give rise to a claim for compensation for losses flowing from dismissal" I do not consider it appropriate to follow that reasoning here. First, the Employment Appeal Tribunal made clear that it did not hear argument on this issue. Secondly, this conclusion is based on an apparent misreading of the legislation because the provisions of s.48(5) ERA 1996 were overlooked. They make clear that the reference to "employer" as the person liable to pay any award of compensation pursuant to s.49(1)(b) includes a "worker or agent" liable under s.47B(1A) ERA 1996. The Employment Appeal Tribunal proceeded in consequence, on the false basis that unless the motivations of the manager could be attributed to the employer and so form part of the employer's "reason for dismissal" within the scope of s.103A, the employee would be left without a financial remedy against the worker or agent. It seems to me to be unlikely that the Employment Appeal Tribunal would have reached the same conclusion had consideration been given to the effect of the construction adopted by it, namely that workers and agents would be relieved of the consequences of their own unlawful detrimental treatment.

163. For all these reasons I consider that claims for detriment amounting to unfair dismissal (necessarily against employers) can only be brought under Part X. The higher threshold test applies so that complainants must show that the reason (or principal reason) for dismissal was the protected disclosure, and simply establishing that a ground for the dismissal was the protected disclosure is insufficient. Claims for detriment amounting to dismissal not within Part X (in other words, where for example the claim is against a fellow worker or agent of the employer and relates to an instruction or recommendation to dismiss, or to a termination of a contract that does not give rise to a claim of unfair dismissal) continue to be capable of being brought under Part V by reference to a test based on "the ground of". Workers and agents are

not relieved of liability for detriments amounting to dismissal not within Part X (in other words not pursued as claims of unfair dismissal within Part X) simply because a Part X claim based on dismissal is pursued against the employer.

164. Mr Forshaw submits that to the extent that the Employment Tribunal intended by [179] and [180] of the First Judgment that Mr Timis and Mr Sage should be liable for all elements of the awards referred to, it erred in law because awards for unfair dismissal are payable only by the employer (see s.112(4) ERA 1996); and the same is true in respect of wages claims (see s.24 ERA 1996). Further, he contends that although a s.207A Trade Union & Labour Relations (Consolidation) Act 1992, ("TULRCA") uplift can be awarded on a joint and several basis as between different respondents in a discrimination claim (see **Catanzano v. Studio London Limited** UKEAT/0487/11), that can only occur where findings are made as to the extent to which a person is responsible for the failure to follow the particular statutory procedure, and then only where the uplift relates to an underlying claim which can be advanced against that individual.

165. Although I accept that the basic award is a sum payable under s.119 ERA and only by the employer, I do not accept the other submissions made by Mr Forshaw and prefer the arguments of Mr Carr on this issue. It seems to me that the remainder of the compensation awarded to the Claimant relates to losses which flow directly from his dismissal and the detriments to which he was subjected by Mr Sage and Mr Timis. It is therefore recoverable from the Respondent and/or from Messrs Sage and/or Timis. In the case of an award based on detriment under s.49 or an award based on dismissal under s.123, the test is materially the same – compensation which is just and equitable having regard to the loss attributable, in a detriment

A case to the act complained of (s.49(2)) or in a dismissal case, sustained in consequence of the dismissal (s.123(1)). Both exercises will, in a case such as the present, produce the same level of award, this being exactly the sort of case envisaged by the Court of Appeal in **CLFIS v. Reynolds** as being one in which the unlawful discriminatory act causes the dismissal so that the individual respondent is liable for it.

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C 166. So far as concerns the statutory uplift for failure to comply with the ACAS Code, the power to make such an award is found in s.207A TULRCA. By s.207A(1) it applies to claims "under any of the jurisdictions listed in Schedule A2". Under s.207A(2), the power that a tribunal has is to increase "any award it makes to an employee" (emphasis added), subject of course to the just and equitable principle contained in the same subsection. Schedule A2 then includes within the scope of claims covered by the uplift provisions detriment claims under s.48 ERA 1996. There is therefore no statutory basis on which to regard Mr Timis and Mr Sage as being outside the scope of any award made against them being uplifted by an appropriate percentage determined as a matter of discretion by the Employment Tribunal.

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F 167. I can see no error of law in the uplift order made against these two individuals in light of the Employment Tribunal's findings and bearing in mind that it was they who were responsible for the peremptory dismissal of the Claimant for having made the series of protected disclosures that he did. Where an individual respondent is responsible for a failure to follow a relevant procedure it follows that he or she falls within s.207A TULRCA and an award of compensation made against them is liable to the uplift provided for under s.207A(2) TULRCA: see **Catanzano v. Studio London Limited & Others**. Here, as the Employment Tribunal found, the decision to dismiss was taken by Mr Timis and implemented by Mr Sage. The Respondents

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A did not even seek to argue that the ACAS Code had been complied with – the only persons with responsibility for this were Mr Sage and Mr Timis. The Employment Tribunal accepted that this was the case at [178] where it found that, having been instructed by Mr Timis, Mr Sage dismissed the Claimant by email and without any process whatsoever. Nevertheless, the Employment Tribunal accepted the submission that the Respondent was a small employer and that any uplift should be seen against that background. The uplift was therefore limited to 12.5%.

168. Accordingly I do not consider that the Employment Tribunal erred in law in dismissing the arguments advanced by the Respondents and holding Mr Timis and Mr Sage jointly and severally liable for all losses (save in respect of the basic award) flowing from the detriments to which they subjected the Claimant.

The Status Issue (cross-appeal)

169. The Claimant challenges the Employment Tribunal's conclusion that neither Dr Lake nor Mr Matveev had the status of worker or agent for the purposes of establishing individual liability for subjecting him to detriments for making protected disclosures.

170. The Tribunal dealt with the issue in the First Judgment. So far as Dr Lake is concerned, the Tribunal held:

(a) it was entirely satisfied that prior to the date of signing the Advisory Agreement, Dr Lake was neither an agent of the Respondent nor a worker: [90].

(b) In relation to the period after the signing of the Advisory Agreement on 31 July 2014, the Tribunal took note of the observations of Elias LJ in **Kemeh v. Ministry of**

Defence [2014] ICR 625 at paragraphs 40 to 43, that it is not appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of the third-party employer; and there would need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B.

(c) Dr Lake was providing the advice in Niger pursuant to the Advisory Agreement in his capacity as a director of APCL and the Tribunal rejected the argument that he was a worker under an implied contract for personal service or an agent of the Respondent: [92].

171. In relation to Mr Matveev, the Tribunal referred to the Consulting Agreement between the Respondent and Mr Matveev dated 1 March 2013, describing him as a private consultant in Niger/Chad and identifying the nature of his retainer. There was evidence of other consultancy and advisory services to businesses operating in Africa provided by him and also evidence that he had provided consultancy and advisory services to other "Timis Group" companies. The Tribunal found that he was conducting a business on his own account, whether in his own name or through corporate entities: [93]. His Consultancy Agreement expressly provided that he had no power to execute agreements or transactions unless issued with a power of attorney or proxy specifically authorising him to do so. The Tribunal continued:

> **"93. …On the evidence before the Tribunal Mr Matveev was undertaking consultancy services and it does not fall within the definition of worker under section 230(3) or section 43K(1) of the Employment Rights Act 1996.**
>
> **94. Mr Carr also refers us to Cotswold Developments v. Williams [2006] IRLR 181 in which Langstaff J held the following in relation to the "profession, or business undertaking" exception under section 230 Employment Rights Act 1996:**
>
> > **"The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is**

> **recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."**
>
> **We accept that Mr Matveev's situation was far from the paradigm case of a business undertaking providing services to a customer and that Mr Matveev did not market his services to the world in general.**
>
> **95. In the circumstances it is the unanimous judgment of the Tribunal that Mr Matveev was neither a worker nor an agent and has no liability to the Claimant."**

172. In relation to these conclusions, Mr Carr submits that the Tribunal made errors of law in the analysis of the legal status of these two individuals and should have found that Dr Lake was a worker and in particular in relation to the period after 31 July 2014, that Dr Lake went beyond the terms of the Advisory Agreement in the work that he did and in appearing to represent the Respondent in negotiations with the Niger Government and so was either a worker under an implied contract for personal service or an agent of the Respondent. So far as Mr Matveev is concerned, he worked under a contract undertaking to do or perform work personally for the Respondent and did not actively market his services to the world in general but worked for Mr Timis and his companies as an integral part of those operations. The only correct analysis of his legal status on this footing is that he was a worker or agent of the Respondent. The Tribunal's reasoning is also challenged by Mr Carr as inadequate in relation to both conclusions.

173. Taking worker status first, the relevant legal framework is not in doubt. Pursuant to s.47B(1A) ERA 1996, workers have the right not to be subjected to any detriment on the ground that the worker made a protected disclosure, by: (i) *"another worker"*; or (ii) *"by an agent… with the employer's authority"*. Section 47B(1B) ERA 1996 provides that *"Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer."* Accordingly, in respect of detriments

A occasioned by an employer's agent or worker, both the employer can be sued and similarly, the worker or agent can be sued: see s.48 ERA 1996.

B 174. "Worker" is defined by s.230(3) ERA 1996 as meaning "an individual who has entered into or works under (or where the employment has ceased, worked under)-

> **"(a) a contract of employment; or**
>
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."**

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175. Nobody has suggested that Dr Lake or Mr Matveev worked under contracts of

D employment for the Respondent. The Claimant argued that they were both limb (b) workers. That required him to show that each was:

(a) working under a contract, whether express or implied;

(b) where such contract requires him to perform work or services, personally for

E another party to the contract;

(c) where the status of the person for whom the work is performed is not that of customer or client.

F

176. It is unnecessary for the purpose of this ground of the cross-appeal to rehearse the considerable body of guidance built up in case law on worker status. It is sufficient for my

G purposes to refer to **Cotswold Developments Construction Limited v. Williams** [2006] IRLR 181 (as the Employment Tribunal did) where the Employment Appeal Tribunal (Langstaff J) stated (at paragraph 53):

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> **"It is clear that the statue recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that "other" is neither a client nor customer of theirs – and thus that the definition of who is a "client" or**

> **"customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as a employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 230(3)(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the other hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."**

177. More recently in **Pimlico Plumbers Limited v. Smith** [2017] IRLR 323 the Court of Appeal stressed that evaluating whether or not an individual was performing work for a client or customer, or as a worker, was a task carried out by a "specialist tribunal" which was "entitled to the respect due…[in] carrying out that kind of evaluation" (see paragraph 116). There is no single test that applies in every case though depending on the context a number of factors may be relevant. Dependence is one. Integration into the organisation may be another. It is a matter for the specialist tribunal to judge the evidence in each case, and absent an error of law, the Employment Appeal Tribunal is not entitled to interfere with that assessment.

178. So far as agency status is concerned, the term "agent" is not defined in ERA 1996 (nor in the Equality Act 2010 or in the predecessor statutory provisions where it is or was also used). The term has been considered in two cases, both of which were referred to below. First, in **Yearwood v. Metropolitan Police Commissioner** [2004] ICR 1660 (at paragraphs 35 to 40) in the context of anti-discrimination legislation, the Employment Appeal Tribunal considered that agency referred to the common law concept of agency whereby a person (the agent) is empowered (expressly or impliedly) by the principal to undertake certain acts which affect his relations with third parties.

179. Secondly, in **Kemeh v. Ministry of Defence** [2014] IRLR 377 the Court of Appeal (having considered **Yearwood** but without deciding whether it was correctly decided) held:

(a) whatever the precise scope of the legal concept of agency, and whatever difficulties there might be of applying it in marginal cases "…it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents." (paragraph 40).

(b) It would be unusual for a person who was the employee of one company to be an agent of another company. There would "need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed" (paragraph 43).

(c) Whatever concept of agency was adopted, the putative agent needed to be acting on behalf of the putative principal with the authority of the putative principal in relation to independent third parties (paragraphs 39 to 44).

I do not consider it necessary for the purposes of this cross-appeal to determine whether the **Yearwood** approach is correct or not.

180. I have concluded that although the Employment Tribunal's conclusions are expressed in brief terms and the reasoning somewhat compressed, no error of law is made out so far as Dr Lake is concerned in relation to this aspect of the cross-appeal. My reasons follow.

181. In relation to Dr Lake, there is no finding that there was a contract between him and the Respondent before 31 July 2014. Further, the Employment Tribunal rejected Dr Lake's evidence in relation to 'Chief Exploration Officer'. Instead the Employment Tribunal accepted that Dr Lake was assisting the Respondent for two principal reasons: as a favour to Mr Timis, and so that APCL could recover the money owed to it by the Respondent (see [36]). Since a contract could only have been implied if its implication was necessary to explain the relationship of the parties, and the evidence shows that they would or may have acted as they did without there being a contract between them, that finding is also fatal to the implication of any contract: see **Tilsom v. Alstrom Transport** [2011] IRLR 169. Dr Lake's involvement and assistance was designed to ensure that his company, APCL, recovered money it was owed, and in the absence of any evidence or finding that Dr Lake had agreed to act on behalf of the Respondent in an agency sense, the Tribunal's conclusion that he was not an agent in this period cannot be impugned.

182. Once the Advisory Agreement was in place, whether or not the scope of the work actually carried out by him went beyond the terms of the Advisory Agreement or not, it seems to me that the Employment Tribunal made a finding of fact that he undertook the work he did as CEO of APCL and not as a worker under an implied contract, or as an agent. Those conclusions were open to the Employment Tribunal in particular, in circumstances where it accepted that there was a personal relationship between him and Mr Timis, and his friendship with Mr Timis, and the desire for APCL to recover money owed to it by the Respondent provided a clear basis for any action he took that went beyond the scope of the Advisory Agreement. There was no need to resort to an implied worker contract in these circumstances.

Nor for the same reasons, was there any basis for finding that Dr Lake was acting as agent of the Respondent in this second period.

183. As for Mr Matveev, there is no doubt that he had a contract with the Respondent and that the contract required personal service. The issue for the Employment Tribunal in deciding whether he was a worker was accordingly, whether or not Mr Matveev provided his services to the Respondent in circumstances where the Respondent was his client or customer. On that issue the Employment Tribunal made the following findings at [93] and [94]:

(a) Mr Matveev's Consultancy Agreement with the Respondent required him to be available to travel on 24 hours notice and to work as and when required;

(b) Mr Matveev had a number of consultancy agreements with other businesses and acted as a consultant to Timis Group Companies since 2011;

(c) Mr Matveev "was conducting a business on his own account, whether in his own name or through corporate entities";

(d) Mr Matveev "had no power to execute any agreements or transactions unless he had been issued with power of attorney or proxy specifically authorising him to do so";

(e) Mr Matveev did not market his services to the world in general.

184. It seems to me that these findings point in both directions and do not obviously lead to the conclusion that the Respondent was a client or customer of Mr Matveev. The Employment Tribunal's observation that Mr Matveev's situation was far from *"the paradigm case of a business undertaking providing services to a customer,"* coupled with the fact that he *"did not market his services to the world in general"* pointed to the opposite conclusion, but the Employment Tribunal appears to have thought it supported it, as demonstrated by the opening

words of [95]. It is not possible to understand from the equivocal findings and the two factors pointing against the Respondent being a client or customer how "the circumstances" led to the conclusion reached by the Employment Tribunal here. This is not a question of reading the reasoning of Langstaff J in **Cotswold Developments v. Williams** like a statute, as Mr Forshaw suggests, and which is plainly inappropriate. Rather it is a matter of considering the Employment Tribunal's reasons and whether they are adequate to explain why it concluded that Mr Matveev was not a worker here.

185. Reading [93] to [95] as generously as I can, I cannot be confident that the Employment Tribunal correctly applied the law to the facts in relation to Mr Matveev's status. The reasoning is simply inadequate to enable me to so conclude. Furthermore, there is no consideration by the Employment Tribunal of factors relied on by the Claimant as pointing to worker status, such as whether and to what extent Mr Matveev was integrated into the Respondent or dependent on it for his livelihood. It seems to me for these reasons that this conclusion cannot safely stand, and this question will have to be remitted for reconsideration.

186. Finally in relation to agency, I accept Mr Forshaw's submission that no case was advanced before the Employment Tribunal that Mr Matveev was an agent of the Respondent. In any event, I agree with him that there would have been no basis for finding that Mr Matveev was acting as an agent of the Respondent. There is no finding (or evidence) that he was authorised to act on its behalf in relation to its dealings with third parties and the Employment Tribunal found expressly that he was not authorised to execute agreements or transactions with third parties in the absence of a specific power of attorney authorising him to do so.

The Remedy Issues on the Appeal and Cross-Appeal

Contributory Fault (ground 18)

187. Sections 122(2) and 123(6) ERA 1996 afford power to reduce any award of compensation on the basis that it is "just and equitable" to do so having regard to a claimant's conduct, or on the basis that a claimant "caused or contributed" to his dismissal. The question for tribunals in making such a determination, is whether and to what extent the claimant engaged in 'blameworthy' conduct that caused or contributed to the dismissal.

188. Mr Forshaw relies on a single sentence extracted from [156] of the First Judgment where the Tribunal considered contributory conduct and argues that the Tribunal said nothing more than this:

> **As far as contributory fault is concerned, Mr Osipov was dismissed because he raised protected disclosures".**

He submits that there was in fact clear evidence that the Claimant was guilty of blameworthy conduct given the fact that he terminated the Advisory Agreement without authority, refused to retract this termination and there was, he submits, clear evidence in the form of Mr. Sage's email of 27 October that these matters formed (at least) part of the reason for the Claimant's dismissal. Notwithstanding all of this, the Tribunal declined to make any deduction for contributory fault either because it failed to apply the correct test by considering whether there was blameworthy conduct or because it assumed wrongly that a plea of contributory fault must necessarily fail in a case under s.103A ERA 1996.

189. I do not accept that the Tribunal declined to make a deduction because it simply assumed that no such deduction could be made in a protected disclosure dismissal case. The

Tribunal expressly recognised at [156] that the asserted blameworthy conduct was the Claimant's termination of the Advisory Agreement but held "on the evidence" that it was "not satisfied that it is appropriate for any deduction to be made in respect of contributory fault".

190. Whether there was blameworthy conduct or not is a question of fact and impression. The Employment Tribunal made findings at [136] to [139] which are discussed above and rejected the reasons relied on by the Respondents for dismissing the Claimant. It accepted that the letter terminating the Advisory Agreement with APCL "properly identified that Dr Lake had breached the terms of the Advisory Agreement" (see [137] and [139]). In these circumstances, it was open to the Tribunal to find that there was no blameworthy conduct. In the absence of any clear error of law or perversity there is no basis on which to challenge this conclusion.

Polkey (ground 19)

191. This ground challenges the approach adopted by the Tribunal in relation to **Polkey**. While it is accepted by Mr Forshaw that the Tribunal did not treat the Claimant's employment as open ended and adopted, following **O'Donoghue v. Redcar** [2001] IRLR 615, a "safe date" approach by finding that his employment would certainly have come to an end by 8 June 2016, it is argued that it was incumbent on the Tribunal to assess the chance of a fair dismissal before that safe date in light of two particular factors. First it is said that there was clear evidence of a breakdown in the relationship between the Claimant and the Niger Government; and secondly that Mr Timis and Mr Sage had grave concerns about the Claimant's conduct in terminating the Advisory Agreement. On this basis, there must have been at least some chance that the Claimant could and would have been fairly and lawfully dismissed at that time or in the future.

A Since the Tribunal made no attempt to assess this chance, it is argued that the Tribunal erred in law.

B 192. The Tribunal dealt with future loss beginning at [168] of the First Judgment. The Claimant invited the Tribunal to assess future loss based on 14 years to the date of retirement making such reductions as it thought appropriate to take account (inter alia) of (a) the risk that his employment may have come to an end at some point in future due to dismissal or

C resignation and (b) any risk that the Claimant's employment may have come to an end as a result of the Respondent going out of business.

D 193. The Tribunal said expressly at [169] that it did take into account the factors at (a) and (b). Having said that, it rejected the starting point of losses based on 14 years to the date of retirement, indicated that it would adopt the **O'Donoghue** approach, and at [171] concluded

E that the Claimant's employment would definitely have ended by 8 June 2016, but made no other reduction.

194. It would have been better for the Tribunal to spell out how it took account of factor (a)

F but I am satisfied that by adopting the **O'Donoghue** approach the Tribunal engaged in a sufficient assessment of what was likely to happen in the future. It was not obliged to make specific findings, but rather required to make a broad brush assessment about what might

G happen or might have happened: see **Beatt v. Croydon Health Services** [2017] EWCA Civ 401 at paragraph 101.

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195. The Tribunal found the dismissal substantively unfair on the basis of the protected disclosures and under the ordinary unfair dismissal provisions. In the absence of any specific submission about future loss beyond an invitation to the Tribunal to find that a fair dismissal (for the reasons the Respondents were then advancing) could have been effected within two weeks (see paragraph 86 of the Respondents' Closing Submissions) and having rejected the Respondents' case that the Claimant's conduct in terminating the Advisory Agreement was the reason for dismissal, it seems to me that the Tribunal dealt adequately with the **Polkey** issue. In any event, given its findings, it is entirely unsurprising that the Tribunal did not conclude that there could be a fair dismissal for the same reason within a relatively short period of time.

196. As for the remaining factor, it is legitimate to have regard to the Tribunal's earlier findings. The Employment Tribunal made no finding that there was the asserted breakdown in the relationship between the Claimant and the Niger authorities now relied on by Mr Forshaw (but not relied on below). Indeed, reading the First Judgment as a whole it was plainly sceptical about the claimed breakdown (which was denied by the Claimant) given the timing issues it referred to (namely, the fact that the Claimant was appointed CEO in June, encouraged to travel to Niger by Mr Timis but before having any opportunity to do so, was prevented and instructed not to go there; and the significantly later, hitherto unreported discussion about the inadequacies of the Claimant's performance at the meeting on 2 September, at a time when he had not had any involvement in Niger since June). It seems to me that the findings at [58], [65], [125] and [128] show that the Tribunal found that the real reason the Respondents wished to keep the Claimant away from Niger had nothing to do with his relationship with the authorities there and everything to do with the fact that he was viewed as an obstacle because of the protected disclosures he made.

Wages (ground 20)

197. This ground seeks to challenge the Employment Tribunal's award of unpaid salary in the sum of £308,550.16. There is no dispute that the Claimant is entitled to this sum (as Mr Forshaw accepted on the Respondents' behalf, on instructions and in open court) and, despite taking the opportunity offered to him to take further instructions, Mr Forshaw was unable to offer me any reason, still less any good reason why that sum has not been paid.

198. Nonetheless, Mr Forshaw contends that in the absence of a Wages Act claim to support this award, the Tribunal was not entitled to make it. He submits by reference to [177] and [179] of the First Judgment that the sum was awarded as wages and not as part of the compensatory award. Moreover, it was not a loss arising from dismissal but a claim that arose before the Claimant's dismissal and which he continues to have. He has not accordingly suffered any loss as a result of the dismissal in this respect.

199. Mr Carr submits that it is not correct that there was no claim for this sum before the Employment Tribunal. He submits that paragraph 93(a) of the Claimant's Closing Submissions expressly made such a claim. It contended for losses for a finite period from, say two years from the actual date of dismissal, to include all lost earnings and payments to which he would have been entitled on lawful termination. I accept that contention. The Claimant expressly identified his right under the Term Sheet governing his employment, to receive all unpaid salary at the point of a lawful termination. I also accept that this explains the phrase used by the Employment Tribunal at [177] of the First Judgment: "Mr Osipov has a claim for unpaid salary in the sum of £308,550.16 gross…".

200. The more difficult question is whether Mr Carr is correct to submit that this loss plainly flowed from the dismissal in that the Claimant was dismissed without payment of the sum to which the Respondents had agreed he was entitled. Mr Carr relies if necessary on the principle in **Norton Tool Co Ltd v.Tewson.**

201. Section 123 of the ERA 1996 provides so far as relevant:

> **"(1) Subject to the provisions of this section…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".**

Awards for compensation for unfair dismissal are accordingly limited to losses flowing from that dismissal.

202. Here, the Employment Tribunal identified a safe date by which it was certain that a fair and lawful dismissal would have taken place. It was therefore required to make an award of full compensation to reflect losses attributable to the Claimant's dismissal on that basis.

203. The relevant part of the Claimant's Term Sheet provides:

> **"Severance: the company shall, within 30 days from employment termination, pay any accrued salary and bonuses, as well as ….".**

Although I accept Mr Forshaw's submission that the Claimant had accrued the outstanding salary entitlement in question, and would have continued to have a right to claim for that salary irrespective of dismissal, this clause creates a separate right on severance to payment of all outstanding accrued salary within 30 days from employment termination. It seems to me that this contractual right makes all the difference. There is no reason why the Tribunal should have

awarded compensation on a just and equitable basis that envisaged a future dismissal that was either unfair or in breach of contract. A fair and lawful dismissal on 8 June 2016 in accordance with the Claimant's contractual right to receive his accrued salary entitlement within 30 days of that date, would have resulted in payment of the outstanding salary due. It seems to me that it would be unjust and inequitable to proceed on the alternative basis advanced by Mr Forshaw. In the circumstances I do not consider that the Tribunal made any error of law in awarding the outstanding accrued salary entitlement as part of the Claimant's compensatory award.

204. Mr Forshaw suggests that there is some unfairness in this approach because it results in an uplift in respect of these wages which the Claimant would not have been entitled to had he brought this claim in the civil courts and enables the Claimant to seek recovery of the sums against Mr Timis and Mr Sage, a right he would not otherwise have had.

205. I do not consider that any real unfairness arises. These Respondents (who are the minds behind the Respondent, and take the day to day decisions and manage it) accept that the sums are due and payable and could (at any time) have caused the Respondent to make the payments to which the Claimant is entitled, thereby avoiding the risk of an award of compensation being made on this or any other basis. Not only have they failed to cause the Respondent to make the payments due but they have provided no explanation at all for the Respondent's failure to pay outstanding accrued salary for service performed by the Claimant for the Respondent.

Injury to Feelings Award (cross-appeal)

206. The assessment of an injury to feelings award is undertaken on a broad-brush basis in accordance with current guidance. A tribunal's determination cannot accordingly be lightly interfered with on appeal. At paragraph 51 of its judgment in **Vento** the Court of Appeal stated:

> **"Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury. In these circumstances an appellate body is not entitled to interfere with the assessment of the employment tribunal simply because it would have awarded more or less than the tribunal has done. It has to be established that the tribunal has acted on a wrong principle of law or has misapprehended the facts or made a wholly erroneous estimate of the loss suffered. Striking the right balance between awarding too much and too little is obviously not easy" (emphasis added).**

207. In **Vento** the Employment Appeal Tribunal gave guidance as to the quantum of general damages identifying three bands. In relation to the top two bands, it said:

> **"(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band…"(paragraph 65).**

The **Vento** guidance is, however, only guidance. It should not be read or applied like a statue. The three bands identified have been updated to take account of inflation over the years since the guidance was first given.

208. Here the Employment Tribunal felt that the case merited an award in the middle band reflecting its assessment that this was a serious case. Mr Carr challenges this finding as in error and contends that a top band award should have been made. He submits that this was a sustained campaign of victimisation and exclusion of the Claimant from early June to his dismissal at the end of October 2014. He relies on the Employment Tribunal's findings of:

> **"…upset over a long period by the undermining of him. The treatment accorded to him was of long duration. Mr Osipov was cut out of meetings and his professionalism was impugned".**

209. True it is (as Mr Carr submits) that no reference is made there to the final detriment to which the Claimant was subjected, namely Mr Sage and Mr Timis acting together to bring his job to an end. However, I do not consider that the termination of the Claimant's employment was overlooked by the Employment Tribunal. His summary termination is referred to at [146] and cannot have been forgotten. The Employment Tribunal was referred to the guidance. It considered the evidence it heard (as it said at [147]) and concluded that an award at the top of the middle band appropriately reflected the seriousness of the case. I consider that assessment was open to the Employment Tribunal and reflects no error of law.

10% Increase to Salary (cross-appeal)

210. The Claimant challenges the Employment Tribunal for failing to award him a 10% increase in his salary, year on year in accordance with the terms of his Term Sheet which said:

> **"Annual Increase: greater of 10% or cost of living index".**

The Employment Tribunal's reasons (at [159]) for not calculating the Claimant's losses by reference to this provision are as follows:

> **"The Tribunal notes the provision for an annual increase of the greater of 10% or cost of living increase. The fact that the provision says "or" implies that Mr Osipov is not entitled to a 10% increase. Neither party has provided information to the Tribunal on the cost of living (although the Tribunal is aware from its own knowledge that the figure is minimal). The Tribunal therefore makes no award in relation to pay increases. In addition, there is no evidence before the Tribunal that Mr Osipov ever had an increase. There is no evidence of year-on-year increases for the duration of his employment by IPL. Further, the earlier term sheet made no mention of annual increases. There is insufficient evidence for the Tribunal to find that annual increases were ever made or ever paid."**

211. There is no dispute that this reasoning is wrong and reflects a misunderstanding of the clause. The use of the word "or" did not mean "that he is not entitled to a 10% increase". 10% was the minimum to which the Claimant was entitled. He would only be able to claim more than that figure in the event that he was able to demonstrate that the cost of living index had

risen by a sum in excess of 10%. In the absence of a higher increase in the cost of living, the Claimant was accordingly contractually entitled to the guaranteed minimum increase of 10%. To exclude the 10% uplift on the basis that: "there was no evidence before the Tribunal that Mr Osipov ever had an increase" also reflects a misunderstanding. What had happened in previous years was irrelevant as his earlier contract had not provided for the 10% minimum increase. The contract on which he relied (the Term Sheet) was only entered into in June 2014 and by the end of October 2014, he had been dismissed.

212. Mr Forshaw resists this ground of appeal, arguing that the point goes nowhere because the Claimant conceded (at footnote 96 of the Claimant's Closing Submissions) that no claim for a 10% increase would be pursued as this would be cancelled out by the reduction for accelerated receipt that would otherwise have to be made. The Employment Tribunal cannot be criticised in light of this concession for failing to make this award.

213. I do not accept that there was the unqualified concession relied on by Mr Forshaw and it is clear that the Employment Tribunal did not understand Mr Carr's submissions in that way. Footnote 96 is expressed to be on the basis of a claim for compensation for the period to June 2018. On that basis there would be an element of accelerated receipt as the Claimant would receive an award in 2016 for losses going forward to June 2018. However, since the Employment Tribunal found that the Claimant would have been dismissed in June 2016, there was no element of accelerated receipt and no doubt that is why the Employment Tribunal considered the 10% uplift clause, albeit on an erroneous basis. The Employment Tribunal understood that there was no concession in relation to the 10% uplift save in circumstances where an element of accelerated receipt would arise and potentially cancel it out.

214. In these circumstances, this ground of appeal must succeed. The Claimant is entitled to receive the 10% increase guaranteed by his Term Sheet as the minimum year on year increase to his salary. Absent the error it made in construing the provision, it is plain that the Employment Tribunal would have made this award.

Housing Allowance (cross-appeal)

215. This issue was dealt with by the Tribunal at [164]. The claim for housing allowance was allowed by the Tribunal to the extent of £41,930 being 14 months (to the date of a future dismissal projected by the Employment Tribunal to be in June 2016) at £2,995 per month. This figure was used by the Employment Tribunal because it appeared in the Claimant's schedule setting out his unpaid salary claim for 2012 to 2014. Whilst he claimed £2,995 per month, this related to the period up to May 2014, reflecting the period prior to the Claimant and the Respondent entering into the Term Sheet in June 2014 which increased this allowance to £5,000 per month. Mr Carr accordingly submits that the Tribunal should have used the figure contained in the Term Sheet, and was wrong to regard the figure claimed by reference to the earlier contract as relevant in any way.

216. As to Mr Forshaw's argument resisting this ground, that the Claimant led no evidence that he was actually receiving housing allowance in the sum of £5,000 per month even after June 2014, it seems to me that the Claimant did not need to do so. He was entitled to do what he did, which was simply to point to his contractual entitlement expressed in clear and unequivocal terms in the Term Sheet, as follows:

> **"Housing expenses: Monthly cash allowance of British Pounds £5,000"**

217. This was not accordingly a question to be decided on evidence from the Claimant as to the housing allowance he was actually receiving at the point of his dismissal to determine what his loss was in this respect. The contractual position was clear and by failing to have regard to the Term Sheet the Employment Tribunal did err in law. This ground succeeds for this reason.

Golden Parachute (cross-appeal)

218. This ground of the Claimant's cross-appeal challenges the Employment Tribunal's decision to award the Claimant the sum of £175,285 only by way of 'Golden Parachute': see [173] of the First Judgment where the Employment Tribunal recognised that the Term Sheet provides for "one year's annual salary on severance… referred to as a 'Golden Parachute'." The Claimant contends that a higher sum should have been awarded under this head of loss as appears below.

219. At [173] the Employment Tribunal referred to the figure for annual net salary as £175,285. This was the figure set out in the Claimant's Closing Submissions. However, the Employment Tribunal held in terms at [160] that it was basing compensation on a salary of the net equivalent of £350,000 per annum. This produced a net figure of £196,086.20, and Mr Carr contends that having made that finding, it should have followed that calculation through to its logical conclusion and applied the same figure to the calculation of the Golden Parachute payment. In addition, the figure used should have reflected the 10% increase to which the Claimant was contractually entitled.

220. Mr Forshaw contends that the Employment Tribunal's approach is unimpeachable because the Claimant was awarded the sum he asked for in Leading Counsel's Closing

Submissions (at paragraph 84) and the Claimant cannot therefore criticise the Employment Tribunal for awarding him the sum he asked for.

221. Again, I disagree with Mr Forshaw. The Employment Tribunal did not simply adopt the figure sought in the Claimant's schedule or submissions, and plainly was not bound to do so. Rather, the Tribunal adopted its own approach to these figures, and having done so and expressly decided that the net equivalent of an annual salary of £350,000 should be used to determine the compensatory award, I agree with Mr Carr that the logic of that decision means that the Claimant was entitled to a Golden Parachute calculated on that basis, uplifted by the 10% increase to which he was also contractually entitled. Its failure to do so was in error and accordingly this ground also succeeds.

Additional matters

222. In the course of lengthy written and oral argument both sides made a number of legal points and referred to a number of documents. This is an already over long judgment, but I have sought to deal with what I consider to be the principal points raised in relation to the many grounds of appeal and cross-appeal. Both sides can, however, be assured that I have considered all the points made and all the documents relied upon, even where no specific reference is made to them.

Conclusion

223. In summary, therefore, the Respondents' appeals are dismissed save in relation to the finding that the Respondent is liable for the actions of Dr Lake for detriments done by him to

the Claimant: ground 9. That finding cannot stand. The tax issues raised by the second appeal will be addressed separately.

224. Save for the grounds of the Claimant's cross-appeal set out below, all other grounds fail and are dismissed. The successful grounds are:

(i) The finding that Mr Matveev is not a worker is set aside and will be remitted for reconsideration.

(ii) The finding that the Claimant is not entitled to a 10% increase to his salary is set aside. His award must be increased to reflect this entitlement.

(iii) The findings in relation to Housing Allowance and Golden Parachute are also in error, and awards based on £5000 per month for Housing Allowance and a net annual salary figure of £196,086.20 (uplifted by 10%) must be substituted by way of award for the Golden Parachute.

225. So far as consequential orders are concerned, including the nature of the order for remittal, these can be dealt with in writing once the parties have had an opportunity to consider this judgment, or at the hearing reserved for the appeal on tax issues arising out of the award.

226. Finally, I am grateful to both counsel and their legal teams for the written and oral submissions, and the helpful way in which these appeals were prepared and argued.

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