EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

CLAIMANT **MS J STEWART**

RESPONDENT **FOREIGN, COMMONWAELTH & DEVELOPMENT OFFICE**

ON: **20- 23 SEPTEMBER 2023**

Appearances:

For the Claimant: **MR G MILLAR, KC**
For the Respondent: **MR B COOPER, KC**

ORDER

Paragraphs 53, 59,82, 109 and 143 (other than the first sentence) of the Claimant's witness statement attract Parliamentary privilege and should be deleted from the Claimant statement.

Paragraphs 70. 75, 78 and 79(c) are admissible.

REASONS

1. This Preliminary Hearing was listed to deal with an issue relating to parliamentary privilege. This is not a topic that routinely comes up in Employment Tribunal proceedings. I am not aware of any prior employment cases which have dealt with this issue.

2. In this case the Respondent submits that various paragraphs of the Claimant's witness statement, prepared for the final hearing, breach Article 9 of the Bill of Rights 1689 and/or constitutional principles of parliamentary privilege. Initially the Respondent invited the Claimant to delete the various paragraphs. The Claimant has declined to do so, saying that they form an important part of her case. The issue before me was whether parliamentary privilege applied to those passages, such that they should be removed from the Claimant's witness statement.

3. As is customary in cases where Parliamentary privilege is asserted, the Respondent has sought the views of Speaker's Counsel, and this view was provided on 5 September 2023. Her opinion is a matter to which I am entitled to attach significant weight, though ultimately the issue is for the courts to decide.

4. Background facts. The Claimant was a civil servant employed by the Respondent from April 2015. She was dismissed, and her employment ended on 9 September 2022. She brings claims of detriment and dismissal on the ground that she had made protected disclosures.

5. When the Claimant was first employed she spent some time working at the British Embassy in Kabul. Following the fall of the Afghan government to the Taliban in August 2021 the Claimant volunteered to leave her current post, on a temporary basis, to work in the Afghan Crisis centre. According to her witness statement she did so from 23 August until 8th September 2021.

6. On 7 December 2021 the Claimant gave an interview, on an anonymous basis, to a journalist, Sima Kotecha at BBC Newsnight. In that interview the Claimant was critical of the Government's management of the evacuation from Afghanistan of Afghan citizens who had worked for or assisted the UK government in Afghanistan. Sometime later, in early or mid-January 2023, following an approach from Ms Kotecha who was pursuing a story that the government had prioritized animals over people for evacuation, the Claimant sent screenshots of two emails to Ms Kotecha which were classified Official Sensitive. (Both sides agree that the emails did not in fact indicate any decision to prioritise animals over people.)

7. On 27 January 2022 Ms Kotecha tweeted images of the emails which the Claimant had sent to her. By this means the Claimant was inadvertently identified. She was suspended from duty on 1 February 2022, and her security clearances were revoked on 7 February 2022. She was subsequently dismissed, and her employment ended on 9 September 2022 on the ground that there was no role within the Respondent that she was able to perform following the withdrawal of her security clearances. Her appeal against dismissal was unsuccessful.

8. The Claimant says that she spoke to the press on 7th December because she wanted to corroborate evidence given by Mr Raphael Marshall to the

Foreign Affairs Select Committee on the FCDO's handling of the Afghanistan crisis, which had been denied (outside Parliament) by Mr Raab and because of statements made by the then Prime Minister, also outside of Parliament, which she knew to be untrue. She says that she reasonably believed that the disclosures were true, that disclosure was in the public interest because the process of parliamentary scrutiny was being undermined by untruthfulness (ws para 125). It is her case that disclosing internally was not a meaningful option.

9. The issues for the full merits hearing. As set out above, the Claimant says that she was subjected to detriments and dismissed for making protected disclosures. The Respondent denies that the Claimant was dismissed or subjected to a detriment because she made protected disclosures. The Respondent denies both that the Claimant made protected disclosures as defined in section 43A of the Employment Rights Act 1996, and that the reason or principal reason for the Claimant's dismissal or her pleaded detriments was that she had made protected disclosures.

10. Both parties are very well represented and a list of issues for determination at the full merits hearing is set out at page 81 of the bundle. In her (relatively brief) Amended Grounds of Complaint the Claimant says that she relies on section 43B (1) (b) and/or (d) and/or (f) of the Employment Rights Act 1996.

11. As is well known, a protected disclosure is defined in section 43A of the ERA as "*a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*." Section 43B defines a qualifying disclosure as "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 of the following...

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

(d) that the health or safety of any individual has been, is being or is likely to be endangered.

(f) that information tending to show any matter falling with any one of the preceding paragraphs has been concealed."

12. A qualifying disclosure only becomes a protected disclosure, if it is made in accordance with one of Sections 43C -43H. In the vast majority of cases before this Tribunal the worker has made the disclosure to his or her employer, which satisfies section 43C. In this case, the Claimant did not make the disclosures to her employer. She relies instead on sections 43G or 43H. Those sections set out a number of additional criteria in order to satisfy the definition of a protected disclosure. Those criteria are accurately set out in the agreed list of issues at page 82.

13. To rely on Section 43G or 43H the Claimant will need to show, amongst other things, that she reasonably believed that the information disclosed and any allegation in it was substantially true and that in all the circumstances of

the case it was reasonable for her to make the disclosure. In assessing whether it was reasonable for her to make the disclosure a number of different factors have to be taken into account including the identity of the person to whom the disclosure was made. (Factors to be taken into account in 43G – but not 43H - include whether the disclosure is made in breach of a duty of confidentiality to the employer.)

14. The Respondent disputes that the Claimant had a subjective belief that the disclosures were in the public interest or that this belief was objectively reasonable. It disputes that she had a reasonable belief that she would be subjected to a detriment or that evidence would be concealed or destroyed if she had made the disclosures internally. It disputes that it was reasonable in all the circumstances for the Claimant to have made the disclosures to Ms Kotecha, rather than addressing them internally with the Respondent. The Tribunal will therefore, at the final hearing need to decide those central disputes of fact.

15. The issue for this hearing is whether the Claimant should be permitted to include certain paragraphs in her witness statement for the final hearing or whether that is impermissible. The issue of parliamentary privilege arises because in her witness statement, the Claimant refers to evidence given by various individuals to the Parliamentary Joint Committee on the National Security Strategy, and to the Foreign Affairs Committee on the Respondent's handling of the Afghanistan crisis. It is common ground that evidence given to a select committee is covered by Parliamentary privilege; the issue for me was to determine the extent and scope of privilege in the context of this case.

16. The Claimant includes the disputed paragraphs because, on her case, they form part of her explanation of the reason that she gave an anonymous interview and leaked emails to the BBC. She says that they explain and support her reasonable belief that the disclosures were in the public interest and are substantially true. Some of these paragraphs refer to statements made to the relevant committee after the Claimant had given her interview to the BBC or shared the emails in question.

17. It is the Respondent's position that those paragraphs are for the most part irrelevant and involve a breach of article 9 of the Bill of Rights and principles of Parliamentary privilege more generally. They challenge paragraphs 53, 59, 70, 75, 78 and 79 (c), 82, 107, 109 and 143. For ease of reference those paragraphs are set out in the schedule to this Judgment.

18. The principle of Parliamentary privilege. There is a dispute between the parties as to the extent of the privilege and, in particular, as to how it applies in whistleblowing cases.

19. The starting point is Article 9 of the Bill of Rights 1689 which provides:

"*That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*."

20. Parliamentary privilege, if it applies, is a rule that cannot be waived by the parties.

21. Both parties have referred me to the Prebble v Television New Zealand 1995 1AC 321. This was a defamation case in which the defendant sought to justify allegations made against the plaintiff by alleging that the plaintiff and others had made untrue statements in the House of Representatives. The Privy Council held (from the headnote)

"*It was an infringement of Parliamentary privilege for any party to legal proceedings to question in those proceedings words spoken, or actions done, in Parliament by suggesting, whether by direct evidence, cross examination, inference or submission, that they would be untrue or misleading or were instigated for improper motives, even where such suggestions were advanced by way of defence to proceedings instituted by a member of the legislature….*" (See also paragraph A at page 337)

22. In that case the Privy Council noted that "*in addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established principles*."

23. In arriving at that decision Lord Browne-Wilkinson, giving the judgment of the Privy Council referred to section 16(3) of the Australian Parliamentary Privileges Act 1987, and specifically said that this reflected, and declared, what had previously been the effect of Article 9 of the Bill of Rights 1689 and was "the true principle to be applied". (p333E). That section provides as follows:

"In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of – (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."

24. The judgment later contains a narrower statement of the principle by limiting it to cases in which there is some "questioning" of a parliamentary proceeding. (As later cases have noticed paragraph (c) of the above Australian statute is extremely wide and does not require questioning.) That narrower principle, as stated in Prebble, is that parties to litigation "*cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross examination, inference or submission) that the actions or words were inspired by improper motives or untrue or*

misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exist in New Zealand In relation to perjury under section 108 of the Crimes Act 1961". He continued *"but their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegations of impropriety or any other questioning there is no objection to that course."*

25. Prebble has been endorsed and relied on in various cases which follow it including Church of Scientology of California v Johnson-Smith 1972 1QB 522 and Hamilton v Al Fayed 2001 1AC 395 and Coulson v HM Advocate 2015 SLT 438.

26. In R v Federation of Tour Operators and others v HM Treasury 2007 EWHC 2062 Stanley Burton J stated that it was important to identify the purpose for which evidence of proceedings in Parliament was adduced. *"In my judgment, the Speaker's submissions, and the authorities to which I have referred, demonstrate the importance of identifying the purpose for which evidence of proceedings in Parliament is relied upon.… It is the relevance of that material as well as its origin that the court must consider. It is necessary to consider whether this material would otherwise be admissible on or relevant to the determination of the claimant's substantive claims, before deciding whether its origins preclude their adducing it in evidence."*

27. More recently in Office of Government Commerce v Information Commissioner 2010 QB 98 (OGC) Stanley Burton J reviewed the various authorities on Parliamentary privilege including Prebble. In that case, having reviewed the authorities, Stanley Burton J said this "*However it is also important to recognise the limitations of these principles. There is no reason why the court should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events; no questioning arises in such a case. Similarly it is of the essence of the judicial function that the court shall determine issues of law arising from legislation and delegated legislation. Thus there can be no suggestion of a breach of Parliamentary privilege if the courts decide that legislation is incompatible with the European Convention of Human Rights…"*

28. In OGC Stanley Burton J also said this "*if a party to proceedings before a court seeks to rely on an opinion expressed by a select committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the committee was wrong and give reasons why, thereby the very least risking a breach of Parliamentary privilege if not committing an actual breach or, because of the risk of that breach, accept that the opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. It indicates that a party to litigation should not seek to rely on the opinion of a Parliamentary committee, since it puts the other party at an unfair disadvantage…. "*

29. Stanley Burton J in the Tour Operators case placed much emphasis on "identifying the purpose for which evidence of proceedings is relied on". It

may for example fall into one of the exceptions to the principle as concisely set out by Speaker's Counsel at paragraph 12 of her opinion (and see paragraph 33 below). He also refers to the need *"to consider whether this material would otherwise be admissible on or relevant to the determination of the claimant's substantive claims, before deciding whether its origins preclude their adducing it in evidence."* I have dealt with relevance later on in these reasons.

The opinion of Speakers Counsel.

30. On August 24, 2023, the Respondent's solicitors wrote to Speakers Counsel (175) seeking a written view as to whether the Claimant's evidence, contained in her written witness statement, contravened article 9 of the Bill of Rights. In that letter the Respondent said that it considered that paragraphs 53, 59, 82, 107, 109, 143 as well as paragraph 75 and 78 contravened article 9.

31. On 31st August the Claimant's solicitors wrote to Speakers Counsel (194). They noted that it was for the tribunal to determine whether Parliamentary privilege applied, that it was critical to identify the purpose for which evidence the proceedings in Parliament was reduced. They stated that Parliamentary privilege did not prevent a litigant from citing Parliamentary material to establish, as a fact, what a person said in Parliament "so long as they do not also seek a finding that the person spoke with improper motives or said things which were untrue or misleading". They refer to Prebble and the observation of Lord Browne-Wilkinson that litigants could adduce evidence about "what was done and said in Parliament as a matter of history."

32. In their submissions to Speaker's Counsel the solicitors for the Claimant note that:

    a. that Parliamentary privilege, which was designed to protect freedom of speech on matters of public interest should not be allowed to undermine the Claimant's ability to speak freely and to present her whistleblowing claims.
    b. none of the issues raised by the Claimant's claims "require the tribunal to decide whether things which was said in Parliament were true or untrue or were made with improper motives."
    c. that the Claimant also referred to statements made by the same individuals outside of Parliament so that removing the challenged passages would not advance the purpose of parliamentary privilege in any meaningful way.
    d. that paragraph 53, 59 82 and 143 simply and accurately described what was said and did not fall foul of Parliamentary privilege. Paragraphs 107 to 109 did not invite the tribunal to find that the civil servant (Nigel Casey) giving evidence to the select committee was dishonest.
    e. that the Respondent had not provided any clarity as to the nature of its objection to paragraphs 75 and 78.

33. In her opinion, dated 5 September 2023, Speakers Counsel, after setting out the general principles says this: "In determining whether evidence concerning proceedings in Parliament is admissible or not, the starting point is the purpose for which the material is to be used." She refers to a R (Heathrow Hub) v Secretary of State for Transport 2020 EWCA civ 213 which set out the various circumstances in which reference to Parliamentary proceedings would not breach article 9.

    a. The court may admit evidence of the proceedings in Parliament to prove what was said or done in Parliament as a matter of historic fact where this is uncontentious *(my underlining).*
    b. Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights.
    c. The courts may have regard to a clear ministerial statement as an aid to construction of ambiguous legislation.
    d. The courts may have regard to Parliamentary proceedings to ensure the requirements of the statutory process have been complied with.
    e. The courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament on the courts to agree if possible.
    f. The use of ministerial statements in judicial review proceedings.

    (Of these exceptions the Claimant seeks to rely on a. alone. She does also mount a challenge to the validity of Article 9 itself in the context of whistleblowing cases.)

34. Speakers Counsel also referred to two decisions which gave detailed consideration to the meaning of "questioning". The first is Office of Government Commerce the Information Commissioner (see above). The second is Kimathi and others v Foreign and Commonwealth Office 2018 4 WLR 48.

35. Speaker's Counsel noted that there was no exception from article 9 in the legislation protecting public interest disclosure. As a matter of general principle, Article 9 was a constitutional statute which could not be disapplied saved by express provision or clear necessary implication and that *"There is no such necessary implication here."* Further she opines that *"It is not a necessary condition of infringement of privilege, as suggested in the Claimant's solicitors' letter of 31st August, that there be an allegation of impropriety. That is much too narrow a formulation of the protection conferred by privilege. It is enough, as shown by the reference to "any other questioning" in the quotation from Lord Browne-Wilkinson set out in that letter, that there be questioning of the Parliamentary material for there to be a breach of article 9. As Stewart J made clear in Kimathi there is a potential breach of privilege in a case where either the Respondent may wish to contest what was said or the court or tribunal may be placed in the position of having to decide the accuracy of the content of the proceedings."*

36. In her opinion paragraphs 59 and 82 both appeared to be impermissible. She offered no opinion on paragraphs 107 or 109 as "this will depend on whether the Respondent wishes to challenge aspects of her evidence in those paragraphs.". The same applied to paragraph 143. If the Respondent wished to dispute the Claimant's account of what was said, then it "*would be placed in the position of either failing to defend its position when it might wish to do so or infringing privilege." "As noted above, the Claimant is herself questioning the accuracy of what was said in Parliament in some cases. As a general point, I agree with the respondent's view that even where there is no such questioning, the Claimant's use of Parliamentary material is potentially inviting the tribunal to rely on that material. If it is admitted, then to the extent that any of it is disputed, this requires either the Respondent or the tribunal, or both to risk infringing Parliamentary privilege in the conduct of this case."* The opinion does not refer to paragraphs 53,75 or 78 at all.)

Submissions of the parties.

37. In the interests of brevity I record only the more significant aspects of the parties' submissions, but I am grateful to both counsel for the comprehensive written and oral submissions which I received during the course of the hearing.

38. For the Respondent Mr Cooper referred to article 9 and the principle in Prebble (see above). He submitted the starting point was whether the evidence in question was relevant and if so for what purpose.

39. Mr Cooper submitted that questioning was a broad concept which encompassed any suggestion or inference that called into question the truth, motive or propriety of anything that constitutes part of the proceedings in Parliament. In particular it was not an essential ingredient of the principle of parliamentary privilege that the court or tribunal would be required to make a formal or direct determination or finding about whether a statement in Parliament was untrue, improperly motivated or otherwise demonstrative of impropriety.

40. He submitted that it was apparent from the Claimant's witness statement that, contrary to what was submitted to Speaker's Counsel, the Claimant's references to the evidence given to the Select Committee were not straightforward accounts of what was said.

41. When referring to evidence or statements made in Parliament there was a spectrum of what was acceptable and what was not acceptable. The Claimant appeared to be saying that the principle only applied where it required the Tribunal to make a finding as to the veracity of the statement made to Parliament or otherwise. That was not the proper test. The authorities demonstrated that the Claimant herself could not engage in questioning of what was said or done in Parliament. The issue was one of constitutional importance and as a government entity the Respondent was

obliged to ensure that constitutional propriety was addressed. It was not the case at the Respondent was trying to seek a narrow advantage in litigation.

42. In relation to the suggestion that to excise the relevant statements would prevent, or disadvantage, the Claimant in bringing her claim, Mr Cooper argues that the effect of Parliamentary privilege cuts both ways. Neither party could challenge evidence given in Parliament. The Respondent does not accept that the passages which the Claimant referred to were not true or misleading. It also did not wholly accept Mr Marshall's account to the select committee. If the Claimant was permitted to suggest otherwise the Respondent would wish to challenge her evidence in cross examination and would wish to adduce its own material in support of its position that the Claimant could not have had the relevant reasonable belief at the time of her disclosure.

43. The main issue before the Tribunal at the final hearing would be why the Claimant gave an interview to the BBC and revealed confidential emails and what her beliefs were at the time. The Respondent would wish to challenge whether the Claimant genuinely held a subjective belief that disclosure to the BBC would be in the public interest. If the Claimant got over that that hurdle, the Respondent would want to whether that belief was objectively reasonable.

44. Drawing on the issue in OGC Mr Cooper emphasised that the central point was not just about what evidence the Claimant wanted to bring. It was necessary to look at Respondent's position. The Claimant relied on evidence given by Mr Marshall to the select committee to support her position that others were not being truthful in their evidence to the select committee. It would not be a level playing field if the Claimant was permitted to do this without allowing the Respondent to dispute whether the Claimant's belief was objectively reasonable by challenging Mr Marshall's evidence, which would be impermissible.

45. Mr Cooper submitted that the line of "questioning" is crossed "as soon as there is any reliance beyond the bare facts of what was said or done in a way that potentially makes it the subject of a submission as to its correctness and of inference."

46. For the Claimant Mr Miller submitted that, while Parliamentary privilege was an important constitutional doctrine, the authorities made it clear that it must be kept within proper bounds. He submitted that the purpose of part IV of the Employment Rights Act 1996 was to protect freedom of speech. That purpose would be undermined if the Tribunal were to strike out important witness evidence in support of the Claimant's whistleblowing claim. The Claimant would be disadvantaged because the issues she made disclosures about were also considered to be important to Parliament.

47. He also submitted that: –
    a. The Claimant did not invite the tribunal to make any ruling on the accuracy or inaccuracy of any statement made in Parliament.

b. The Claimant's purpose in adducing the challenged evidence was to support her case on various live issues, and in particular to support her case that her subjective beliefs were reasonable.
c. To a large extent the challenged evidence was simply given to establish what was actually said.
d. If the tribunal disagreed with the above, it could allow the material to be included in the witness statement on the basis that the trial judge could "manage the use of the evidence as the trial develops rather than pre-empt matters."
e. The tribunal was required to admit the evidence to comply with its duties under the Human Rights Act and the right to a fair trial.
f. In the alternative Parliamentary privilege had no application because part IV of the ERA dis-applied Parliamentary privilege insofar as it prevented the tribunal from adjudicating fully on claims brought under the legislation.

Conclusions

Does the exclusion of the relevant paragraphs of the Claimant's statement breach the Claimant's Convention rights?

48. I turn first to Mr Millar's alternative arguments because, if they succeed, the outcome would be that privilege did not apply at all; and the issues would end there.

49. For the Claimant Mr Millar argues, in the alternative, that the principle of parliamentary privilege should not be applied in this case as the outcome for which the Respondent contended would breach article 6 of the European Convention on Human Rights - namely the right to a fair trial - as well as article 10 – the right to freedom of expression. As required by the Human Rights Act, Article 9 of the Bill of Rights should therefore be interpreted in a way that was compatible with the Claimant's Convention rights.

50. In support of this argument Mr Millar refers me to A v United Kingdom 2003 36 EHHR. In that case the Claimant complained that absolute Parliamentary immunity prevented her from taking legal action in respect of statements made about her by an MP in Parliament. It was her case that parliamentary immunity violated her right of access to the courts. The ECHR determined that parliamentary immunity did not contravene Articles 6,8,13 or 14 as it pursued the legitimate aims of (i) the protection of speech in parliament and (ii) maintaining the separation of powers between the legislature and the judiciary. It also concluded that it was proportionate. While acknowledging this result Mr Millar submits that the conclusion in that case was fact specific, and that the judgment did not say that, in some cases, parliamentary immunity might not be disproportionate. In this case it was not proportionate.

51. Further Mr Miller submits that the case before me could be differentiated from A v UK. The Claimant in A v UK had challenged the purpose for which

the principle of Parliamentary immunity had been created. This was not the same here. In Castells v Spain a litigant had succeeded in his argument that, by refusing to admit a defence of truth in a libel action, the government had interfered with the exercise of the applicant's freedom of expression and there had been a violation of article 10 .

52. Mr Millar also refers me to R v Chaytor, 2011 AC 684 61 in which the Privy Council referred to a policy of giving Article 9 a narrow ambit, restricted to the important purpose for which it was enacted – freedom for Parliament to conduct its business without interference from Crown or the Crown's judges. Further in Buchanan v Jennings 2004 WLR 2 the Privy Council noted that as the legal immunity conferred by Article 9 was comprehensive and absolute it "should therefore be confined to activities justifying such a high degree of protection and its boundary should be clear."

53. As was said in Office of Government Commerce v Information Commissioner (above) there can be no question of parliamentary principle if its effect is to contravene the Convention. However, as Mr Miller acknowledges, A v United Kingdom establishes that the principle of parliamentary privilege pursues legitimate aims. (Although the Court refers to immunity it is clear from the case as a whole that it is referring to the parliamentary privilege generally.) Mr Millar invites me, however, to say that the test of proportionality is not met in this case, because the application of the principle of parliamentary principle strikes at the heart of the ability of civil servants to bring whistleblowing claims.

54. I do not accept that. First, there will be a limited number of cases where this issue will arise. More importantly, (unlike the position in A v UK) the position for which the Respondent contends does not prevent the Claimant pursuing her case. Neither party has suggested that if the relevant paragraphs were disallowed the Claimant would not be able to continue her claim. The Buchanon case, on which Mr Millar relies, was about whether Mr Buchanon could rely on statements made outside parliament, but which effectively repeated statements made in parliament. That is not the case here. All the disputed paragraphs refer to statements in parliament.

55. Much of the disputed evidence is, in my view, of limited relevance, and none is fundamental to the Claimant's case. I deal with that further later on in these reasons. It is Mr Cooper's case that even if the evidence was fundamental to the case privilege would still apply, and that the ECtHR in A v UK suggested that exceptions to that immunity would seriously undermine its legitimate aims. As that is not the case here, I do not have to decide this point, but I am satisfied that on the facts of this case the application of the principles of parliamentary privilege does not breach the Claimant's Article 6 or Article 10 convention rights.

Does the Employment Rights Act 1996 override Article 9 of the Bill of Rights?

56. Mr Miller submits that there is a clash between two statutes of equal status - the Bill of Rights on the one hand, and part IVA of the Employment Rights Act 1996 on the other. In such circumstances the Tribunal should give precedence to the Employment Rights Act as the newer statute. (As there are no express provisions which override parliamentary privilege in the Act, I assume that he contends Article 9 has been repealed by implication in whistleblowing cases).

57. In her opinion speaker's counsel states that article 9 of the Bill of Rights is a constitutional statute which cannot be repealed or disapplied save by express provision or clear necessary implication. The concept of a constitutional statute was introduced by Laws LJ in Thoburn v Sunderland City Council 2003 QB 151. In that Judgment Laws LJ set out examples of constitutional statutes and these specifically included the Bill of Rights (para 62).

58. To counter this Mr Miller says, (contrary to the opinion of Speaker's Counsel) that the Bill of Rights is not a constitutional statute, and that the examples of constitutional statues given by Laws LJ in Thoburn are obiter. While they may be obiter, Mr Millar has not pointed me to any subsequent authority or commentary in which that proposition has been challenged, and it is not for me to do so now.

59. I also agree with Speaker's counsel that that there is no "necessary implication" in the whistleblowing provisions of the Employment Rights Act 1996 that, as a matter of public policy, the goal of providing protection from detriment for whistleblowers requires Parliamentary privilege to be dis-applied. I conclude that it cannot sensibly be argued that those provisions must trump the doctrine of parliamentary privilege.

60. I turn therefore to the paragraphs themselves on the basis that privilege has not been disapplied by the Convention or by the Employment Rights Act 1996.

Does parliamentary privilege prevent the Claimant from adducing the evidence in the disputed paragraphs?

61. As to the meaning of questioning, I accept the submission of Mr Cooper, endorsed by Speaker's Counsel, that questioning is a broad concept which encompassed any suggestion or inference that called into question the truth, motive, or propriety of anything that is said in Parliament, including to a select committee. It seems clear that, as Mr Cooper submits, it is not an essential ingredient of the principle of parliamentary privilege that the tribunal would be required to make a finding about whether a statement in Parliament was untrue, improperly motivated, or otherwise demonstrative of impropriety. The line is crossed as soon as there is reliance beyond the bare facts of what was said or done in a way that potentially makes it the subject of a submission as to its correctness and of inference."

62. In the Claimant's witness statement she seeks to explain why she gave an interview to the BBC. She will need to show that she had a belief that making the disclosures was in the public interest and that belief was reasonable. It is common ground that is not for the Tribunal to decide whether her belief was in fact correct – but the Tribunal will have to decide whether it was reasonable. In so far as she relies on section 43G and H she will need to show that she reasonably believed the disclosures to be substantially true.

63. In essence what the Claimant says is that she spoke to the BBC because the government was attempting to portray what had happened during the Afghan evacuation inaccurately. In early December Raphael Marshall gave evidence to the Select Committee. In that evidence he was critical of the government's handling of the evacuation process from Afghanistan. I understand that the Claimant largely agreed with that account. It is the Claimant's case that when she read in the media that the Foreign Secretary, Mr Raab, as well as the Prime Minister, Mr Johnson, had said that Mr Marshall's evidence was inaccurate, her conscience dictated that she should corroborate his account of the failings of the crisis centre by giving an anonymous interview to the BBC.

64. There is no issue with the Claimant referring to what both Mr Raab and Mr Johnson have said outside of Parliament. However at paragraph 53 the Claimant says this: "*I recall being aware of the then-Foreign Secretary Dominic Raab's oral evidence to the Foreign Affairs Committee (FAC) on 1 September 2021 (although I did not myself listen to this until about a week later, when I finished in the Crisis Centre). Mr Raab was asked by the Committee if he was content that the effort within the Crisis Centre matched requirements. He said yes."*

65. Mr Millar submits that in this paragraph "the Claimant factually and accurately describes an exchange" with Mr Raab, and while it is implicit that she disagreed with him, the passage "in no way requires the Tribunal to grapple with the accuracy of what he said." The Claimant is instead simply giving evidence about her own subjective belief.

66. However, privilege is infringed whether of not the Tribunal has to make findings about the accuracy of what was said. It is enough that the witness challenges the veracity or accuracy of what was said. The Claimant in this passage clearly does so. It is no answer to say that the Claimant is only referring to her subjective belief. Any dispute between two parties will involve differences in people's subjective beliefs. By including that paragraph, the Claimant intends the Tribunal to understand that she considered that Mr Raab's statement to the Select Committee reply was misleading or untrue. I find that this amounts to "*questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."* As such it breaches parliamentary privilege.

67. Further that paragraph could not remain in the Claimant's evidence without also allowing the Respondent, in fairness, to cross examine her on the whole of Mr Raab's evidence to the Select Committee, (which it contends was fuller and more nuanced than the one-word extract reproduced in the Claimant's witness statement). It seems likely that the Claimant would then be led into being more overtly questioning of the accuracy of Mr Raab's evidence, which would infringe privilege.

68. Paragraph 59 refers to evidence given by the national security adviser, Stephen Lovegrove to the FAC to the effect that the Afghan evacuation was a "qualified success". She says: "*Sometime around the last week of October 2021, someone shared with me a quote from a meeting on 20 October 2021 of the Parliamentary Joint Committee on the National Security Strategy. The National Security Adviser, Stephen Lovegrove, had told the Committee that "on any calculus, [the Afghan evacuation] must be looked upon as a qualified success". This further confirmed to me, at a government-wide level, the inaccurate manner in which Government was intending and attempting to portray what had happened.* "

69. Both paragraphs 53 and 59 are evidence about why the Claimant made her disclosures to the BBC. The why question is relevant to the issue of what the Claimant believed at the time and whether she reasonably believed the disclosure was in the public interest (although that belief does not have to be the motive for the disclosure – see Chesterton Global v Nurmohamed 2018 ICR 731).

70. As above, Mr Millar submits that here the Claimant is simply and accurately describing an exchange with Mr Lovegrove, and that she disagreed with his statement. I do not accept that. In this paragraph the Claimant says in terms that Mr Lovegrove's evidence to parliament is inaccurate and misleading. She is expressly questioning and challenging what has been said to the FAC, and as such that evidence is impermissible. It matters not that the Tribunal does not have to make a finding that Mr Lovegrove's evidence was, in fact misleading, though it might be said that in determining whether the Claimant's public interest belief was reasonable (a matter which the Respondent disputes) the Tribunal might be led into making such a determination, if only by inference. As before, if the Claimant is permitted to suggest that his evidence was misleading the Respondent must be allowed to cross examine her on that belief, leading to dangerous waters.

71. At paragraph 82 the Claimant refers to evidence given by Mr Barton to the FAC after the Claimant had given her anonymous interview to the BBC. She says this: "*Later than afternoon, Philip Barton gave oral testimony to the Foreign Affairs Committee, in response to Raphael Marshall's evidence. I watched it the next day. In his evidence, he contested much of Raphael Marshall's account, and presented FCDO's management of the crisis as appropriate under the crisis circumstances. His testimony confirmed my belief that civil service officials at the highest level were not prepared to*

honestly acknowledge, accept, and therefore be able to learn from, the true extent of the failures of the Afghanistan crisis response".

72. Again the Claimant is explicitly challenging the veracity of what was said in Parliament and the paragraph offends the principle of parliamentary privilege. I do not accept, as Mr Millar submits, that the evidence does not infringe parliamentary privilege because it is simply an accurate summary of Mr Barton's evidence, together with a statement of her subjective belief. An expression of a subjective belief can still amount to questioning.

73. In any event that evidence is of limited relevance (see further below). It post dates her interview with the BBC. The Tribunal will need to determine her beliefs, and the reasonableness of them by reference to what she knew at the time at the time of the disclosure, and not what she found out or believed at a later date. Mr Barton's evidence to the Select Committee did not touch upon the matters that were the subject of the second disclosure - which related to the Prime Minister's involvement and decisions regarding the animal charity Nowzad.

74. At paragraph 107 the Claimant refers to Mr Casey's evidence to the FAC. *This evidence was given subsequent to <u>both</u> disclosures. She says this "Nigel Casey gave oral evidence to the Foreign Affairs Committee on 25 January 2022. Towards the end of the hearing, he was asked whether he had ever seen anything to suggest that the Prime Minister had been involved in decision-making on Nowzad. He replied "No". He explicitly testified that he had searched his emails, and found nothing of relevance."*

75. Again Mr Millar submits that this is simply an accurate description of Mr Casey's evidence, but the clear implication of the last sentence is that his evidence was not true. This is reinforced at paragraph 109 where the Claimant expressly refers to Mr Casey's "apparent dishonesty before the FAC." Mr Millar says that the Claimant is simply "indicating her suspicion that the statement was wrong and potentially dishonest", but the prohibition is on "questioning" – not on providing proof that a statement was wrong or misleading.

76. Again that evidence is largely irrelevant because it postdates the disclosures and cannot inform what the Claimant thought at the time of her disclosures. Mr Millar says that his remarks shed light on the reasonableness of the Claimant's belief that officials were tending to conceal the realities of the Afghan crisis response – but that does appear to be an argument as to whether her belief was in fact correct (with hindsight) and not whether it was reasonable to hold it at the time.

77. Paragraph 143 refers to the oral evidence of Mr Barton and Chua to the FAC Select Committee on 28th March 2023 (over a year after the Claimant had made her disclosures) . She says this: *"In an oral evidence session on 28 March 2023, the Chair of the Foreign Affairs Committee asked Philip Barton and Juliet Chua, FCDO Director General Finance and Corporate, what changes they have made to FCDO's approach to whistleblowing. Besides*

responding that they had instituted an annual "Speak Up Week", their responses covered only the element of protecting whistleblowers from retribution. They showed absolutely no awareness that whistleblowing mechanisms need to lead somewhere – to result in something in order to be meaningful."

78. It is hard to see how this evidence can be relevant to establishing whether at the time of the disclosures the Claimant had the relevant beliefs or whether they were reasonable. The question of whether a worker had a reasonable belief must be decided on the facts as (reasonably understood) at the time the disclosure was made, not on the facts as subsequently found by the Tribunal.

79. The applicability of parliamentary privilege to this paragraph is less clear cut. This evidence is about the conclusions that the Claimant has drawn from what was said (i.e. that they showed no awareness) rather than a questioning of the veracity of their evidence. By itself this does not seem to cross the line of questioning.

80. However, the Respondent says that the Claimant has mischaracterized both the questions and the answers given by Mr Barton and Ms Chua. The Respondent says that, if this passage were admitted, the parties and the Tribunal would need to examine the relevant passages from Hansard and get into a debate as to whether the Claimant's conclusion that they showed "*no awareness that whistleblowing mechanisms need to lead somewhere"* was justifiable. Mr Cooper submits that on this basis it falls squarely withing the forbidden territory identified by the Court of Appeal in Heathrow Hub.

81. I note the view of Speaker's counsel that if the Respondent wished to dispute what was said or implied in paragraph 143 the paragraph would be impermissible "as the Respondent would be placed in the position of either failing to defend its position when it might wish to do so, or infringing privilege." Somewhat reluctantly I agree with her. At this early stage in the proceedings the relevance of this evidence (or the need for the Respondent to challenge it) is wholly unclear, but if the Claimant seeks to rely on it, the Respondent must be permitted to challenge it. The Respondent says it should be struck out on the grounds of relevance in any event. While Tribunals do not ordinarily strike passages from witness statement out because they are irrelevant, given that its evidential value is negligible, I find it should be deleted from the witness statement to avoid any risk of breaching privilege.

82. In addition the Respondent also considers that paragraphs 70, 75, 78 and 79c also have the potential to breach the principle of parliamentary privilege- although with the exception of paragraph 79(c) they are "not on their face inadmissible".

83. In those paragraphs (see the Schedule to these reasons) the Claimant says that it was the public rebuttals (i.e. outside Parliament) of Mr Marshall's evidence to the FAC that led her to speak to the BBC. She says that she

believed that the government was deliberately concealing risks to health and safety because it was challenging the accuracy of Mr Marshall's account "misleading Parliament and the public about matters of such seriousness was a red line for me." It is the heart of the Claimant's case.

84. It is the Respondent's case that, although those remarks were made outside of Parliament, "any debate about the correctness and/or propriety of public comments on Mr Marshall's evidence is inseparable from the public debate about that evidence itself…..Any evidence which would require the tribunal to enter into that arena and to assess the merits of either side in that debate would be impermissible."

85. The Respondent also says that although there is no objection to the Claimant referring to (i) the fact of Mr Marshall's evidence, and (ii) the fact that it was the trigger for her disclosures, difficulties arise if and because the Claimant places reliance on her belief in the accuracy of that evidence in order to justify her reasonable belief that her disclosures were in the public interest. The Respondent would then wish to challenge the accuracy of that evidence which was impermissible.

86. The Respondent states that the Tribunal should, at this stage, determine and rule on the boundaries of the purpose(s) for which reference may be made to Mr Marshall's evidence to the FAC. In particular, the Tribunal should rule that parliamentary privilege precludes reliance on the alleged accuracy of Mr Marshall's evidence to the FAC, including reliance on a belief by the Claimant as to its accuracy and/or as to the accuracy or sustainability of any comments on it by others, to support her case.

87. I agree that if the Respondent sought to challenge Mr Marshall's evidence that would infringe parliamentary privilege. However I do not consider that this would be relevant or necessary for a fair hearing of the case. The Claimant had not, as I understand her witness statement, read Mr Marshall's statement to the Select Committee at the time that she gave her interview to the BBC. She had only read the reports in the press. The Claimant relies on her own experience of working in the crisis centre as informing her belief that public statements made by politicians and others around that time were misleading (see paragraph 75 in particular). She says she wishes to corroborate what he said, but she does that by reference to her own experience and it is this that Respondent would need to question if it seeks to challenge the Claimant's beliefs and/or their reasonableness. I do not however accept that parliamentary privilege would prevent the Claimant relying on her belief as to the accuracy of what Mr Marshall was reported to have said, provided she does so by reference to her own experiences.

88. As Mr Millar points out, the Claimant's witness statement focuses on her desire to respond to public statements made about Mr Marshall's evidence. It is evidence which she clearly broadly agrees with, but the genuineness, or otherwise, of her belief that those public statements were misleading must be tested by reference to the Claimant's own experience.

89. The Respondent points in particular to paragraph 79c in which the Claimant refers in terms to misleading "Parliament and the public". As I read it the Claimant is referring to public statements made around that time – which on her case misled both Parliament and the public. The misleading, as I read her statement happened in public and not in Parliament and parliamentary privilege does not apply.

90. Relevance. As I have set out above the evidence in paragraphs 107, 109 and 143 of the Claimant's witness statement postdate both disclosures. The evidence in paragraph 82 postdates her interview with the BBC. (Paragraphs 53 and 59 predate the disclosures and so have more probative value).

91. Mr Miller submits that evidence which postdates a protected disclosure is relevant to the question of the Claimant's subjective belief and the reasonableness of those beliefs at the time of making the disclosure and refers to Santander v Bharaj 2021 ICR 580, (a case about disclosure and which I did not find helpful in this context). He also suggests that "they have narrative relevance."

92. There *might* be an argument as to the relevance. I accept there may be some relevance but, if so, it is marginal. The Claimant's evidence at paragraph 125 of her witness statement is that she had made a clear decision on public interest before making her disclosures. In Chesterton (above) the EAT said that the Tribunal must judge the reasonableness of the Claimant's belief at the time that she made the disclosure, and not with the benefit of hindsight. It also said (and reiterated in Ibrahim v ICA International Ltd) that, in principle, a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her (subjective) belief but nevertheless find it to have been reasonable for different reasons which he or she had not articulated at the time: all that mattered was that her actual (subjective) belief was (objectively) reasonable. Santander v Bharaj is not helpful in this context. As Mr Cooper submits, a subsequent investigation into the matters raised in an alleged protected disclosure may well shed light on what it was reasonable for a claimant to believe at the time of the disclosure because it is likely to be based (at least in part) on the same information that was available to the claimant. But it does not follow that subsequent events are which relate in some way to the subject matter of the disclosure are necessarily relevant.

93. Other cases, such as the Court of Appeal in Jesudason v Alder Hey Children's NHS Trust 2020 emphasise the need to assess the question of reasonableness at the time the disclosure is made and not with the benefit of hindsight.)

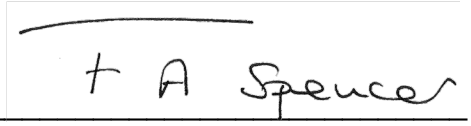
94. Mr Millar says that, in assessing the ambit of privilege, I should look at the purpose for which the evidence is adduced; and the Claimant's purpose was to "support her case" and to provide a narrative to explain the background

and context of her decision. But that purpose alone is not enough to override privilege as many cases have shown.

95. In this context, as I have said, much of the evidence which offends parliamentary privilege is (at best) of marginal relevance to the Claimant's case. It is true that Tribunals do not routinely require irrelevant passages in witness statement to be struck out, but the real issue here is privilege not admissibility, and the less probative the evidence the less compelling is the case for its inclusion. Mr Millar overstates his case when he submits that the application of parliamentary privilege in this case undermines the Claimant's ability to speak freely and should not be permitted to prevent the Claimant to adducing such evidence as she wishes to present her whistleblowing case.

96. Mr Millar made one further submission which was to suggest that the disputed paragraphs be admitted – leaving the question of admissibility to be determined by the Tribunal at the final hearing. He submits that the Tribunal at that stage could decide the purpose for which the evidence was to be used, and disregard any evidence which it found to be in breach of that principle in arriving at its decision.

97. I do not regard that as satisfactory. The issue is, as both sides have stressed, of constitutional importance and needs to be determined in advance. Not to do so risks breaching privilege as well muddying the waters.



Employment Judge Spencer

JUDGMENT SENT TO THE PARTIES ON

16 November 2023

P Caspersz
FOR THE TRIBUNAL OFFICE
13 November 2023

THE SCHEDULE

<u>The paragraphs in issue</u>
Para 53
"I recall being aware of the then-Foreign Secretary Dominic Raab's oral evidence to the Foreign Affairs Committee (FAC) on 1 September 2021 (although I did not myself listen to this until about a week later, when I finished in the Crisis Centre).

Mr Raab was asked by the Committee if he was content that the effort within the Crisis Centre matched requirements. He said yes."

Para 59
"Sometime around the last week of October 2021, someone shared with me a quote from a meeting on 20 October 2021 of the Parliamentary Joint Committee on the National Security Strategy. The National Security Adviser, Stephen Lovegrove, had told the Committee that "on any calculus, [the Afghan evacuation] must be looked upon as a qualified success." This further confirmed to me, at a government-wide level, the inaccurate manner in which Government was intending and attempting to portray what had happened."

Para 82
"Later than afternoon, Philip Barton gave oral testimony to the Foreign Affairs Committee, in response to Raphael Marshall's evidence. I watched it the next day. In his evidence, he contested much of Raphael Marshall's account, and presented FCDO's management of the crisis as appropriate under the crisis circumstances. His testimony confirmed my belief that civil service officials at the highest level were not prepared to honestly acknowledge, accept, and therefore be able to learn from, the true extent of the failures of the Afghanistan crisis response."

Para 107
"Nigel Casey gave oral evidence to the Foreign Affairs Committee on 25 January 2022. Towards the end of the hearing, he was asked whether he had ever seen anything to suggest that the Prime Minister had been involved in decision-making on Nowzad. He replied "No". He explicitly testified that he had searched his emails and found nothing of relevance.";

Para 109
"I had a brief conversation with my line manager, Richard Jones, in the morning of 27 January 2022, in which I mentioned to him my concerns about Nigel Casey's apparent dishonesty before the FAC. Richard advised me to take no immediate action: to sleep on it. I planned to come back later to thinking about what to do."

Para 143 – "I was disheartened, but not surprised, to hear that FCDO has not yet developed a meaningful culture of 'safe to challenge'. In an oral evidence session on 28 March 2023, the Chair of the Foreign Affairs Committee asked Philip Barton and Juliet Chua, FCDO Director General Finance and Corporate, what changes they have made to FCDO's approach to whistleblowing. Besides responding that they had instituted an annual "Speak Up Week", their responses covered only the element of protecting whistleblowers from retribution. They showed absolutely no awareness that whistleblowing mechanisms need to lead somewhere – to result in something – in order to be meaningful."

Para 70
"[Sima Kotecha] asked if I could corroborate Raphael Marshall's general account, and I said that I could.

Para 75
My interview focused on information which was already in the public domain (in particular because of Raphael Marshall's account to the FAC).

Para 78
[Sima Kotecha] said that… Raphael Marshall was a hero, that the emerging narrative which that he was just one junior, inexperienced person who did not understand the nature of crisis operations was taking hold, and that unless they could get someone to corroborate his account there was a real risk that government would get away with just denying and dismissing it. I agreed. That is why I believed that the public interest required me to publicly corroborate Raphael Marshall's account."

Para 79c
I believed that information pertaining to these risks to health and safety was being deliberately concealed, because the accuracy of Raphael Marshall's account was being contested and publicly undermined by government. Misleading Parliament and the public about matters of such seriousness was a red line for me. The Civil Service Code includes the requirement not to mislead ministers, Parliament or others. A civil servant who is aware that the public or Parliament has been deliberately misled by the government has a duty to put this right."