LAWYERS ARE RESPONSIBLE

COUNSEL'S OPINION ON THE RIGHT OF CONSCIENTIOUS OBJECTION AT WORK

OUR POSITION STATEMENT

1. In September 2023, a team of scientists quantified, for the first time, all nine processes that regulate the stability and resilience of the Earth system. These nine Planetary Boundaries were first proposed by Johan Rockström, head of the Stockholm Resilience Centre at Stockholm University, and a group of 28 internationally renowned scientists in 2009. The Planetary Boundaries are the safe limits for human pressure on the nine critical processes which together maintain a stable and resilient Earth. The 2023 update report **[1]** not only quantified all boundaries, it also concluded that six of the nine boundaries have been transgressed. The findings of the Stockholm Resilience Centre were corroborated by an annual 'Planetary Health Check' published by Planetary Boundaries Science and the Potsdam Institute for Climate Impact Research **[2].**

2. The fossil fuel industry continues to operate at full capacity in the midst of a climate and ecological emergency largely due to the support of several "enabler" industries, including financial services, public relations, insurance, and, crucially, the legal sector. Among these, the legal sector plays a pivotal role, particularly in facilitating projects that expand fossil fuel infrastructure. A fundamental shift in the legal industry, away from advising and supporting fossil fuel companies and toward renewable energy, would send a strong signal through society that supporting new fossil fuel extraction is not only ethically indefensible but potentially unlawful.

3. In this regard, the British legal industry, with its global influence, is a critical point of intervention. The legal industry globally also continues to operate in an 'ecocidal' manner. Since the Paris Agreement, 55 law firms have facilitated over £1.48 trillion in fossil fuel projects, more than 2.5 times the amount these firms facilitated for the renewable energy industry according to data from Law Students for Climate Accountability (LSCA), published in their 2023 report "*The Carbon Circle: The UK Legal Industry's Ties to Fossil Fuel Companies*" **[3]** which analyses law firms' work on fossil fuel transactions, as well as their lobbying activities for the fossil fuel industry and representation of fossil fuel companies, for example in Investor-State Dispute Settlement (ISDS) arbitration.

4. Lawyers Are Responsible (LAR) is an unincorporated association of lawyers - both solicitors and barristers - working to tackle the climate & ecological crises, principally by seeking to change the legal profession's role in enabling the current and future consequences of the actions of the fossil fuel industry. LAR's mission was widely publicised, in part through a short film projected onto the Royal Courts of Justice in March 2023 **[4]**. The launch was accompanied by a Declaration of Conscience, where as an act of civil disobedience over 180 lawyers globally pledged to withhold their services from (i) supporting new fossil fuel projects; and (ii) action against climate protesters exercising their democratic right of peaceful protest **[5]**.

5. LAR aims to build on the original Declaration of Conscience to address objectives such as de-legitimising legal support for fossil fuels by making it professionally unacceptable for law firms to advise on new fossil fuel projects. This would remove a critical support structure for the fossil fuel industry. LAR has written to several 'Magic Circle' law firms **[6]** to request that they withhold their services in respect of new fossil fuel projects, but has not received a commitment from any of them to do so. Our focus is now turning to employees within these firms.

6. LAR has instructed leading Counsel in Employment law, Claire McCann and Hana Abas of Cloisters Chambers, to prepare an Opinion on certain scenarios where lawyers who are practising may hold deep convictions about tackling the climate crisis. Counsel's Opinion was delivered on 15 November 2024.

COUNSEL'S OPINION

7. The Opinion covers three areas of activity that individual lawyers can engage in at work:

    a. Refusing work connected with fossil fuel extraction in certain circumstances ('**conscientious objection activities**');

    b. Blowing the whistle in respect of their employers, clients or third parties in certain circumstances ('**whistleblowing activities**');

    c. Exercising their democratic right to peaceful protest outside of their workplace, including where this leads to criminal sanctions ('**protest activities**').

8. For individuals engaged in **conscientious objection activities**, such as refusing to work on fossil fuel projects, their belief in the climate crisis and the moral duty to avoid catastrophic climate change is potentially protected under human rights and discrimination law. This means that they **cannot** be unlawfully discriminated against, harassed or victimised because of their climate-related protected beliefs, so long as they have manifested their beliefs in an appropriate way and there is a sufficiently close and direct connection between their refusal to do the work and their beliefs. The more directly identifiable the impact on the climate crisis of the work that they are objecting to is, the more likely it is that a refusal do the work will be protected. These protections apply to barristers and solicitors alike, although the former may face more challenges than the latter due to the 'cab rank rule'; the self-employed are unlikely to breach it in practice.

9. For those blowing the whistle for climate-related reasons, protections will apply to 'workers' meaning solicitors and partners in law firms, but not self-employed barristers. **Whistleblowing activities** involve a disclosure of information that the individual reasonably believes is in the public interest which falls within defined categories of wrongdoing (and to a specified person or persons). These categories of wrongdoing include circumstances that endanger health and safety or the environment, and can stretch as far as to include endangerment of the environment as a whole, through the medium to long-term effects of carbon emissions or the endangerment of the health and safety of the population at large in the future through climate impacts. Legal professional privilege does not apply as an exemption from the protections where the advice is sought by the client to further a crime, fraud or similar – and which can include an environmental crime (the '*iniquity exception*').

10. Finally, for those engaged in **protest activities**, disciplining an employee for the mere act of attending a peaceful climate-related protest is unlikely to constitute a justified interference with their human rights by their employer (or Chambers). Even in the event that the attendance of the protest involves the individual receiving a criminal sanction, the employer or Chambers (or indeed, the individual lawyer's regulator) will need to weigh up many factors to ensure that any action taken is proportionate and does not interfere with the individual's rights to peacefully protest in a climate and ecological emergency.

OUR NEXT STEPS

11. LAR will be building a campaign to educate staff about their rights as conscientious objectors, to whistleblow on wrongdoing and to engage in peaceful protest. Alongside this Position Statement, we have prepared an executive summary and worked scenarios for use as a teaching tool in Law Schools and Universities**.** We encourage our lawyer colleagues who have read this Position Statement to sign our Declaration of Conscience and to join us at peaceful protests. There is only one Earth.

LAWYERS ARE RESPONSIBLE
17 November 2024

NOTES:

[1] Richardson, J., Steffen W., Lucht, W., Bendtsen, J., Cornell, S.E., et.al. 2023. Earth beyond six of nine Planetary Boundaries. Science Advances, 9, 37, available at: https://www.science.org/doi/10.1126/sciadv.adh2458

[2] The Executive Summary of the 2024 Planetary Health Check is available at: https://www.planetaryhealthcheck.org/storyblok-cdn/f/301438/x/a4efc3f6d5/planetaryhealthcheck2024_report.pdf

[3] The Carbon Circle: The UK Legal Industry's Ties to Fossil Fuel Companies, available at : https://www.ls4ca.org/blog-show-all/the-carbon-circle

[4] Available on the homepage of: www.lar.earth

[5] https://www.lar.earth/sign/

[6] https://www.lar.earth/magic-circle-actions/

COUNSEL'S OPINION ON THE RIGHT OF CONSCIENTIOUS OBJECTION AT WORK

EXECUTIVE SUMMARY

12. The Counsel's Opinion in respect of 'Lawyers Are Responsible' covers three potential scenarios for lawyers working in the climate and ecological emergency:

    a. Refusing work connected with fossil fuel extraction in certain circumstances ('**conscientious objection activities**');

    b. Blowing the whistle in respect of their employers, clients or third parties in certain circumstances ('**whistleblowing activities**');

    c. Exercising their democratic right to peaceful protest outside of their workplace, including where this leads to criminal sanctions ('**protest activities**').

(A) CONSCIENTIOUS OBJECTION ACTIVITIES

What is a Climate-Related Protected Belief?

13. 'Conscientious objection' refers to the refusal of an individual working in the legal sector to carry out certain types of work, on account of their genuinely held belief in the climate crisis and its consequences (*para 2*).

14. A belief in the climate crisis and the moral duty to avoid catastrophic climate change is protected under Article 9 of the European Convention on Human Rights ('**ECHR**') and/or as a '*religious or philosophical belief*' under Section 10 of the Equality Act 2010 ('**EqA 2010'**). This was established in the case of Grainger plc and ors v Nicholson [2010] ICR 360 (*paras 3 – 11*).

15. The belief has to satisfy the criteria for protection in Grainger. These are that the belief: (i) is genuinely held; (ii) is not simply an opinion or viewpoint based on the present state of information available; (iii) concerns a weighty and substantial aspect of human life

and behaviour; (iv) attains a certain level of cogency, seriousness, cohesion and importance; and (v) is worthy of respect in a democratic society, is not incompatible with human dignity, and is not in conflict with the fundamental rights of others. The first, second and fourth criteria are the most important in these circumstances. For a '**climate-related protected belief'**, it is necessary to ensure the individual's beliefs go beyond a mere opinion and have the necessary cogency and coherence to be protected. The fact the individual is prepared to refuse certain work connected with fossil fuel extraction will, in many cases, be clear and persuasive evidence of the extent to which they live their life according to their belief (*paras 12 – 16*).

What Protections are there for Conscientious Objection Activities?

16. For those who have a climate-related protected belief, there are four specific provisions of the EqA 2010 that afford protection in this context for conscientious objection activities: (i) direct discrimination (s 13); (ii) indirect discrimination (s 19); (iii) harassment (s 26); and (iv) victimisation (s 27) (*para 18 – 19*).

17. For a claim in **direct discrimination** by someone who carries out conscientious objection activities to succeed, it needs to be shown that less favourable treatment from their employer or Chambers was <u>because of</u> the climate-related protected belief, comparing the treatment of an individual who refuses the fossil fuel work with the treatment of a hypothetical or real comparator without the belief whose circumstances are materially similar, including a refusal to carry out similar work for non-climate related reasons. This involves an inquiry into the employer's subjective reasons for acting as it did (*paras 20 - 22*). This is likely to depend in part on the working practices of the organisation e.g. how much flexibility are associates given to reject work, and have there been any other cases? (*para 59*).

18. An employer may be able to rely on the distinction between the underlying belief and an inappropriate manifestation of the same belief, so there is no direct discrimination or contravention of Art 9 ECHR. However, they can only do so where the action they have taken in response to the conscientious objection activities is a proportionate means of achieving a legitimate aim – meaning that the *proportionality* of the employer's action is relevant to whether there has been direct discrimination (*paras 23 – 24 with case examples at para 25*). For example, if an individual were disciplined for refusing to carry out work for clients and expressing the refusal in a way in which the employer could reasonably object (e.g. posting a public statement on social media) then it is more likely that a Tribunal or Court would conclude that the employer was able to distinguish between the belief and manifestation (*paras 58 – 60)*.

19. In **indirect discrimination**, a provision, criterion or practice ('**PCP**') is applied neutrally, but puts people with a climate-related protected belief at a particular disadvantage when they carry out conscientious objection activities (e.g. a policy requiring all solicitors to work on all cases, including for fossil fuel clients, failing which they are liable to disciplinary action). The employer or Chambers has to show the PCP is a proportionate means of achieving a legitimate aim; operational needs of a business are a relevant legitimate aim but do not automatically mean the discrimination is justified - there will be an assessment of proportionality by the tribunal. The employer will need to evidence

that the operational need is so pressing that it outweighs any discriminatory impact (*paras 26 – 34*). The proportionality assessment will be fact-sensitive, but the size of the company and the extent to which fossil fuel companies form a core part of its practice may be significant (*paras 61 - 62)*.

20. **Victimisation** will occur where an individual is subjected to detrimental treatment where they have done a protected act – raised a complaint or grievance of discrimination on the grounds of the climate-related protected belief. It is unlikely that the act of refusing to perform work would in and of itself constitute a protected act (it would have to be a separate act, such as a complaint of discrimination suffered as a result of having carried out conscientious objection activities) (*paras 63 – 65*). The detrimental treatment must be because of the protected act, requiring a subjective inquiry into the employer's reasons for doing so – this is a fact-sensitive exercise. There will be no victimisation where the real reason for the treatment is not the fact an individual has done the protected act but some other reason, such as giving a television interview criticising the firm and repeating the complaint *(paras 35 – 41).*

21. **Harassment** will occur where an individual is subjected to unwanted conduct (e.g. abuse, mimicry or pranks that create an intimidating and hostile environment for them) and this must be related to the climate-related protected belief *(paras 42 – 47)*. An individual's conscientious objection activities may provoke unwanted conduct from their colleagues, such as mocking comments and memes about their environmental beliefs (*para 66 – 67*).

22. Where an individual has a climate-related protected belief and has carried out conscientious objection activities (such as refusing to work on a fossil fuel project, or a project which will otherwise contribute to the climate and ecological emergency), several criteria need to be met for a successful claim to an Employment Tribunal or Court. The analysis involves assessing: (1) whether their climate-related protected belief meets the threshold criteria under Grainger; (2) whether the manifestation of that belief in the form of their conscientious objection activities is an 'appropriate' or 'inappropriate' manifestation; (3) whether there is a sufficiently close and direct nexus between the act they have carried out and the climate-related protected belief *(paras 53 – 57)*. The climate-related and ecological impact of some projects will be clearer than others – the more directly identifiable the impact on the climate crisis, the more likely it is that a refusal to carry out the work will attract protections under ECHR/EqA 2010 (*paras 75 – 76*).

23. It may even be possible to bring a claim where a lawyer is required to perform activities in a manner which is inconsistent with the law firm's own commitments – e.g. where the firm has a position on air travel and the lawyer is sanctioned for refusing to travel by air (*para 77 – 79)*.

24. It is possible, at least in theory, for claims in respect of a climate-related protected belief to be brought by employees and partners of a law firm (or other employed lawyers) as well as pupils and barristers (*paras 68-73)*. For public sector employees, duties of political impartiality (such as under the Civil Service Code) will be weighed in the balance when assessing proportionality (*para 94 – 98)*.

Regulatory Action arising from Conscientious Objection Activities

25. In terms of any additional regulatory risks: for barristers, conscientious objection activities may lead to a breach of the 'cab rank rule'. Notably, the cab rank rule is qualified by some exceptions, in particular Rule 21.10 which states that a barrister must refuse instructions where there is *'a real prospect that* [they] *are not going to be able to maintain* [their] *independence'*. This means that an individual who refuses instructions on account of their climate-related beliefs may be able to argue that the strength of their conviction is such there is a real prospect they would be unable to maintain their independence in acting for that client. However, *'independence'* in this context may mean independence from external pressures (rather than moral convictions). No guidance has been issued by the Bar Council or Bar Standards Board to date, nor has it been properly tested in the context of disciplinary action. No action has been taken against the barrister signatories of the LAR Declaration of Conscience. Any regulatory action would need to be justified as an interference with Article 9 rights. The severity of the sanction imposed will determine the question of whether the action is necessary and proportionate. In practice, barristers are likely to arrange their self-employed practice so no breach occurs, or is apparent (*paras 100 - 109)*.

26. For solicitors, any regulatory action taken against them would also need to be justified as an interference with Article 9 ECHR. However, it is unlikely that the Solicitors Regulation Authority (**SRA**) would choose to take any such action, given that the Law Society has recently published guidance on '*The impact of climate change on solicitors'* (2023) which has addressed client choice and made clear that solicitors may legitimately place weight on climate-related concerns when deciding whether to accept/advise a client. It is possible that the manner in which an individual refuses the work (e.g. public criticisms on social media) may be distinguished from the actual refusal and may be done in such a way to undermine public trust and confidence in the profession. In these circumstances, the SRA would have to show that any disciplinary sanction was proportionate and necessary (*paras 110 – 115*).

(B) WHISTLEBLOWING ACTIVITIES

27. Whistleblowing is a term used colloquially to refer to situations where individuals may disclose information concerning certain types of wrongdoing.

28. There are statutory protections under the Employment Rights Act 1996 ('**ERA**') for whistleblowers in certain circumstances, the following being the most relevant in the context of climate-related beliefs: (i) a right not to be subjected to any detriment on the grounds of making a 'protected disclosure' (s 47B ERA); and (ii) a right not to be unfairly dismissed, with the dismissal being deemed automatically unfair where the main reason is that the claimant made a protected disclosure (s 103A ERA) (*paras 116 – 117*). As an important side-note, these protections will only apply to 'workers' and so in practice will apply to solicitors and potentially partners in organisations and law firms, but not to self-employed barristers (*paras 118 – 123*).

29. A 'protected disclosure' is (i) a disclosure of information; (ii) by a person who must reasonably believe it to be in the public interest; (iii) the person making the disclosure must reasonably believe that it falls within the six defined categories of wrongdoing; and (iv) it must be via six prescribed methods (*para 124*). It is likely, in circumstances where climate-related matters arise, for a disclosure to be in the public interest (*e.g. para 151)*; the fact that it may also concern a personal interest (such as the individual's own beliefs) does not necessarily preclude an individual having the reasonable belief that a matter is in the public interest and other factors will come into play such as the nature of the wrongdoing disclosed and identity of the alleged wrongdoer *(para 127)*.

30. The six defined categories of wrongdoing under s 43B ERA include:
    (i) that a criminal offence has been committed, is being committed or is likely to be committed;
    (ii) that a person has failed, is failing or is likely to fail to comply with a legal obligation;
    (iii) that a miscarriage of justice has occurred, is occurring or is likely to occur;
    (iv) that the health or safety of any individual has been, is being, or is likely to be endangered;
    (v) that the environment has been, is being or is likely to be endangered; and
    (vi) the information showing any of these matters has been, is being or is likely to be deliberately concealed.

31. The first, second, fourth and fifth category are flagged as the most important in the climate-related context *(para 128 - 129*). There is no minimum threshold of harm to the environment or to health and safety; there is also no temporal threshold, meaning that it is not necessary to prove that there is 'imminent' danger to health and safety or the environment (*para 129(vi)*). Harm to a local environment and harm to the global environment may both be encompassed (including by endangerment of the environment as a whole, through the medium to long-term effects of carbon emissions). However, the greater the specificity with which an individual can identify the environmental harm alleged, the more likely it is that a Tribunal will be satisfied that the individual engaged in whistleblowing activities reasonably believed the information disclosed tended to show the environment was endangered (*para 156(i)*). Similarly, information tending to show the health and safety of the population at large being endangered and at a point in the future may be part of a protected disclosure under this category of wrongdoing, although the greater the precision, the more likely it is a Tribunal will consider the individual's belief was reasonable that it fell within that category of wrongdoing (*para 156(ii*)).

32. There are certain types of disclosures which are excluded from the statutory scheme; most relevant to this situation is where legal professional privilege can be claimed in respect of the information (s 43B(4)). However, LPP will not apply to prevent protection where the legal adviser's advice would be sought to further a crime, fraud or similar – which can include an environmental crime (the '*iniquity exception*'). The conduct must be unlawful and not merely unethical *(para 137*). The iniquity exception will arise only where the advice is being sought for fraudulent / dishonest purposes, not where the client is simply seeking advice about its potential liabilities. So, for example, if a legal professional were asked to advise an organisation on how to conceal an environmental

crime, the protection of legal professional privilege would not apply to that communication (*para 138*).

33. There are several worked scenarios in the Counsel's Opinion, illustrating the application of the law to whistleblowing activities (*paras 139 - 186*).

(C) PROTEST ACTIVITIES

34. The attendance of lawyers at climate protests can attract human rights protections under the ECHR, in particular Article 8 (*right to respect for private and family life*), Article 9 (as above), Article 10 (*freedom of expression*) and Article 11(*freedom of assembly*) as well as under s 10 EqA 2010 *(paras 188 – 199)*.

35. The level of legal protection available to individuals disciplined by their employer for attending a peaceful protest will depend if they have a protected climate-related belief and whether their attendance at a protest was a manifestation of that belief. If so, then they will have legal protections under the EqA 2010 for any disciplinary or other action taken against them. The proportionality of any sanction or other interference by their employer will be considered as part of any discrimination claims (*paras 200 – 202*).

36. Disciplining an employee for the mere act of attending a peaceful climate-related protest is unlikely to constitute a justified interference with their rights (*para 202 (iii))*.

37. Where an employee attends a climate-related protest resulting in the imposition of a criminal sanction, the position is more nuanced. The need to uphold public trust and confidence in the legal profession and the risk of harm to an employer's reputation are likely to constitute legitimate aims. The question of whether disciplinary action is necessary and proportionate in pursuit of those aims will depend on matters such as the gravity of the offence of which the individual has been convicted; the extent to which it caused or risked harm to the public; and the extent to which it involved damage to property (*para 202 (iv)*). For public sector employees subject to the Civil Service Code, the heightened expectation of their independence and impartiality will be a significant factor weighed in the balance of any proportionality assessment when deciding on a disciplinary sanction (*para 204)*.

38. For solicitors, the publication by the SRA of guidance on *"Convictions arising from matters of principle or social conscience"* (1 Sept 2022) has highlighted their regulatory approach will also involve balancing of 'mitigating' and 'aggravating' factors of the conviction. Therefore, the SRA appears to be taking an approach to the proportionality assessment on investigating and sanctioning the individual that is compliant with individual's human rights under the ECHR for engaging in protest activities as a result of their climate-related beliefs (*para 49*). To date, the BSB do not appear to have published guidance specifically addressing this point.

LAWYERS ARE RESPONSIBLE
17 November 2024

This advice is provided to Lawyers Are Responsible. Whilst it is understood that it may be circulated more widely, it does not address any specific situations and cannot be relied upon for that purpose.

OPINION IN RESPECT OF 'LAWYERS ARE RESPONSIBLE'

Index

INTRODUCTION

1. We are asked to advise on the legal protections available to individuals working in the legal sector who, on account of a genuinely held belief in the climate crisis and concerns about climate breakdown, do one or more of the following:

   (i) Refuse work connected with fossil fuel extraction in certain circumstances (**"conscientious objection activities"**);

   (ii) Blow the whistle in respect of their employers, clients or third parties in certain circumstances (**"whistleblowing activities"**); and

   (iii) Exercise their democratic right to peaceful protest outside of the workplace, including in circumstances where participation in protest leads to the actual or possible imposition of criminal sanctions (**"protest activities"**).

CATEGORY 1: CONSCIENTIOUS OBJECTION ACTIVITIES

What is conscientious objection?

2. In the context of this advice, the phrase "conscientious objection" refers to the refusal of an individual working in the legal sector to carry out certain types of work, on account of their genuinely held belief in the climate crisis and its consequences.

3. The right to freedom of thought, conscience and religion derives from Art 9 of the European Convention on Human Rights (**"ECHR"**), which provides as follows:

   (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

   (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

4. In order for a religion or belief to attract the protection of Art 9, it must meet the threshold of having a certain level of cogency, seriousness and importance[1].

5. There are two limbs to Art 9. The first is an absolute right to hold a particular religion or belief – this is sometimes termed the "internal aspect" of Art 9. The second is a qualified right to manifest that religion or belief – what is sometimes referred to as the "external aspect" of Art 9. Under Art 9(2), interference with an individual's freedom to manifest their religion or belief can be justified, so long as the restrictions imposed are prescribed by law and are necessary in a democratic society for the specific purposes set out in Art 9(2). The qualified nature of this aspect of Art 9, therefore, implicitly recognises that the manifestation of one's beliefs may well have an impact on others in society.

6. Crucially, not every act (or refusal to act) which is motivated or inspired by a religion or belief will constitute a "manifestation" of that belief. In order to come within the scope of Art 9(2), the act must be intimately linked to the underlying belief. The question of whether a "sufficiently close and direct nexus" exists will be determined on the facts of each individual case.[2]

7. The mechanism by which Convention rights are given effect in private employment relationships is sections 3 and 6(1) of the Human Rights Act 1998 (**"HRA"**). Section 3 imposes an obligation on courts and tribunals to interpret, so far as it is possible to do so, legislation in a way that is compatible with Convention rights. Section 6(1) in turn requires public authorities (including courts and tribunals) to act compatibly with Convention rights. Consequently, in the case of an employment tribunal claim against a private employer, section 6 has the effect of reinforcing the tribunal's interpretive obligation under section 3.[3]

8. If the employer concerned is a public body, then they themselves are directly subject to the duty to act compatibly with Convention rights imposed by section 6(1) HRA.

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[1] Campbell and Cosans v UK (1982) EHRR 293; R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15; [2005] 2 AC 246.
[2] Eweida & Ors v UK [2013] IRLR 231; SAS v France [2014] 7 WLUK 38; (2015) 60 EHRR 11.
[3] X v Y [2004] EWCA Civ 662 at [58].

The framework under the Equality Act 2010

9. The key domestic framework by which Art 9 rights are protected in a workplace context is the Equality Act 2010 (**"EqA"**). The EqA makes discrimination connected with protected characteristics unlawful in certain circumstances, including work[4]. This includes discrimination connected with the protected characteristic of religion or belief, defined under section 10 EqA in the following terms:

> *(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.*
>
> *(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*

10. Art 9 provides an important framework for establishing what constitutes a protected belief under s.10 EqA, so as to attract protection against discriminatory conduct.

11. In Grainger plc and ors v Nicholson[5], the Employment Appeal Tribunal, drawing heavily on the jurisprudence of the European Court of Human Rights (**"ECtHR"**) on Art 9, concluded that a belief in the ***moral duty to take steps to avoid catastrophic climate change*** was capable of constituting a protected philosophical belief.

12. It is important to stress the limits of the decision in Grainger. The effect of Grainger is not that every individual who believes in the climate crisis and has concerns about its consequences will automatically be deemed to hold a protected belief under section 10 EqA. Rather, in respect of each individual case, it will need to be shown that the belief satisfies the criteria for protection established by the EAT in Grainger. These are that the belief:

    (i) is genuinely held;

    (ii) is not simply an opinion or viewpoint based on the present state of information available;

    (iii) concerns a weighty and substantial aspect of human life and behaviour;

    (iv) attains a certain level of cogency, seriousness, cohesion and importance; and

    (v) is worthy of respect in a democratic society, is not incompatible with human dignity, and is not in conflict with the fundamental rights of others.

13. In our view, the first, second and fourth criteria are likely to be of particular importance when assessing whether a belief relating to the climate crisis constitutes a protected belief.

14. In 2022, according to data collected by the Office for National Statistics, around three in four adults in the UK reported feeling very or somewhat worried about climate change[6]. For a significant proportion of the population, those concerns are likely to be somewhat passively held. An individual may, in a general sense, believe on the

[4] Part 5 of the Equality Act 2010.
[5] [2010] ICR 360, EAT.
[6] Worries about climate change, Great Britain - Office for National Statistics (https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/articles/worriesaboutclimatechangegreatbritain/septembertooctober2022)

basis of scientific evidence that climate change is real and poses potentially catastrophic risks to human health and the environment. However, the extent to which this belief has any guiding impact on the way in which they live their lives may be extremely limited – for example, extending only to a general commitment to recycling. In order for a belief in the climate crisis to attain the protection of section 10 EqA, it would need to be shown that the individual actually lives according to the precepts of such a belief, and that it goes beyond a mere opinion.

15. It may be thought that, in the context of climate crisis-related conscientious objection activities, it will not be difficult for an individual to satisfy the Grainger criteria. The fact that the individual is prepared to refuse certain work connected with fossil fuel extraction will, in many cases, be clear and persuasive evidence of the extent to which they live their life according to the precepts of their underlying belief. However, if an individual refused to carry out certain work in their professional life, but did not show any comparable commitment to addressing the climate crisis in their personal life, it would be open to a tribunal to conclude that the belief lacked the necessary cogency or coherence to be protected under s.10 EqA.[7]

16. We do not consider that a belief relating to the climate crisis would need to be articulated in a manner identical to the way in which the belief in Grainger was articulated in order to qualify for protection. The key question is simply whether the Grainger criteria are satisfied on the facts. For that reason, we will, in this advice, use the term "climate-related protected belief".

17. The authorities are clear that there is no material difference between the domestic law approach to what constitutes a protected philosophical belief under the Grainger criteria and what constitutes a belief protected by Art 9.[8] A belief that qualifies for protection under section 10 EqA is therefore likely to attract the protection of Art 9, and vice versa.

18. There are four provisions of EqA 2010 that afford particularly important protection in the context of conscientious objection activities:

    (i) Direct discrimination (section 13 EqA);

    (ii) Indirect discrimination (section 19 EqA);

    (iii) Harassment (section 26 EqA);

    (iv) Victimisation (section 27 EqA).

19. The specific provisions of EqA under which these protections are given effect differ depending on the workplace relationship concerned. Sections 39 and 40 EqA make it unlawful for an employer to discriminate against, victimise or harass an employee; sections 44 and 45 EqA make it unlawful for partnerships and LLPs to discriminate against, victimise or harass members; and section 47 EqA makes it unlawful for a barrister to discriminate against, victimise or harass a pupil or tenant.

Direct discrimination

[7] See, for example, Gray v Mulberry Co (Design) Ltd [2019] ICR 175, EAT at para [34] – *"[if], for example, a belief is expressed in relation to one act or omission, but inexplicably not expressed in relation to another which is very similar, then it would be open to a tribunal to conclude that the belief was unintelligible and lacking a certain level of cogency or coherence".*

[8] See Harron v Chief Constable of Dorset Police [2016] IRLR 481, EAT at [33].

20. Direct discrimination occurs where an individual is treated less favourably because of a protected characteristic (here, the individual's climate-related belief).

21. This will require a comparison to be undertaken between an employer or other organisation's treatment of an individual who, on account of their protected belief, refuses to carry out certain work, and the treatment (hypothetical or otherwise) of an individual without that protected belief whose circumstances are materially similar, including a refusal to carry out similar work (but not for climate-related belief reasons).

22. Crucially, in order to succeed in a claim for direct discrimination, it must be shown that the less favourable treatment was because of the protected characteristic in question. Therefore, except for the rare cases where an employer's discriminatory motive is obvious on the facts, establishing that an employee who engaged in climate-related conscientious objection activities was disciplined or dismissed because of their climate-related protected belief is likely to require an inquiry into the employer's subjective reasons for acting as it did[9].

23. In the context of the protected characteristic of religion or belief, caselaw recognises a key distinction between (i) instances where the reason for the treatment is the fact that the individual holds and/or has manifested a protected belief and (ii) instances where the reason for the treatment is that the individual has manifested their belief in some objectively inappropriate way.[10] An inappropriate manifestation of a protected belief may be properly "dissociated" from the belief itself[11], so that there will be no direct discrimination or contravention of Art 9 where that is, on a proper analysis, the reason for the treatment.

24. However, an employer will only be able to rely on the distinction between inappropriate manifestation and the underlying belief where the action taken is, in itself, a proportionate means of achieving a legitimate aim.[12] In other words, the proportionality of the action taken is relevant to the question of why the decision-maker acted as they did and, therefore, to whether there has been direct discrimination or not because of the protected belief.

25. The following three cases are indicative of the importance of establishing, with precision, the reason for the treatment complained of in cases involving conscientious objection:

    (i) **Page v NHS Trust Development Authority[13]:** the claimant was a non-executive director of an NHS Trust who also sat as a magistrate. His directorship was not renewed after he gave several media interviews, including on national television, in which he expressed his objection, rooted in his Christian faith, to the adoption of children by same-sex couples. The Court of Appeal upheld an employment tribunal's finding that there had been no direct discrimination. The decision not to renew was taken not because of the claimant's beliefs, but rather, the manner in which he had expressed those beliefs – namely, on national television, in circumstances where he had not informed the Trust despite having been expressly told to do so.

[9] Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL; R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors [2010] IRLR 136, SC.
[10] See Page v NHS Trust Development Authority [2021] ICR 941, CA at [68].
[11] Page (above) at [78]; Mackereth v Department for Work and Pensions and anor [2022] IRLR 721, EAT at [96] – [99].
[12] Page (above) at [68]; Higgs v Farmor's School (No.3) [2023] ICR 1072 at [57].
[13] [2021] ICR 941, CA. At the time of writing, the decision is under appeal.

(ii) **Mackereth v Department for Work and Pensions and anor**[14]: the claimant worked as a health and disabilities assessor of benefits claimants. He held gender-critical beliefs and refused to use the preferred pronouns of transgender service users. The EAT held that an employment tribunal had been entitled to find that no direct discrimination arose from the Respondent's treatment of the claimant – the reason for the treatment was that the Respondent wanted to treat service users in the manner of their choosing, and any other assessor would have been treated in the same way. The tribunal had drawn a permissible distinction between the claimant's beliefs and the particular way in which he wished to manifest those beliefs.

(iii) **Ladele v London Borough of Islington**[15]**:** the claimant worked as a registrar of births, deaths and marriages. She refused to carry out same-sex civil partnerships on account of her Christian beliefs. Following a formal complaint, she was threatened with dismissal. Her claim for direct discrimination succeeded at first instance. This was overturned by the EAT, and the EAT's decision was upheld by the Court of Appeal. The reason for the treatment was the claimant's failure to comply with the Respondent's equality and diversity policy, and any other registrar would have been treated in the same way.[16]

Indirect discrimination

26. Indirect discrimination is defined under section 19 EqA as follows:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

27. The relevant protected characteristics include religion and belief (section 19(3) EqA). In short, this means that a provision, practice or criterion (**"PCP"**) that is applied

[14] [2022] IRLR 721, EAT.
[15] [2010] ICR 532, CA
[16] This case then came before the ECtHR as part of four joined cases in Eweida & Ors v United Kingdom [2013] IRLR 234. Ms Ladele's arguments that her rights had been violated failed before the ECtHR. The Court concluded that the equality/non-discrimination aims pursued by the local authority were legitimate; and that a fair balance had been struck between the competing interests at stake. It noted that state authorities were afforded a wide margin of appreciation in deciding where to strike the balance between the individual's right to manifest their religion and the countervailing interest (here, on the part of the local authority) to secure the rights of others.

neutrally, but which puts individuals with a protected climate-related belief at a particular disadvantage, will be unlawful unless shown to be a proportionate means of achieving a legitimate aim.

28. For example, in a solicitors' firm, this could be a policy of requiring all solicitors to work on all cases to which they are assigned, including cases that involve fossil fuel clients. Such a policy may be shown to put individuals with a protected climate-related belief at a particular disadvantage. The employer would then need to show that the PCP was a proportionate means of achieving a legitimate aim.

29. Much of the caselaw on indirect discrimination claims brought in the context of conscientious objection activities concerns situations where a manifestation of the religion or belief is in some way discriminatory to clients or service users. In such circumstances, it is likely to be easier for an employer or other decision-maker to show that a PCP which is restrictive of an individual's Art 9(2) rights is justified as a proportionate means of achieving a legitimate aim.[17] The jurisprudence of the ECtHR is clear that state authorities will be granted a wide margin of appreciation in deciding where to strike the balance between the individual's right to manifest their religion and the countervailing interest to secure the rights of others[18].

30. Such "clash of rights" scenarios are perhaps unlikely to arise in the context of climate-related conscientious objection activities (although, we note that a belief in climate scepticism may, in theory, be capable of attracting protection under Art 9, in which case the two opposing beliefs will be in conflict with each other). Notwithstanding this, the operational needs of a business can be relied upon as a legitimate aim so as to potentially justify indirect discrimination. However, the mere fact that an employer has a legitimate business need does not automatically mean that any indirect discrimination is justified.

31. In Eweida v British Airways plc[19], the claimant was a devout and practising Christian employed as part of BA's check-in staff. She refused to conceal her silver cross necklace, in breach of the company's dress which prohibited customer-facing staff from wearing any visible adornment. The Court of Appeal held that there was no evidence that the dress code policy put Christians at a particular disadvantage, such that no indirect discrimination arose – however, it indicated that it would, in any event, have found any indirect discrimination to be objectively justified. The claimant's objection to concealing the cross was an entirely personal decision which neither arose from any doctrine of her faith nor interfered with her observance of it; it had not been raised by any other employees and the claimant had, in fact, complied with the policy for seven years before raising any objection; and the company had taken steps such as offering her a non-customer-facing role, which she had refused.

[17] For example, in Mackereth v Department for Work and Pensions and anor (above), it was held that PCPs of (i) requiring all health and disabilities assessors to use a client's preferred pronouns, regardless of the client's biological sex and (ii) requiring assessors to confirm their adherence to the first PCP at an early stage of their training and without any such issue arising in their practical work had been applied to the claimant. It was held that both PCPs were a proportionate means of the respondent achieving the legitimate aims of (i) ensuring transgender customers were treated with respect and in accordance with their rights under the EqA and (ii) providing a service complying with the overarching policy of commitment to the promotion of equal opportunities.

[18] See Eweida & Ors v United Kingdom [2013] IRLR 234 at paras [106] and [109].

[19] [2010] ICR 890, CA.

32. However, in Ms Eweida's proceedings before the ECtHR[20], her claim that her Art 9 rights had been violated succeeded. The ECtHR considered that, whilst the employer had a legitimate aim of projecting a certain corporate image, this had been afforded too much weight by the domestic courts in rejecting Ms Eweida's claim for indirect discrimination. Her cross was discreet and was unlikely to have had a negative impact on BA's image as illustrated by the fact that BA had subsequently amended the uniform code to allow for religious jewellery to be worn.[21]

33. The first-instance decision of Ahmed v Tesco Stores Ltd and ors[22] is also illustrative. The claimant, a practising Muslim worked as a warehouse operative. A tribunal held that a PCP of requiring him to handle alcohol was justified on the facts as a proportionate means of achieving a legitimate aim. The respondent had sought to minimise the claimant's contact with products containing alcohol, but the inevitable consequence of his role was that he would be required to handle such products from time to time. Mr Ahmed's claim, accordingly, did not succeed.

34. Such cases show that the mere fact that a decision-maker has a legitimate business need will not, in and of itself be sufficient to justify indirect discrimination. Rather, the decision-maker will need to be able to evidence that the operational need is such that it outweighs the discriminatory impact.

Victimisation

35. Section 27 EqA provides, insofar as material:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

[20] Her case was joined with four other cases in Eweida & Ors v United Kingdom [2013] IRLR 234, including that of Ms Ladele, discussed at paragraph 25(iii) above.
[21] Para [94].
[22] ET Case No.1301492/08.

(4) This section applies only where the person subjected to a detriment is an individual.

…

36. Unlawful victimisation will therefore occur where an individual is subjected to detrimental treatment because they have done a protected act, or because it is believed that they have done or may do a protected act.

37. The term "protected act" is defined under section 27(2) EqA. For the purposes of section 27(2)(d) (making an allegation of contravention of EqA), it is not necessary that the individual makes a specific reference to EqA. It is enough that they are alleging facts which would, if established, be capable of constituting a contravention of EqA. However, merely making a general complaint, grievance or complaint is not enough – there must be, in some sense, an allegation of discrimination or other contravention of EqA[23].

38. The detrimental treatment must be "because of" the protected act (or because the person who subjected the individual treatment believed they had done or may do a protected act). As noted at paragraph 22 above in relation to direct discrimination, this requires a subjective inquiry into the decision-maker's reasons for acting as it did.

39. Importantly, there will be no victimisation in circumstances where, on a proper analysis, the real reason for the treatment is not the fact that an individual has done a protected act, but rather, some other genuinely separable feature of the complaint - for example, the manner in which it was done[24]. This principle was explored by the Court of Appeal in Page v Lord Chancellor and anor[25] (a related decision to Page v NHS Trust Development Authority, discussed at paragraph 25(i) above).

40. The claimant, a practising Christian, was a lay magistrate and non-executive director of an NHS Trust. Whilst sitting as a member of the family panel hearing a same-sex adoption application, he expressed his objection to adoption by same-sex couples and declined to sign the order. He was formally reprimanded. He then gave interviews in the press and on national television in which he expressed his view that same sex adoption was not in the best interests of a child, and that he found it difficult to believe that his Christian views were seen as prejudice. This resulted in him being disciplined and removed from the magistracy.

41. A tribunal dismissed his claim for victimisation, and this was affirmed by the EAT and subsequently the Court of Appeal. The reason for the claimant's treatment was not that he had done a protected act[26] - rather, it was that he had publicly declared that, in cases involving adoption by same-sex couples, he would proceed as a magistrate on the basis of his preconceived beliefs about such adoptions.

Harassment

42. Section 26 EqA provides, insofar as material:

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[23] Beneviste v Kingston University EAT 0393/05.
[24] Martin v Devonshires Solicitors [2011] ICR 352, EAT.
[25] [2021] ICR 912, CA
[26] It had been accepted by the tribunal that the television interview, taken as a whole, amounted to a protected act for the purposes of section 27 EqA.

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

religion or belief; …

43. Unlawful harassment will therefore occur where an individual is subjected to unwanted conduct related to a protected characteristic (here, the individual's protected climate-related belief) that has the proscribed purpose or effect under section 26(1)(b).

44. The causal link required for harassment is that the unwanted conduct is "related to" the protected characteristic. This is broader than the causal link required in a claim for direct discrimination, where the less favourable treatment must be "because of" the protected characteristic.

45. Paragraph 7.7 of the Equality and Human Rights Commission's Code of Practice on Employment notes that the term unwanted conduct covers a wide range of behaviour. It can encompass verbal or written abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings and other physical behaviour.

46. In determining whether conduct had the proscribed effect, the tribunal must consider the factors listed at section 37(4). This will be a highly fact-sensitive enquiry, and the context in which the conduct occurred will be crucial. Depending on its severity, a single incident may constitute harassment[27]. However, trivial acts causing minor upsets will not[28].

[27] Reed & Bull Information Systems v Stedman [1999] IRLR 299.
[28] Grant v HM Land Registry [2011] EWCA Civ 769 at [47].

47. It is worth noting that, under section 212(1) EqA, conduct which amounts to harassment cannot also amount to a detriment for the purposes of a claim for direct discrimination and / or a claim for victimisation. This does not prevent an individual from bringing the claims as alternatives, but in practice, they are mutually exclusive.

How do the protections of Art 9 apply in the regulatory context?

48. The Bar Standards Board (BSB) and the Solicitors Regulation Authority (SRA) are both public authorities for the purposes of the Human Rights Act 1998. They are therefore directly subject to the duty imposed by section 6(1) HRA not to act incompatibly with Convention rights.

49. In practice, this means that any regulatory action which interferes with the Art 9 (or, indeed, Art 8 or 10) rights of individuals who engage in climate-related conscientious objection activities will need to be justified in accordance with Art 9(2) (and/or Art 8(2) and 10(2)). Indeed, this is apparent from the SRA's guidance document *"Convictions arising from matters of principle or social conscience"*, published in September 2022[29]. The guidance outlines the approach that the SRA will take to solicitors who are convicted in relation to matters of principle or social conscience Whilst the guidance does not explicitly refer to Convention rights, it adopts the language of *"mitigating"* and *"aggravating"* features, which is clearly indicative of the balancing exercise that must be undertaken for a Convention-compliant approach.

50. We address the scope of Articles 8 and 10 (and indeed Art 11) below when we examine the questions of whistleblowing and protest activities as these protections are more likely to arise in those contexts than in relation to conscientious objection activities.

Conscientious objection activities – questions

51. We have been asked to advise on three specific questions in relation to participation in climate-relation conscientious objection activities:

    (i) **Question 1:** in light of the decision in Grainger plc and anor v Nicholson (above), what are the possible consequences and legal protections for individuals working in the private legal sector who engage in climate-related conscientious objection activities?

    (ii) **Question 2:** in the public sector, could employees refuse work on the same grounds, and what additional risks might arise and/or additional grounds for refusing work?

    (iii) **Question 3:** are there any specific additional regulatory risks for solicitors or barristers who refuse work on these grounds?

Question 1 – what are the possible consequences and legal protections within the workplace for individuals working in the private legal sector who, on account of their genuinely held belief in the climate crisis and concerns about its consequences, engage in climate-related conscientious objection activities?

52. We have been given four specific scenarios to consider. In respect of each scenario, we are asked to advise on whether our analysis would differ based on whether the activities were carried out by a trainee solicitor or pupil barrister; an associate / solicitor or other

[29] https://www.sra.org.uk/solicitors/guidance/convictions-arising-social-conscience/

employed lawyer in a law firm; a partner in a law firm; a self-employed barrister in Chambers; other support staff in a law firm or Chambers (employees); and an in-house lawyer working in an organisation.

Scenario A – an individual refuses to perform work for fossil fuel clients

53. In all cases, the starting point will be an assessment of whether the individual's belief in the climate crisis and its consequences meets the threshold for protection under Art 9 and section 10 EqA. As discussed at paragraph 10 above, in Grainger, the EAT held that a belief in the moral duty to take steps to avoid catastrophic climate change was capable of constituting a protected philosophical belief. However, we reiterate our comments at paragraphs 13 - 15 above. Whilst the fact that an individual feels strongly enough about the climate crisis to refuse certain types of work will undoubtedly be persuasive *prima facie* evidence that the belief meets the threshold for protection, this will always be determined on a case-by-case basis.

54. Assuming that the individual's belief meets the threshold for protection, they will have a qualified right to manifest that belief under Art 9(2). As discussed at paragraph 6 above, the question of whether an act, or a refusal to act, constitutes a "manifestation" of a belief is fact-sensitive, and a sufficiently close and direct nexus between the act and the belief must be shown. It is unlikely that this will pose a hurdle in this scenario, where an individual refuses to perform work for a fossil fuel company. The connection between the refusal to act and the underlying belief appears plain, even more so where the individual is explicit about the reason for their refusal.

55. For individuals working in the legal sector who refuse to carry out work for fossil fuel clients, the most obvious potential consequence they could face is some form of disciplinary action. The precise manner in which a disciplinary sanction could take effect would, of course, differ based on the employment status of the individual concerned:

    (i) For employed individuals (trainee solicitors, associate solicitors, other employed lawyers and support staff in a Chambers or firm) dismissal or some other disciplinary sanction would be possible;

    (ii) For partners, expulsion or some other form of disciplinary sanction would be possible, depending on the specific terms of the partnership or LLP agreement;

    (iii) For pupils in Chambers, the termination of their pupillage or some other form of disciplinary sanction would be possible, depending on the specific provisions of their pupillage agreement;

    (iv) For self-employed barristers in Chambers, expulsion from Chambers or some other form of disciplinary sanction would be possible, depending on the specific provisions of the Chambers' constitution.

56. In addition to (or instead of) overt disciplinary sanctions, the above individuals might experience more covert or subtle types of detrimental treatment in the workplace – for example, being given fewer opportunities for career progression, being socially excluded or being ridiculed by colleagues for their beliefs.

57. As noted at paragraph 18 above, the four main claims available under EqA would be claims for (i) direct discrimination (ii) indirect discrimination (iii) victimisation and (iv) harassment. In the scenarios on which we have been asked to advise, we consider

that it is the potential claims for direct and indirect discrimination that are likely to be the most complex. The analysis in relation to the potential claims for victimisation and harassment is, in our view, likely to be much the same across all four scenarios.

Direct discrimination

58. In relation to a claim for direct discrimination under s.13 EqA, the first key issue is likely to be proving less favourable treatment. This will require a comparison to be undertaken between the treatment of the individual who, an account of his or her protected climate-related belief, refuses to carry out work for a fossil fuel client, and the treatment of a real or hypothetical comparator who refused the same work and whose circumstances are materially similar to those of the individual, but who does not have the protected belief. The question will be whether there is a difference in treatment.

59. This is likely to depend, in part, on the working practices of the organisation itself – for example, how much flexibility are individuals usually given to accept or reject work? Have there been instances of other individuals refusing to carry out work for certain clients and, if so, how did the organisation respond?

60. Another potential issue is that of proving less favourable treatment because of the protected characteristic. As discussed at paragraph 23 above, the caselaw recognises that, in certain circumstances, it is permissible for a decision-maker to distinguish between an individual's protected belief, and the particular way in which they wish to manifest that belief. Provided the action taken is proportionate, there will be no direct discrimination where, on a proper analysis, the reason for the treatment is the inappropriate manifestation of the belief. For example, if an individual were disciplined having refused to carry out work for fossil fuel clients in a manner to which the decision-maker could reasonably object – such as in a public statement on social media or via an email to the client's shareholders – a tribunal may well conclude that the decision-maker was entitled to rely on the distinction between the individual's protected belief, and the manner in which that belief was manifested.

Indirect discrimination

61. A claim for indirect discrimination under section 19 EqA could also be pursued. What would need to be shown is that in taking disciplinary action against the individual, the decision-maker applied a PCP which put or would put those with the relevant protected characteristic (i.e., a protected climate-related belief) at a particular disadvantage, and which put the individual at that disadvantage. The exact PCP relied upon would depend upon the facts of the individual case but, in broad terms, it might be framed as a requirement that individuals carry out all work to which they are assigned (which would therefore include work for fossil fuel clients), failing which they would be liable to disciplinary action.

62. It would then fall to the decision-maker to show that the PCP was a proportionate means of achieving a legitimate aim. For employed individuals, the employer is likely to be able to rely on the legitimate aim of operational or business need. The proportionality assessment will inevitably be fact sensitive. However, the following factors are likely to be particularly relevant:

    (i) **The size of the company:** it will, in our view, be harder for an employer to justify a PCP that, in practice, requires all employees to work on all projects where the capacity of an organisation is such that it could reasonably accommodate an individual's refusal to work on a project for fossil fuel clients

within the allocation of work. In contrast, the operational needs of a smaller organisation may well be weightier;

(ii) The extent to which fossil fuel companies comprise a core part of the organisation's client base: a PCP requiring all individuals to undertake all work which they are allocated, including work for fossil fuel companies, is, in our view, more likely to be justified where such companies form a core part of the organisation's client base and where that was (or ought to have been) apparent to the individual when accepting an offer of employment with the organisation[30]. In contrast, where an organisation's client base is sufficiently varied that an employee could carry out the full responsibilities of their role without having to perform work for fossil fuel clients, such a PCP will be harder to justify.

Victimisation

63. An individual may be able to pursue a claim for victimisation under section 27 EqA.

64. The mere act of refusing to perform work for a fossil fuel client is unlikely to constitute a protected act. However, there would be a protected act under section 27(1)(b) EqA if, in connection with refusing the work, the individual made an express or implied allegation that the requirement to carry out the work was in some way a contravention of EqA.

65. The key issue is then likely to be showing that any detrimental treatment was <u>because of</u> the protected act. As discussed at paragraph 39 - 41 above, there will be no victimisation where, on a proper analysis, the reason for the treatment was not the protected act, but rather some genuinely separable feature of it. This will be highly fact sensitive. However, as noted at paragraph 60 above in relation to direct discrimination, in this scenario, the manner in which any protected act was done is likely to be relevant to determining the reason for the treatment.

Harassment

66. Depending on the facts, a potential claim for harassment under section 26 EqA may also arise.

67. An individual's refusal to carry out certain work on account of their belief in the climate crisis may well provoke unwanted conduct from colleagues. This could involve, for example, trivialising or mocking comments, or being sent "memes" about climate activists. As discussed at paragraph 46 above, the question of whether conduct had the proscribed effect will be highly context specific, with matters such as whether the conduct was a one-off or a repeated course of conduct being of particular relevance.

Relevance of the employment status of the individual

68. As a matter of legal analysis, we do not see any material distinction in the protections available to different types of employed individuals and partners. From a practical perspective, however, it may well be that it will be easier for more senior individuals

[30] To be clear, we are not suggesting that indirect discrimination will be automatically justified whenever it was or ought to have been apparent to an individual that fossil fuel clients formed a core part of the organisation's client base. However, it may well be an important weight in the balancing exercise, depending on the specific facts of the individual case.

(such as partners) to refuse to carry out certain types of work without facing disciplinary sanctions; although a more senior individual would also be expected to be a role model for junior employees and to act in such a way as promotes the wider interests of the organisation.

69. However, in relation to barristers and pupil barristers, the analysis insofar as it relates to claims for direct and indirect discrimination is likely to differ. Under the cab rank rule, a barrister is obliged to accept any work in a field in which they profess themselves competent to practise, so long as they are available and appropriately remunerated. This obligation applies equally to self-employed barristers; employed barristers; and pupil barristers providing legal services in the practising period of pupillage. See paragraphs 100 - 109 below for a more detailed discussion of the cab rank rule.

70. For self-employed barristers in Chambers (including pupil barristers), the Chambers' constitution is likely to provide a framework allowing for disciplinary action to be taken where an individual acts in breach of the BSB's Code of Conduct. This could involve taking internal disciplinary action, or it could instead involve referring the individual to the BSB.

71. In practice, a breach of the cab rank rule by a self-employed barrister may not come to light in any obvious way. Self-employed barristers have a relatively high degree of control over their diary, and an individual's assertion to their clerks that they do not have capacity to take on potential instructions in any particular case (for example, from a fossil fuel client) may be rather unlikely to be scrutinised.

72. However, where such a breach does occur and becomes known to Chambers management, it may result in disciplinary action. Chambers are likely to have a spectrum of disciplinary sanctions available to them, ranging from a formal warning from the Head of Chambers to expulsion. The most likely scenario is perhaps that the barrister is referred to the BSB (for example, by their lay or professional client or, potentially, by the Head of Chambers).

73. A barrister who is subjected to a disciplinary sanction will be able to pursue the same claims under EqA as any other individual working in the legal sector[31]. However, in our view, depending on the severity of the sanction applied, it may well be harder for a barrister to succeed in such claims where a breach of the cab rank rule is involved:

    (i) **Direct discrimination:** as discussed above, in order for any claim for direct discrimination to succeed, a tribunal would need to be satisfied that the reason for the disciplinary sanction being imposed was the individual's protected belief, as opposed to an inappropriate manifestation of that belief. Depending on the facts of the case, a respondent Chambers is likely to point to the individual's breach of the cab rank rule and/or bringing Chambers into disrepute as the reason for the treatment. When evaluating Chambers' reason for the disciplinary action, whether an individual's breach of the cab rank rule can be permissibly dissociated from their underlying belief will depend on the overall proportionality of the proposed or actual sanction.

    (ii) **Indirect discrimination:** in our view, the legitimate aim of requiring all members to comply with their professional obligations, including the cab rank rule, will be readily available to Chambers who take disciplinary action in

[31] As detailed at paragraph 19 above, the specific provision making it unlawful for barristers' chambers to discriminate against, harass or victimise a pupil or barrister within those chambers is section 47 EqA, rather than section 39 EqA (which applies to employers).

respect of members who refuse work for fossil fuel clients. Whether the relevant PCP will be considered a proportionate means of achieving that legitimate aim is likely to depend on the severity of the sanction imposed and what alternatives were considered.

Scenario B – an individual refuses to perform work for clients in projects or matters that reasonably could be deemed to contribute to the climate and ecological crisis

74. The analysis at paragraphs 53 - 73 above is likely to apply to this scenario in much the same way.

75. The question discussed at paragraph 54 above, of whether the refusal to act constitutes a "manifestation" of the underlying belief may become more important in this scenario. In order to constitute a manifestation and attract the protection of Art 9 (and section 10 EqA), the refusal of work must be intimately connected with the underlying belief. The question of whether a sufficiently close and direct nexus exists in an individual case will be highly fact sensitive. However, it is clear that within the broad category of "projects or matters that reasonably could be deemed to contribute to the climate and ecological crisis", the climate-related and ecological impact of some projects or matters will be far more remote / less immediately discernible than others.

76. In our view, the more directly identifiable the impact of a certain project or piece of work on the climate crisis, the more likely it is that a refusal to carry out that work will attract Art 9 (and section 10 EqA) protection. The fact-sensitive evaluation of whether a refusal to perform work is a "manifestation" of the underlying protected belief will also consider what the individual says about their refusal.

Scenario C – an individual refuses to perform work in a manner that is not consistent or aligned with the public commitments made by the law firm or organisation to reduce directly or indirectly its CO2 emission

77. We understand this question to be asking about a refusal to perform work that is unconnected with the identity of the client or the ultimate ecological impact of the project or matter but is connected with the way in which the individual is asked or expected to perform the work activity.

78. The question posed is likely to be most relevant to employed individuals and partners, as opposed to self-employed barristers, who largely control their own working practices. Many solicitors' firms have publicly accessible environmental policies, in which they outline their sustainability targets and commitments[32]. Such targets are often high-level and strategic, rendering it difficult for an individual to assert with precision that he or she is being asked to perform work in a manner inconsistent with the firm's commitments. Furthermore, a firm's failure to comply with a voluntarily imposed target is unlikely to give rise to a cause of action in and of itself – unless that target has, in some way, become part of the individual's contract of employment.

[32] See, for example, Norton Rose Fulbright's "EMEA Sustainability policy" at https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/sustainable-practice/0196404emeaflyersustainability-policy-update-to-53642-external.pdf?revision=&revision=46116860184273879 04; Freshfields' "Global environmental policy" at https://www.freshfields.com/en-gb/about-us/responsible-business/environment/.

79. An example of an area where this scenario could arise might be air travel. Some solicitors' firms have made firm public commitments with regards to air travel – for example, requiring journeys under a certain number of hours to be taken by train[33] or imposing internal "levies" on air travel[34]. If an individual were subjected to a disciplinary sanction for refusing to travel by air, having been asked to do so in circumstances that they considered did not align with the firm's public commitments and which contributed to CO2 emission, a claim under EqA 2010 could be pursued.

Direct discrimination

80. In order to succeed in a claim for direct discrimination under s.13 EqA, the key issues are again likely to be (i) showing less favourable treatment (in other words, that an individual without a protected climate-related belief, but whose circumstances were otherwise materially similar, would not have been treated in the same way) and (ii) showing that that less favourable treatment was because of the individual's protected belief, as opposed to the manner in which that belief was manifested – i.e., the refusal to travel by air.

81. In relation to proving the reason for the treatment, it is, in our view, less likely that a decision-maker will be able to successfully invoke the distinction between the belief and the particular manner of manifestation discussed at paragraphs 22 - 25 above in this scenario. The caselaw is clear that the distinction can be relied upon only in circumstances where the action taken is in itself proportionate. As noted at paragraph 78 above, the voluntary targets set by firms are often high-level, rendering it difficult to assess, with precision, whether an individual was being asked to carry out work in a manner inconsistent with a publicly made commitment. However, where a tribunal considers on the facts that, objectively, that is what an individual was being asked to do, it is likely to be difficult for a decision-maker to establish that disciplinary action was proportionate, so as to be able to dissociate the manner of manifestation of the belief from the underlying belief.

Indirect discrimination

82. Similarly, for the purposes of an indirect discrimination claim, the fact that a firm has voluntarily made a public commitment is likely to be a significant factor to be weighed in the balance when assessing whether any PCP applied was a proportionate means of achieving a legitimate aim.

Victimisation and harassment

83. The analysis at paragraphs 63 - 67 above is likely to apply in much the same way in this scenario.

Relevance of employment status

84. As a matter of legal analysis, we do not see any material distinction in the protections available to different types of individual working in the legal industry, although as

[33] https://www.freshfields.com/4924e4/globalassets/about-us/rb/report-pdfs/freshfields-cdp-2021-response.pdf

[34] https://www.shoosmiths.com/our-responsibility/corporate-responsibility/cr-policies/sustainable-travel-policy

noted at paragraph 78 above, this scenario is less likely to be relevant to self-employed barristers.

Scenario D – an individual organises a boycott or a picket line, which may constitute incitement to others to withhold services

Protection under the Trade Union and Labour Relations (Consolidation) Act 1992

85. In certain circumstances, picketing by workers will be lawful under section 220 Trade Union and Labour Relations (Consolidation) Act 1992 (**"TULRCA"**). The essential conditions for picketing to be lawful are as follows:

    (i) The picketing must be in contemplation or furtherance of a trade dispute;

    (ii) The purpose of the picketing must be only for peacefully obtaining or communicating information, or peacefully persuading any person to abstain from working;

    (iii) The picketing must be at or near the person's place of work;

86. In our view, it is somewhat difficult to envisage how collective action in this context could engage the statutory protections under TULRCA. The key hurdle is likely to be showing that any action was in contemplation or furtherance of a "trade dispute". The term "trade dispute" is defined under section 244(1) TULRCA as a "dispute between workers and their employer which relates wholly or mainly to one or more" of seven specified issues (emphasis added). These are as follows:

    (i) Terms and conditions of employment or the physical conditions in which any workers are required to work;

    (ii) Engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

    (iii) Allocation of work or the duties of employment between workers or groups of workers;

    (iv) Matters of discipline;

    (v) A worker's membership or non-membership of a trade union;

    (vi) Facilities for officials of trade unions; and

    (vii) Machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

87. In the context of this advice, it seems that the most likely purpose of any collective action would be to attempt to persuade the employer to cut ties with a particular fossil fuel client. It is difficult to see how that could come within any of the seven specified issues, as it relates to the employer's relations with a third party, not the workers themselves. However, collective action relating to the fact of individuals being disciplined for climate-related conscientious objection, or the requirement that all employees work on all projects, including projects for fossil fuel clients, could, in theory, come within section 244(1) TULRCA.

88. There are limited dedicated protections from workplace consequences for lawful picketing. Under section 238A TULRCA, a dismissal will be automatically unfair if the reason or principal reason for the dismissal is that the employee took part in "official" industrial action. For industrial action to be "official", the action must be authorised or endorsed by a trade union of which the individual is a member or there are others taking part in the action who are members. There is no equivalent protection in respect of "unofficial" industrial action, and there is also, at present, no protection from detriments for participating in official industrial action. This means that individuals are likely to have to rely on the provisions of EqA instead.

Protections under Equality Act 2010

89. Where an individual is disciplined for having organised some form of collective action, a claim under EqA may well be available.

90. In addition to Art 9, Arts 8, 10 and 11 of the Convention are likely to be engaged by this scenario. We address the scope of these rights at paragraphs 188 - 199 below, in relation to protest activities (the third category of activities on which we are asked to advise).

91. In relation to a claim for direct discrimination, the key issue in this scenario is likely to be proving that any disciplinary action was because of a protected characteristic. In this scenario, the individual is going beyond merely refusing to carry out certain work – they are seeking to persuade others of their beliefs. The impact on the employer's interests is therefore greater. In our view, in evaluating the reason for the treatment, a tribunal may well consider that the employer was entitled to dissociate the underlying belief from its manifestation.

92. Similarly, in relation to any claim for indirect discrimination, the employer's operational needs are likely to be afforded greater weight in the balance when assessing whether any PCP applied was a proportionate means of achieving a legitimate aim.

93. In relation to claims for victimisation and harassment, the analysis at paragraphs 63 - 67 above is likely to apply in much the same way in this scenario.

Question 2: in the public sector, could employees refuse work on the same grounds, and what additional risks might arise and/or additional grounds for refusing work?

Civil servants

94. In our view, it may well prove more challenging for individuals working in the public sector who are subject to the Civil Service Code to succeed in claims for direct or indirect discrimination where they have been subjected to disciplinary sanctions for refusing to perform certain types of work.

95. Civil servants are subject to heightened duties of independence and impartiality in relation to their work activities. There is a clear expectation that civil servants will serve the government of the day to the best of their abilities, regardless of their personal convictions. Individual employees will have been well aware of this expectation upon joining the Civil Service.

96. We consider that this is likely to be significant for claims under EqA in the following ways:

(i) **Direct discrimination –** as discussed at numerous points above, there will be no direct discrimination where, on a proper analysis, the reason for any less favourable treatment is an objectionable manifestation of a belief, as opposed to the underlying belief itself. An employer will only be able to rely on this distinction where the action taken is, in itself, a proportionate means of achieving a legitimate aim. Where an employer seeks to invoke the distinction in this scenario, the heightened expectation of impartiality in respect of the individual's work will be a particularly important weight in the balance when assessing proportionality. As a result, a tribunal may well find that the reason for the treatment was an objectively inappropriate manifestation of the belief, such that a claim for direct discrimination will not succeed. However, as in any claim for direct discrimination, a close analysis of the reason for the treatment will be required.

(ii) **Indirect discrimination –** similarly, the heightened expectation of impartiality will be an important weight in the balance when assessing whether any PCP applied was a proportionate means of achieving a legitimate aim.

Other public sector employees

97. In respect of other public sector employees, the analysis is unlikely to be materially different – although the fact that the employer is itself subject to a duty to act compatibly with Convention rights under section 6(1) HRA 1998 may be a factor in the balance of any proportionality assessment carried out.

Claim under HRA 1998

98. It is worth noting that public sector employees would, in theory, be able to bring a claim in the County Court under HRA 1998, for a direct violation of their Convention rights. Apart from the more generous time limits applicable to a claim under HRA 1998 (one year[35], compared to three months for a claim under EqA[36]), it is, in our view, difficult to see why this would be more advantageous to an individual than bringing a claim in the employment tribunal.

Question 3: are there any specific additional regulatory risks for solicitors or barristers who refuse work on the above grounds?

99. As noted at paragraph 48 above, both the SRA and the BSB are public authorities and are therefore subject to a duty to act compatibly with Convention rights under s.6(1) HRA. In practice, this means that any regulatory action taken against solicitors or barristers who engage in climate-related conscientious objection activities which interferes with their Art 9 rights will need to be justified in accordance with Art 9(2).

Barristers

100. A specific regulatory risk for barristers is that conscientious objection activities may involve a breach of the cab rank rule. Rule C28 of the BSB Code of Conduct provides:

> *"You must not withhold your services or permit your services to be withheld:*

[35] Section 7(5)(a) HRA 1998.
[36] Section 123(1) EqA.

.1 on the ground that the nature of the case is objectionable to you or to any section of the public;

.2 on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public; …"

101. A barrister who refuses instructions from a fossil fuel client on account of their protected climate-related belief would therefore *prima facie* appear to be acting in breach of their professional obligations. It is possible that the BSB would seek to take regulatory action against them.

102. Notably, the cab rank rule is qualified by some exceptions. Rule C21 identifies a number of situations in which a barrister must refuse instructions. Most relevant for the purposes of this advice is Rule C21.10, which states that a barrister must refuse instructions where there is *"a real prospect that* [they] *are not going to be able to maintain* [their] *independence"*. It may therefore be open to an individual who refuses instructions on account of their climate-related beliefs to argue that the strength of their conviction was such that there was a real prospect that they would be unable to maintain their independence in acting for the particular client.

103. The use of Rule C21.10 as a "safety valve" for conscientious objectors appears to have been floated by Stephen Kenny KC, Chair of the Bar Council's Ethics Committee, in April 2023[37] (although we would emphasise that neither the Bar Council nor the BSB have issued any guidance to this effect).

104. As far as we are aware, this argument has not yet been properly tested in the context of disciplinary action. The extent to which it is likely to be accepted by the BSB is therefore unclear. We note, however, that where the term "independence" is used in the Code of Conduct, it primarily appears to be referring to freedom from external pressures. Such pressures are perhaps distinguishable from an individual's internal moral conflict, arising from their personal convictions.

105. Our view at present is, therefore, that the BSB is likely to consider most acts of conscientious objection (where services are withheld) to involve a potential breach of the cab rank rule, but that it is possible that Rule C21.10 could be found to apply in individual cases.

106. Assuming that the climate-related beliefs of the barrister in question meet the threshold for protection under Art 9, and the breach of the cab rank rule is sufficiently connected with the underlying belief to constitute a manifestation, then any regulatory action will require justification under Art 9(2). An interference can be justified only if it is prescribed by law, pursues a legitimate aim, and is necessary and proportionate in pursuit of that aim.

107. In our view, in any case involving an overt, proven breach of the cab rank rule, it will be relatively straightforward for the BSB to show that the legitimate aim of upholding professional conduct obligations is engaged. Furthermore, it is likely to be the severity of the sanction imposed that will determine the question of whether the action taken is necessary and proportionate, as opposed to the fact that a sanction has been imposed.

[37] https://bylinetimes.com/2023/04/27/lawyers-genuinely-afflicted-by-conscience-should-not-represent-fossil-fuel-interests-says-bar-council-ethics-chair/

108. We reiterate, however, our comments at paragraph 71 above. Deliberate breaches of the cab rank rule may not be apparent and/or could be difficult to prove, rendering the prospect of regulatory action, in practice, somewhat remote. Furthermore, we note that the BSB does not appear to have taken any regulatory action against barrister signatories to LAR's Declaration of Conscience[38], through which individuals working in the legal sector have committed to not prosecuting climate protestors or accepting work from fossil fuel companies.

109. The reality is that, through the way in which they develop their practice, self-employed barristers can and frequently do align themselves publicly with various political causes. It is commercially unlikely that a fossil fuel company would seek to instruct a self-employed barrister who has, for example, had cemented a reputation for representing claimants in strategic climate change litigation. It is therefore important that our legal analysis at paragraphs 100 - 107 above is viewed alongside the practical realities of the self-employed bar.

Solicitors

110. Any regulatory action by the SRA involving an interference with a solicitor's Art 9 rights would similarly need to be justified in accordance with Art 9(2).

111. In our view, it is unlikely that the SRA would seek to take regulatory action in respect of a solicitor who refuses work in accordance with the scenarios that we have discussed above. In 2023, the Law Society published guidance for solicitors entitled *"The impact of climate change on solicitors"*[39]. Section 4.3 of the guidance is instructive on the extent to which solicitors may validly consider issues relating to climate breakdown when deciding whether to act for a particular client. Insofar as is material, it states as follows:

> *"… solicitors are not obliged to provide advice to every prospective client that seeks it. Solicitors have wide discretion in choosing whether to accept instructions.*
>
> *Climate-related issues may be valid considerations in determining whether to act …*
>
> *Considerations may include:*
>
> …
>
> - *any apparent conflict with the client organisation's stated values and the potential impact on climate change generally."*

112. The guidance is therefore clear that solicitors may legitimately place weight on climate-related concerns when deciding whether to advise a client.

113. Importantly, the document notes that whilst the SRA is "supportive" of the guidance, "it should not be interpreted as the SRA's regulatory position on these matters". This leaves open the theoretical possibility of the SRA taking regulatory action.

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[38] https://www.legalfutures.co.uk/latest-news/no-cab-rank-rule-breach-yet-for-barrister-signatories-of-eco-resolution

[39] https://www.lawsociety.org.uk/topics/climate-change/impact-of-climate-change-on-solicitors#h4-heading3-4

114. The SRA Principles require solicitors to act:

> "*I. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice*
>
> *II. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons*
>
> *III. with independence*
>
> *IV. with honesty*
>
> *V. with integrity*
>
> *VI. in a way that encourages equality, diversity and inclusion*
>
> *VII. in the best interests of each client*"

115. It is possible that the manner in which an individual refuses particular work could give rise to an arguable breach of the SRA principles. For example, if in the course of refusing work for a fossil fuel company, a solicitor made public, personal criticisms of individuals who do accept work from fossil fuel companies, this might give rise to an arguable breach of the requirement to act in a way that upholds public trust and confidence in the profession. The SRA would need to show, on the facts, that a legitimate aim (probably the upholding of professional conduct standards) was engaged on the facts, and that any disciplinary sanction pursued was proportionate and necessary in pursuing that legitimate aim.

CATEGORY 2: WHISTLEBLOWING ACTIVITIES

The legal framework

116. "Whistleblowing" is a colloquial term used to refer to a situation in which an individual discloses information concerning certain types of wrongdoing.

117. The statutory framework which provides legal protections for whistleblowers is contained within the Employment Rights Act 1996 (**"ERA"**). For the purposes of this advice, the two key protections are as follows:

    (i) Under section 47B ERA, a worker has a right not to be subjected to any detriment on the ground that they have made a protected disclosure; and

    (ii) Under section 103A ERA, an employee will be regarded as having been automatically unfairly dismissed if the principal reason for their dismissal is that they made a protected disclosure.

Who is protected?

118. The extent to which an individual is covered by the statutory whistleblowing protections is dependent upon their employment status. A detailed discussion of the legal tests applicable to determining employment status is outside the scope of this advice, and we will therefore outline the key points only.

119. The protection against dismissal under section 103A ERA is available to "employees" only. Under sections 230(1) – (2) ERA, an "employee" is an individual working under a contract of employment, meaning a contract of service or apprenticeship, whether express or implied and whether oral or in writing.

120. The protection from detriments under section 47B ERA is available to "workers". This is a broader category than "employees". All employees are workers – but not all workers are employees. Under section 230(3) ERA, the standard definition of "worker" includes those working under a contract of employment, but also those working under a contract (whether express or implied, and oral or in writing) with the following features:

(i) It requires personal performance of work or service by the individual;

(ii) The work or service is for the benefit of another party to the contract who is not a customer or client of any business undertaking or profession carried on by the individual.

121. For the purposes of whistleblowing detriment protection, an extended definition of "worker" applies, increasing the scope of the coverage. Under section 43K(1) ERA, individuals who fall outside the standard definition of "worker" but who fall into one of a number of defined categories will benefit from the protection against detriments under section 47B.

122. Importantly, caselaw has established that LLP partners are capable of being "workers"[40] for the purposes of whistleblowing legislation[41]. As far as we are aware, there has been no equivalent decision in respect of partners in a traditional partnership, but there is, in our view, no reason why such individuals would be excluded from having worker status for the purposes of whistleblowing legislation.

123. The practical result is that almost all individuals who are not genuinely self-employed will be afforded a level of statutory whistleblowing protection in the workplace. However, self-employed barristers will fall outside the scope of the statutory protections which might well be viewed as an unsatisfactory gap in the law.

What is a protected disclosure?

124. The statutory protections for whistleblowers will apply only where an individual makes a "protected disclosure" within the meaning of sections 43A - B ERA. In order to constitute a protected disclosure, the whistleblowing must satisfy the following criteria:

(i) There must be a disclosure of information;

(ii) The person making the disclosure must reasonably believe it to be in the public interest;

(iii) The person making the disclosure must reasonably believe that the disclosed information tends to show one or more of six defined categories of wrongdoing;

[40] See section 4(4) of the Limited Liability Partnerships Act 2000, which provides that a member shall not be regarded as "employed" by the LLP "*unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership*". This is likely to preclude LLP partners from being "employees".
[41] Clyde and Co LLP and anor v Bates van Winkelhof [2014] ICR 730, SC.

(iv) The disclosure must have been made by one of six prescribed methods.

125. The first requirement is that there is a disclosure of information (section 43B(1) ERA). In short, this requires the disclosure to have sufficient factual content and specificity to be capable of tending to show one or more of the six prescribed categories of wrongdoing[42]. This will be an evaluative judgment for the tribunal in light of all the facts of the case.

126. The second requirement is that the person making the disclosure must reasonably believe that it is made in the public interest (section 43B(1) ERA). This is a fact-sensitive enquiry, but the key point is that the disclosure must serve a wider interest than the purely private or personal interests of the individual making the disclosure.

127. However, the fact that a disclosure is in the personal interests of the individual does not automatically preclude a finding that the individual reasonably believed the disclosure to be in the public interest. Where the disclosure concerns a personal interest, the caselaw identifies the following features as being potentially relevant to the assessment of whether the individual had a reasonable belief that the disclosure was in the public interest:[43]

(i) The numbers in the group whose interests the disclosure served;

(ii) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

(iii) The nature of the wrongdoing disclosed; and

(iv) The identity of the alleged wrongdoer.

128. The third requirement is that the person making the disclosure must reasonably believe that the disclosed information tends to show one or more of six defined categories of wrongdoing under section 43B(1) ERA. Those categories are as follows:

(i) That a criminal offence has been committed, is being committed or is likely to be committed (section 43B(1)(a));

(ii) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (section 43B(1)(b));

(iii) That a miscarriage of justice has occurred, is occurring or is likely to occur (s.43B(1)(c));

(iv) That the health or safety of any individual has been, is being or is likely to be endangered (section 43B(1)(d));

(v) That the environment has been, is being or is likely to be endangered (section 43B(1)(e));

(vi) That information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed (section 43B(1)(f)).

[42] Kilraine v London Borough of Wandsworth [2016] IRLR 422, EAT.
[43] Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA.

129. The first, second, fourth and fifth categories of wrongdoing are likely to be of particular relevance for the purposes of this advice. We note the following general points:

(i) In relation to the first category (criminal offence), the fact that an individual is in fact mistaken about the existence of any criminal offence will not preclude the statutory protection from arising[44]. However, the belief that the information disclosed tends to show that a criminal offence has been committed must still be reasonable in the circumstances;

(ii) In respect of the second category of wrongdoing, the term "legal obligation" is not defined in section 43B(1)(b) ERA itself. Tribunals have accepted an actual or possible breach of a wide range of legal obligations as falling within the scope of section 43B(1)(b), including breach of anti-discrimination legislation[45];

(iii) It is not necessary for an individual to explicitly identify the specific legal obligation which they claim is being breached. However, the extent to which it is obvious from the disclosure itself that the individual had the specified matters in mind will be relevant to the questions of what the individual believed and to what extent that belief was reasonable[46]. Section 43B(1)(b) will not be engaged in circumstances where an individual simply believes that certain actions are wrong, immoral or undesirable[47];

(iv) Caselaw recognises that whistleblowers are often "insiders" that have a greater insight into the way in which a particular industry or organisation works. The test of "reasonable belief" is therefore subject to what a person in that individual's position would reasonably believe to be wrongdoing[48]. In our view, the fact that the potential whistleblowers in the scenarios we have been asked to consider would all have legal knowledge will be an important factor in assessing the reasonableness of their belief that the information disclosed tended to show one of the categories of wrongdoing.

(v) For example, an individual's belief that a legal obligation is being breached may, in practice, be wrong – all that must be shown is that they genuinely and reasonably believed that the information disclosed tended to show a breach of legal obligation was occurring, had occurred or was likely to occur. However, where the would-be whistleblower is a lawyer working in the area in which the potential breach of legal obligation is said to arise, the fact of them having specialist legal knowledge of that area will, in our view, be relevant to the reasonableness assessment;

(vi) In relation to the fourth category (endangerment of health and safety), neither the text of section 43B(1)(d) nor the caselaw prescribes any minimum threshold of harm. There is also no temporal threshold – there is no requirement, for example, that health and safety be "imminently" endangered. The same is true in respect of the fifth category (endangerment of the environment).

130. The fourth requirement is that the disclosure must be made in one of six prescribed methods. In short, there is a tiered structure for making protected disclosures. The primary way in which protected disclosures can be made is internally within the

[44] Babula v Waltham Forest College [2007] ICR 1026, CA.
[45] Douglas v Birmingham City Council and ors EAT 0518/02.
[46] Twist DX Ltd and ors v Armes and anor EAT 0030/20 at [87].
[47] Eiger Securities LLP v Korshunova [2017] ICR 561, EAT.
[48] Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 at[62].

organisation for which the whistleblower works. The further from the whistleblower's own organisation the disclosure is made, the more onerous the conditions for statutory protection.

131. Under sections 43C – 43H ERA, the six prescribed persons to which a disclosure may be made are:

(i) An employer, a person identified within an employer policy or another responsible person, or a designated person other than an employer (section 43C);

(ii) A legal adviser in the course of obtaining legal advice (section 43D);

(iii) A Minister of the Crown (i.e., government minister) in certain circumstances (section 43E);

(iv) A person prescribed by the Secretary of State, for example, a regulator (section 43F);

(v) A catch all category of other persons if certain stringent conditions are satisfied (section 43G);

(vi) Other persons, where the relevant wrongdoing is exceptionally serious (section 43H). The conditions under section 43H are less stringent than those under section 43G.

Excluded disclosures

132. There are two types of disclosures of information that are excluded from the protection of the statutory scheme, even if all other conditions for a protected disclosure are satisfied:

(i) Where the person making the disclosure commits an offence by making it (section 43B(3) ERA);

(ii) Where legal professional privilege can be claimed in respect of the information disclosed (section 43B(4) ERA).

133. An example of a situation in which the first exception might arise would be disclosures by workers who are subject to the Official Secrets Act 1989 (**"OSA"**). The OSA applies to civil servants; servants of the Crown and UK government staff. Under section 1(1) OSA, it is a criminal offence for anybody subject to the provision to disclose, without lawful authority, any information relating to security or intelligence obtained during the course of their work. Whilst it may appear unlikely that climate-related whistleblowing would concern information relating to security or intelligence, it is certainly a possibility that should be borne in mind by public sector employees who are subject to the OSA.

134. For the purposes of this advice, the second exception is likely to be of more direct relevance. Section 43B(4) ERA provides as follows:

> *A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying*

disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

135. Breaking this down, the effect of section 43B(4) is that legal advisers will fall outside the scope of the statutory protections if they disclose, without express permission from their client, information to which a claim of legal professional privilege could be maintained by the client. In order for the exclusion to apply, the information forming the subject matter of the disclosure must, in the first place have been disclosed to the legal adviser in the course of the client obtaining legal advice.

136. Legal professional privilege applies to some communications between an individual and their legal adviser, where that communication was made under conditions of confidentiality. The communication can be oral or in writing. The two forms of legal professional privilege are:

(i) **Legal advice privilege:** this applies to communications where the legal adviser was acting in their professional capacity and the purpose of the communication was to enable the individual to seek, or the legal adviser to give, legal advice or assistance. The term "legal advice" will encompass any advice relating to the rights, liabilities, obligations or remedies of the client under public or private law, but not more general business advice[49].

(ii) **Litigation privilege:** this applies to communication that was made for the dominant purpose of use in litigation that, at the time the communication was made, was either proceeding or pending, or reasonably anticipated or in contemplation. The communication must have been made for the dominant purpose of (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings.

137. Legal professional privilege will not apply where a legal adviser's advice is sought to further a crime, fraud or similar. This is known as the "iniquity" exception. The conduct in question must be tantamount to fraud, and not merely disreputable or unethical[50].

138. Importantly, the iniquity exception will arise only where the advice is <u>in itself</u> being sought for fraudulent / dishonest purposes, and not where the client is simply seeking advice about its potential liabilities[51]. So, for example, if a legal professional were asked to advise an organisation on how to conceal an environmental crime, the protection of legal professional privilege would not apply to that communication.

Whistleblowing activities – questions

139. We are asked to consider the protections available to individuals who blow the whistle in respect of their employers, clients or third parties on climate-related matters. We are asked to advise on six specific scenarios.

140. When considering whether a potential protected disclosure arises on the facts of the below scenarios, we consider that it is the second and third criteria as set out at paragraph 124 above that are likely to require the most careful analysis – namely, whether the individual reasonably believed that the disclosure was in the public interest and whether they reasonably believed that the information disclosed tended

[49] <u>Three Rivers District Council v Governor and Company of the Bank of England (No 6)</u> [2004] UKHL 48.
[50] <u>Gamlen Chemical Ltd v Rochem</u> Ltd (No.2) [1980] 124 SJ 126.
[51] <u>Gamlen</u> (above) at 565.

to show one of the prescribed categories of wrongdoing. The first and fourth criteria – a disclosure of information, and disclosure by one of the six prescribed methods – will therefore be addressed by us cursorily.

Scenario A - where law firm/Chambers X requires person P to carry out work in the same circumstances as they may seek to refuse work in the first, second and third scenarios above.[52] The instruction to carry out the work impacts or potentially impacts P's mental health or that of P's colleagues.

141. A disclosure of information by P in the above scenario may be found to constitute a protected disclosure within the meaning of section 43A ERA, so as to attract statutory protection.

142. The disclosure would need to be a disclosure of information, with sufficient factual content and specificity, and it would need to be made by one of the six prescribed methods under sections 43C – H ERA.

143. P would need to show that they reasonably believed that the disclosure of information tended to show one or more of the six categories of wrongdoing. In our view, there are two potential categories of wrongdoing that could be engaged here:

(i) **Endangerment of health and safety (section 43B(1)(d) ERA)**: if P reasonably believed the information tended to show that P's mental health and/or the mental health of their colleagues was being impacted, this would be capable of falling within section 43B(1)(d). If the disclosure related to potential risks to mental health only, then P would, in our view, need to show specific evidence of identifiable risks in order to establish a reasonable belief that the information disclosed tended to show health and safety was "likely" to be endangered. In other words, a mere assertion about the general increase in climate crisis-related anxiety may not be sufficient.

(ii) **Breach of a legal obligation (section 43B(1)(b) ERA):** as noted at paragraph 129(ii) above, the caselaw recognises that breach of anti-discrimination legislation may fall within the scope of section 43(1)(b) ERA. If P reasonably believed that the information disclosed tended to show that individuals with a protected climate-related belief under section 10 EqA were being discriminated against by the requirement to carry out certain types of work and this was making them unwell, then section 43B(1)(b) could be engaged.

144. Next, P would need to show that they reasonably believed the disclosure of information to be in the public interest. Depending on the facts, this may not be straightforward. The larger the group of P's colleagues affected and the more serious the impact on their mental health, the more likely it is that a tribunal would accept there was a reasonable belief that the disclosure was in the public interest. It is unlikely, in our view, that a scenario involving a minor effect on P's mental health alone would be sufficient to satisfy this criterion.

145. If the disclosure were found by a tribunal to constitute a protected disclosure, then the level of statutory protection available to P would depend on their employment

[52] That is, work for fossil fuel clients; work for clients in projects or matters that reasonably could be deemed to contribute to the climate and ecological crisis; work in a manner that is not consistent or aligned with the public commitments made by the law firm or organisation to reduce directly or indirectly its CO2 emissions.

status. If P was employed under a contract of employment, then they would be protected both from being subjected to any detriment for having made the protected disclosure (section 47B ERA) and from dismissal where the principal reason for dismissal was that they made a protected disclosure (section 103A ERA). Whilst employment status is fact-specific, we consider that the following individuals are likely to be "employees": trainee solicitors; associate solicitors; other employed lawyers; and support staff in a Chambers or firm.

146. If P were a worker as opposed to an employee, then they would be able to avail themselves of the protection against detriments under section 47B only. As discussed at paragraph 122 above, this might be the case if P were, for example, a partner in a law firm.

147. As neither workers nor employees, self-employed barristers will fall outside the scope of the statutory protections. It is less clear whether pupil barristers will be similarly excluded. In Edmonds v Lawson[53], the Court of Appeal held that a pupil barrister was not a worker, and in 2015, the Bar Council's stated position was that pupils will not ordinarily be workers[54]. However, the Court of Appeal's decision in Edmonds was over two decades ago, and the legal test for determining worker status has, since then, undergone substantial judicial development. It is therefore possible that a pupil barrister could constitute a worker so as to be protected under section 47B ERA, depending on the facts on the individual case.

Scenario B – where law firm/Chambers X is acting for client Y (e.g. an energy company). Person P is a lawyer working on Y's matter and comes to the conclusion that there is a prospective or ongoing breach by Y of health and safety laws in respect of the fossil fuel infrastructure that is being maintained/built (e.g. failure to comply with safety standards in the building of an oil terminal, evidence of methane leaks in a pipeline - which pose an imminent risk of harm).

148. A disclosure of information by P in the above scenario may be found to constitute a protected disclosure within the meaning of section 43A ERA, so as to attract statutory protection.

149. As above, the disclosure would need to be a disclosure of information, with sufficient factual content and specificity, and would need to be made by one of six prescribed methods.

150. P would need to show that they reasonably believed the disclosure of information tended to show one or more of the six categories of wrongdoing. In our view, there are two clear categories of wrongdoing that are likely to be engaged here:

(i) Breach of a legal obligation (section 43B(1)(b) ERA): a potential or actual breach of health and safety laws would clearly fall within the scope of section 43(1)(b) ERA. P would need to show that their belief that the information disclosed tended to show that such a breach was occurring, had occurred or was likely to occur was reasonable. While the caselaw does not require that the whistleblower identify the specific legal obligation that they believe has been breached, the fact that P has legal knowledge would, in our

[53] [2000] ICR 567.

[54] https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/pupils_automatic_enrolment_-_august_2015.pdf

view, mean that the specificity of the breach alleged would factor into the assessment of the reasonableness of P's belief.

(ii) Endangerment of health and safety (section 43B(1)(d) ERA): in the above scenario, the wrongdoing identified is said to pose an "imminent risk of harm". This would clearly be capable of falling within section 43B(10(d). However, as noted at paragraph 129(vi) above, there is no requirement that the harm be "imminent" (although, the remoteness of the harm may well be relevant to the reasonableness of the belief).

151. P would then need to show that they reasonably believed the disclosure to be in the public interest. We consider that this is likely to be established with relative ease. The safety of fossil fuel infrastructure is, in our view, a matter of inherent public interest – the disclosure would clearly serve the interests of a group wider than P alone.

152. A particular issue that may arise on the facts of this scenario is whether legal professional privilege could be claimed in respect of the information forming the subject matter of the disclosure, so as to exclude it from constituting a protected disclosure. This will depend entirely on how P came by the information. We refer to paragraphs 134 - 137 above.

153. Assuming that P is not excluded from the protection of the statutory scheme, then the level of protection available will depend on P's employment status. We repeat our analysis of this issue at paragraphs 145 - 147 above.

Scenario C – where law firm/Chambers X is acting for client Y (e.g. an energy company). Person P is a lawyer working on Y's matter (e.g. a prospective new pipeline that the law firm's work is facilitating being built) and comes to the conclusion that there is a prospective or ongoing risk of harm caused by client Y to the environment which will consequently impact on the health and safety of Y's employees and/or third parties locally to the pipeline (e.g. through pollution of the local environment) - or globally (e.g. through carbon emissions).

154. Again, a disclosure of information by P in the above scenario may be found to constitute a protected disclosure within the meaning of section 43A ERA, so as to attract statutory protection.

155. The disclosure would need to be a disclosure of information, with sufficient factual content and specificity, and it would need to be made in accordance with one of the six prescribed methods.

156. P would need to show that they reasonably believed the disclosure of information tended to show one or more of the six categories of wrongdoing. In our view, there are two potential categories of wrongdoing that are likely to be engaged here:

(i) Endangerment of the environment (section 43B(1)(e) ERA): in the above scenario, it seems that there are two potential environmental harms in respect of which P could seek to disclose information. One is the pollution of the <u>local</u> environment – this is clearly capable of falling within the scope of section 43B(1)(e).

The second is the potential <u>global</u> environmental harm caused by carbon emissions. This is a more remote form of harm. In our view, however, a disclosure in respect of an action which is said to endanger the environment or

the climate as a whole could also, in theory, be capable of falling within section 43B(1)(e). Importantly, the statute does not impose any requirement that the endangerment of the environment is imminent, and the term "environment" itself is not defined. Therefore, there is nothing on the face of the legislation which suggests that section 43B(1)(e) would operate to exclude disclosures of information that an individual reasonably believes tends to show endangerment of the environment as a whole, through the medium to long-term effects of carbon emissions. However, the greater the precision and specificity with which an individual can identify the environmental harm alleged, the more likely it is, in our view, that a tribunal will be satisfied that they reasonably believed that the information disclosed tended to show the environment was being endangered.

(ii) Endangerment of health and safety (section 43B(1)(d) ERA): again, there are two potential ways in which P might disclose information here. The first is in respect of the potential harm to Y's employees and/or local third parties. This would clearly be capable of falling within section 43B(1)(d).

The second is in respect of the potential global harm through carbon emissions. Our analysis on this is similar to our analysis at paragraph 156(i) above. There is no reason, in our view, why section 43B(1)(d) could not extend to disclosures of information that the individual reasonably believes tends to show that the health and safety of the population at large is being endangered. The text of section 43B(1)(d) itself reads "the health and safety of any individual" (our emphasis added). This would appear to us to support a broad construction. Furthermore, there is no temporal restriction, such as an "imminent" endangerment of health and safety. However, we repeat our analysis above - the greater the precision and specificity with which an individual can identify the endangerment of health and safety claimed, the more likely it is, in our view, that a tribunal will consider that their belief was reasonable.

157. Again, in this scenario, we do not consider that it would be difficult for P to show that they reasonably believed the disclosure to be in the public interest. The disclosure would clearly serve the interests of a group wider than just P.

158. We repeat our comments at paragraph 152 above. Depending on how P came by the information forming the subject matter of the disclosure, they may be excluded from the protection of the statutory scheme due to the information disclosed being privileged.

159. Assuming that P is not excluded, the level of protection available will depend on P's employment status. Again, we repeat our analysis at paragraphs 145 - 147 above.

Scenario D – where law firm/Chambers X is acting for client Y (e.g. an energy company). Person P is a lawyer working on Y's matter and comes to the conclusion that Y has deliberately or negligently misreported greenhouse gas (GHG)/carbon emissions when seeking planning permission for an oil drilling site.

160. Again, a disclosure of information by P in the above scenario may be found to constitute a protected disclosure within the meaning of section 43A ERA, so as to attract statutory protection.

161. The disclosure would need to be a disclosure of information, with sufficient factual content and specificity, and it would need to be made in accordance with one of the six prescribed methods.

162. P would need to show that they reasonably believed the disclosure of information tended to show one or more of the six categories of wrongdoing. In our view, the potential category of wrongdoing that is most likely to be engaged here is the **commission of a criminal offence** (section 43B(1)(a)). Whilst we are aware that certain companies are subject to mandatory GHG reporting obligations, we do not have any detailed knowledge of the legal obligations to which companies are subject specifically when seeking planning permission for projects. However, it certainly appears possible that, on the facts of the above scenario, a company could be committing fraud by false representation and/or failing to disclose information, contrary to sections 2 and/or 3 of the Fraud Act 2006. The fact that P has legal knowledge of the field would be relevant to the assessment of whether they reasonably believed that the information disclosed tended to show that a criminal offence had been committed.

163. Again, in this scenario, we consider that P would be able to establish, with relative ease, a reasonable belief that the disclosure was in the public interest. The granting of planning permission for an oil drilling site is a matter which is, in our view, of inherent public interest. The disclosure would therefore clearly serve the interests of a group wider than just P.

164. As noted at paragraph 152 above, depending on how P came by the information forming the subject matter of the disclosure, they may be excluded from the protection of the statutory scheme due to the information disclosed being privileged.

165. Assuming that P is not excluded, the level of protection available will depend on P's employment status – see paragraphs 145 - 147 above.

Scenario E – where law firm/Chambers X is acting for client Y (a public authority). Person P is working on Y's matter and comes to the conclusion that Y has granted planning permission for an oil drilling site without carrying out an environmental impact assessment adequately or at all.

166. A disclosure of information by P in the above scenario may be found to constitute a protected disclosure within the meaning of section 43A ERA, so as to attract statutory protection.

167. As above, the disclosure would need to be a disclosure of information, with sufficient factual content and specificity, and it would need to be made in accordance with one of the six prescribed methods.

168. P would need to show that they reasonably believed the disclosure of information tended to show one or more of the six categories of wrongdoing. In our view, the potential category of wrongdoing that is most likely to be engaged here is **breach of legal obligation** (section 43B(1)(b) ERA). Under domestic law, an environmental impact assessment is mandatory where certain developments (including in the extractive industry) are likely to have significant effects on the environment by virtue of factors such as nature, size or location[55]. Information that P reasonably believed

[55] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 – Regs 2(1) – 3, and Schedule 2.

tended to show a failure to comply with this obligation would clearly be capable of falling within the scope of section 43B(1)(b).

169. It is likely that P would be able to show with relative ease that they reasonably believed the disclosure to be in the public interest. The wrongdoing alleged relates to a matter that is of inherent public interest. The fact that the wrongdoing alleged is by a public authority further enhances the public interest.

170. We repeat our comments at paragraph 152 above. Depending on how P came by the information forming the subject matter of the disclosure, they may be excluded from the protection of the statutory scheme due to legal professional privilege.

171. Assuming that P is not excluded, the level of protection available will depend on P's employment status. See paragraphs 145 - 147 above.

Scenario F – where law firm/Chambers X is acting for client Y (a public authority). Person P is working on Y's matter and comes to the conclusion that Y is carrying out actions (or omissions) that would infringe the Article 8 ECHR rights of P and other third parties, such as failing to implement measures specified in the Third National Adaptation Programme (NAP3).

172. A disclosure of information by P in the above scenario may be found to constitute a protected disclosure within the meaning of section 43A ERA, so as to attract statutory protection.

173. As above, the disclosure would need to be a disclosure of information, with sufficient factual content and specificity, and it would need to be made in accordance with one of the six prescribed methods.

174. P would need to show that they reasonably believed the disclosure of information tended to show one or more of the six categories of wrongdoing. In our view, the potential category of wrongdoing that is most likely to be engaged here is **breach of legal obligation** (section 43B(1)(b) ERA).

175. Section 58 of the Climate Change Act 2008 imposes a duty on the Secretary of State to lay programmes before Parliament setting out the Government's objectives in relation to adaptation to climate change; the Government's proposals and policies for meeting those objectives; and the timescales for introducing those proposals and policies. NAP3 was published pursuant to section 58 of the 2008 Act on 17 July 2023.

176. Whilst NAP3 sets out the Government's view of the action required to tackle climate change, it does not, in and of itself, create any legally binding obligations for public authorities. Therefore, the disclosure of information tending to show that a public authority has failed to implement measures specified in NAP3 would not automatically fall within the scope of section 43B(1)(b). As noted at paragraph 129(iii) above, section 43B(1)(b) will not be engaged in circumstances where an individual simply believes that certain actions are wrong, immoral or undesirable.

177. However, the situation may be different where, for example, the failure to implement measures specified in NAP3 is relied upon by P to show that they reasonably believed the information disclosed tended to show a breach of an actual legal obligation – such as a breach of Art 8 rights.

178. As noted at paragraph 129(ii) above, section 43B(1)(b) ERA does not impose any limits on the term "legal obligation". We do not see any reason why a public

authority's obligation to act compatibly with Convention rights under section 6(1) HRA could not fall within the scope of section 43B(1)(b).

179. It is well-established within the jurisprudence of the ECtHR that Art 8 may be engaged by damage to the health or well-being of an individual, or the risk of such harm. In an environmental context, the ECtHR has most frequently found violations of Art 8 where there is a specific harm emanating from a singular environmental source. For example, in Cordella and others v Italy[56], the applicants were individuals living in the locality of steelworks that produced toxic emissions. The ECtHR found that the persistence of the environmental pollution endangered the health of the applicants and the local population more generally. It held that the State had violated the applicants' Art 8 rights by failing to take all necessary measures to provide effective protection for their right to respect for their private life.

180. However, the ECtHR has also more recently held in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland[57] that Art 8 also encompasses a positive obligation on states to provide effective protection from the serious adverse effects of climate change on lives, health, well-being and quality of life. This requires states to adopt and effectively apply in practice regulations and other measures that are capable of mitigating the "*existing and potentially irreversible future effects of climate change*"[58].

181. The limitations of this decision must be stressed. In order to be able to assert victim status, an individual must show that they were personally and directly affected by the alleged failure to combat climate change.[59] Specifically:

    (i) The individual must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and

    (ii) There must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.

182. In other words, Art 8 will not be engaged simply by general damage to the environment.

183. It is difficult for us to express a view on the likelihood of P establishing a reasonable belief that the information disclosed tended to show a breach of Art 8, without information about the nature of the specific breach alleged. However, we consider that the key issue is likely to be the extent to which the disclosure tends to show that P or other identifiable third parties were personally and directly affected by the alleged breach of Art 8. For example, in light of P's legal knowledge, a general assertion that the climate crisis poses a risk to the health of the population generally is unlikely to be sufficient.

184. Again, we consider that P would be able to show with relative ease that they reasonably believed the disclosure to be in the public interest. The alleged wrongdoing

[56] 54414/13 and 54264/15.
[57] 53600/20.
[58] Para 545.
[59] Para 487. Note that in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, whilst the individual applicants did not have victim status, KlimaSeniorinnen had standing as an association.

concerns environmental matters and is said to have been carried out by a local authority.

185. We repeat our comments at paragraph 152 above. Depending on how P came by the information forming the subject matter of the disclosure, they may be excluded from the protection of the statutory scheme due to legal professional privilege.

186. Assuming that P is not excluded, the level of protection available will depend on P's employment status. See paragraphs 145 - 147 above.

CATEGORY 3 – PROTEST ACTIVITIES

187. In respect of this third category of activities, we are asked to advise on the legal framework around the ability of private and public sector employers, respectively, to discipline lawyers for conduct occurring outside the workplace, in particular the exercise by lawyers of their democratic rights to participate in peaceful protest in respect to the climate and ecological crisis (including where this is subject to criminal sanctions).

The human rights framework

188. The attendance of lawyers at climate-related peaceful protests may engage Articles 8, 9, 10 and 11 of the Convention.

Art 9

189. The question of whether Art 9 is engaged by an individual's participation in protest activities will depend on whether the act of attending the protest is sufficiently connected with an underlying climate-related belief protected by Art 9, so as to constitute a "manifestation" of that belief. This will be a fact-sensitive assessment.

Article 8

190. Article 8 provides as follows:

> *Right to respect for private and family life*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

191. As made clear by Art 8(2), the right to respect for private and family life is a qualified right. Domestic caselaw emphasises that the touchstone of its application is that the individual had a reasonable expectation of privacy. For example, in In re JR38's Application for Judicial Review[60], the Supreme Court held by majority that the

[60] [2015] UKSC 42.

applicant's Art 8 rights were not engaged by the publication in a local newspaper of CCTV images of him taken during street riots for the purposes of identification.

192. The following cases, provide some helpful insights into the questions of when Art 8 will be engaged specifically in the employment context:

(i) **Pay v Lancashire Probation Service**[61]: the claimant was a probation officer specialising in the treatment of sex offenders. He was dismissed following his employer's discovery that he was director of a business involved in sadomasochistic activities and that he performed acts of domination over women at a private members' club. The EAT agreed with the tribunal's analysis that Art 8 was not engaged, since the photographs had been published online and were in the public domain. The EAT also endorsed the tribunal's view that any interference with Art 10 was justified in view of the risk of damage to the reputation of the probation service that the claimant's activities posed. In the subsequent ECtHR decision of Pay v United Kingdom[62], the ECtHR was prepared to proceed on the assumption that Art 8 was engaged. Nevertheless, it considered that any interference with Arts 8 and 10 was justified, as the claimant's activities, if they became widely known, would compromise his work and damage the reputation of the probation service;

(ii) **City and County of Swansea v Gayle:**[63] the claimant had, on two occasions, been observed by a senior employee playing squash in a sports centre near the office whilst still on the clock at work. A private investigator hired by the employer covertly filmed the claimant leaving the sports centre on multiple occasions. The claimant was dismissed and brought a claim for unfair dismissal. The EAT overturned an employment tribunal's finding that the investigation was unreasonable in that it involved an unjustified interference with the claimant's rights under Art 8(1). The EAT held that Article 8 did not engage on the facts. The claimant had been filmed in a public place and was engaged in wrongdoing – he could have no reasonable expectation of privacy in those circumstances. Even if there had been an interference with Art 8, it would have been justified in pursuance of the legitimate aims of preventing crime and protecting the rights of others;

(iii) **X v Y:**[64] the claimant was dismissed after receiving a police caution for gross indecency with another man in a public toilet. The Court of Appeal held that his dismissal was not unfair. There was no interference with his Art 8 rights. Art 8 covered a person's sexual orientation and sex life, and a reasonable expectation of privacy may well extend beyond the confines of the home. However, the following features were significant, such that there was no reasonable expectation of privacy on the facts: the conduct had occurred in a public place; it was a criminal offence; and it had led to a caution that was relevant to his employment (a charity worker working with young offenders).

193. The above cases show that, whilst the fact that conduct occurred in a public place will be relevant to the question of whether an employee had a reasonable expectation of privacy, it may not be determinative. It will fall to be considered alongside factors

[61] [2004] ICR 187, EAT.
[62] [2009] IRLR 139, ECtHR.
[63] [2013] IRLR 768, EAT.
[64] [2004] ICR 1634, CA.

such as the nature of the conduct, and the extent to which it could impact on the individual's employment.

Article 10

194. Article 10 provides as follows:

> *Freedom of expression*
>
> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

195. It is well-established that the right to freedom of expression encompasses speech that offends, shocks or disturbs[65]. However, Art 10 is also a qualified right.

Article 11

196. Art 11 provides as follows:

> *Freedom of assembly and association*
>
> *1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
>
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

197. Much of the domestic employment-related caselaw around Art 11 is concerned with the right to peaceful assembly in the context of trade union activities. However, Art 11 also protects the right to engage in peaceful protest unconnected with trade union rights.

[65] For example, Handyside v UK (1979-80) 1 EHRR 737 at para 49.

198. Importantly, Art 11 extends only to the right to peaceful assembly. It does not extend to a protest where the organisers or participants engage in violence, have violent intentions, incite violence or otherwise "reject the foundations of a democratic society"[66].

199. On the outer limits of the right, the decision of the Court of Appeal in Attorney General's Reference (No. 1 of 2022)[67] is particularly instructive for the purposes of this advice. The subject matter of the reference was the acquittal of criminal damage of four individuals who, in 2020, had attended a peaceful march prompted by the Black Lives Matter movement and toppled a statute of slave trader Edward Colston ("the Colston Four"). Lord Burnett of Maldon (then Lord Chief Justice) considered that the act of toppling the statue fell outside the scope of Art 11, as the act of toppling of the statute was in itself "violent", as well as the damage caused being significant.

The ability of private sector employers to discipline lawyers for participation in peaceful protests

200. The level of legal protection available to individuals who are disciplined by their employer for attending a peaceful protest will depend, to a large extent, on whether or not Art 9 and therefore s.10 EqA are engaged on the facts. If the individual can establish that they have a protected climate-related belief, and that their attendance at a protest was a manifestation of that belief, they will be able to pursue claims under EqA in relation to any disciplinary action taken. The proportionality of any interference with Art 9 will be considered as part of claims for direct or indirect discrimination, as discussed at paragraphs 20 - 34 above.

201. If Art 9 is not engaged, then the legal protections available are more limited. Where an employee with over two years' service is dismissed for their participation in protest activities, they will be able to pursue a claim for unfair dismissal under ss.94 – 98 ERA. The employer will be required to show a potentially fair reason for dismissal, and the tribunal will then need to be satisfied as to the reasonableness of the decision to dismiss. Where Convention rights are engaged, reasonableness will be assessed in light of those rights. However, where EqA is not engaged and the action taken falls short of dismissal, there will be no obvious protection within the sphere of employment law.

202. The questions of whether Convention rights are engaged, and the extent to which any interference with those rights by an employer in the form of disciplinary sanctions is likely to be justified, will be highly fact sensitive. However, we consider that the following broad propositions can be made:

(i) **Attendance at a peaceful climate-related may well engage Art 8.** The key question will be whether, on the facts, the employee had a reasonable expectation of privacy. The fact that the attendance will have taken place in a public setting may not be determinative – the setting in which the protest took place will need to be viewed alongside factors such as the nature of any conduct engaged in by the employee. Where an employee simply attends a peaceful demonstration outside of work hours, a tribunal may well find that Art 8 was engaged, so that any interference with it would need to be justified under Art 8(2). Conversely, where an employee's attendance at a protest leads to a criminal sanction, there is, in our view, a good chance that a tribunal would

[66] Kudrevičius v. Lithuania (2016) 62 EHRR.
[67] [2022] EWCA Crim 1259 | [2023] K.B. 37.

consider that they did not have a reasonable expectation of privacy – especially given the potential relevance of any criminal sanction to their role as a lawyer;

(ii) **Attendance at a peaceful climate-related protest may well engage Art 9.** This is likely to depend on the closeness of the connection between the attendance at the protest and any underlying belief protected by Art 9. As discussed at paragraph 6 above, the act must be intimately connected with the belief in order to qualify as a manifestation of that belief;

(iii) **Disciplining an employee in the private sector for the <u>mere act</u>, without more, of attending a peaceful, climate-related protest, is unlikely to constitute a justified interference with Arts 8, 9, 10 and/or 11**. It is however, possible to envisage some circumstances where disciplinary action could be justified – for example, where the protest is directly critical of the employer;

(iv) **Where an employee attends a climate-related protest and this results in the imposition of a criminal sanction, an employer may be justified in taking disciplinary action against them**. The need to uphold public trust and confidence in the legal profession and the risk of harm to an employer's reputation are likely to constitute legitimate aims. The question of whether such action is necessary and proportionate in pursuit of those aims will depend on matters such as the gravity of the offence of which the individual has been convicted; the extent to which it caused or risked harm to the public; and the extent to which it involved damage to property. As noted at paragraph 198 above, it has been held that acts of criminal damage such as the toppling of a statute are "violent" and therefore fall outside the scope of the right to peaceful protest altogether. This is despite the fact that such actions perhaps do not necessarily accord with the ordinary understanding of the term "violence".

The ability of public sector employers to discipline lawyers for participation in peaceful protests

203. Our analysis here mirrors, in broad terms, our analysis at paragraphs 94 - 97 above in relation to conscientious objection activities.

204. As noted above, a public sector employer would have a direct duty under the Human Rights Act 1998 not to violate an employee's Convention rights. There is otherwise no separate legal framework governing the ability of public sector employers to discipline lawyers for participation in peaceful protests. As also noted above, where public sector employees are subject to the Civil Service Code, the heightened expectation of independence and impartiality is likely to constitute a significant factor to be weighed in the balance of any proportionality assessment.

CLAIRE McCANN

HANA ABAS

Cloisters, 15 November 2024

COUNSEL'S OPINION ON THE RIGHT OF CONSCIENTIOUS OBJECTION AT WORK

WORKED SCENARIOS

SCENARIO A – THE CASPIAN SEA PROJECT

PREPARATION: Please read pg 2 – 12 (paras 2 – 50) of the Counsel's Opinion in preparation for this Scenario.

PART 1

You are an associate at XY&Z International LLP, a prominent law firm. You are assigned to draft documents for a project involving ABC Global, a major oil company. The project pertains to the acquisition of an oil field in the world's largest inland lake, the Caspian Sea ('**The Caspian Sea Project**').

ABC Global is a longstanding client of XY&Z International LLP and generates significant revenue for the firm. However, the company has a poor track record concerning environmental issues, including contributing significantly to greenhouse gas (GHG) emissions. The company was fined in 2023 for environmental violations in the USA for allowing a pipeline crude oil spill which significantly polluted a river and its floodplain in Montana. This allegedly contaminated farmland and caused crop failures and the deaths of cattle; health issues in the local community which is predominantly poor and rural; and the deaths of thousands of migratory birds. Reading about a similar oil spill in Nigeria involving a different fossil fuel company not too long ago inspired you to join a 'River Guardians' group outside of work. Since then you have become much better informed about way that companies like ABC Global are contributing to the climate and ecological crisis.

Having thought carefully about it, you inform the client relationship partner for ABC Global that you cannot work on the Caspian Sea Project because you believe it will pollute the delicate ecosystem of the Caspian Sea and contribute materially to fossil fuel pollution at a

time when society should be moving rapidly to decarbonise and transition to cleaner energy sources.

The partner is furious and threatens to report you to your line manager, HR and your regulator. He tells you that your refusal undermines the firm's policy that its employees should represent all its clients without fear or favour. Also, he says that given your abilities and specialist skillset, XY&Z International LLP will not be able to deliver on the project without you unless it hires a contractor and your unavailability may compromise its contractual responsibilities under its retainer.

Q1. What, if any, right do you have to refuse to work on ABC Global's matter? What sort of legal and ethical issues arise?

PART 2

You stand your ground. You are immediately reassigned to working on a merger of two pharmaceutical companies and so you continue to meet your chargeable hours and billing targets. However, your colleagues who had to pick up your work on the Caspian Sea Project make snide comments to the effect that you're a 'work shirker' and start to address you in emails as 'Eco Zealot'. You raise the fact this is making you feel stressed and unwelcome at work with your line manager but they discourage you from raising a formal grievance and tell you it's 'only a bit of banter'.

After the Caspian Sea Project finishes, you are notified that a complaint was made about you to the Solicitors Regulation Authority. Without waiting to find out the outcome of this complaint, you are informed by HR and your line manager that you will be moved to a 'professional support lawyer' role which does not involve any advisory or transactional work because you might 'find this a bit more comfortable, given your views'.

Q2. What legal issues does this scenario raise? What, if any, recourse do you have against XY&Z International LLP?

Q3. How do you think the SRA will deal with the complaint?

FURTHER READING: For discussion of these issues, please read pg 13 – 26 (Paras 52 – 115) of the Counsel's Opinion.

SCENARIO B – THE PANTANAL PIPELINE

PREPARATION: Please read pg 26 – 32 (paras 116 – 138) of the Counsel's Opinion in preparation for this Scenario.

BigLaw LLP is acting for NautralEnergy Corporation, an energy company engaged in the development of a new natural gas pipeline project in South America ('**Pantanal Pipeline Project**'). NaturalEnergy Corporation, with its distinctive 'falling leaves' logo, styles itself as an ethical and modern company with many employee engagement awards, providing a 'cleaner energy transition fuel' than the alternatives of oil and coal.

You are a junior solicitor at BigLaw LLP, a member of the team on the Pantanal Pipeline Project coordinating and providing legal advice on the various regulatory approvals and contracts required for the gas pipeline's construction and operation. During your work, you identify significant concerns set out in underlying documents on the matter file regarding the project's potential impacts. You discover that:

1. According to environmental impact assessments which have been prepared, the construction and operation of one section of the pipeline will result in the destruction of local water sources, and estimated significant incidental methane leakage, posing serious health risks to nearby indigenous communities in the Pantanal wetlands and Chiquitano forest. NaturalEnergy disclose these risks on the face of the documents and not appear to be taking any steps to mitigate these risks.

2. Health and safety documentation concerning workers has been omitted or has not been prepared at all, save for the first phase of the pipeline construction. This strikes you as odd. You raise this (with the approval of the supervising partner) with the client, but they do not respond to any of your or her chasers on this.

3. You also notice that the planning approvals for one section of the pipeline in Brazil appear to have been procured with no applications, environmental impact assessments or other paperwork filed. On investigating public domain records available for these planning approvals, several 'facilitation payments' appear to have been made to officials of the local municipality, after which approvals were granted.

4. Looking at both the confidential documentation you have from NaturalEnergy and reports published on the potential impacts of the Pantanal Pipeline by researchers and civil society groups who oppose the pipeline's construction, the pipeline's operation is expected to substantially contribute to global carbon emissions, both through the correct operation of the pipeline and through incidental methane leakage. However, it appears that external researchers have vastly underestimated the incidental methane leakage of the pipeline in tonnes, according to NaturalEnergy's documents, which suggest that it will in fact be around 5.5 – 6x the researchers' estimates. NaturalEnergy do not appear to be taking any steps to mitigate the leakage risks.

BigLaw LLP are told that NaturalEnergy Corporation wants to complete the legal side of things quickly so that they can start construction in Q2 next year. You are chivvied along by the client with various deadlines and told not to 'hold matters up' and 'incur costs by looking into things too closely because our internal lawyers have already checked everything'.

Q1. What sort of legal and ethical issues arise here?

Q2. Would you be able to make a protected disclosure to an appropriate authority (and, if so, on which grounds/categories of wrongdoing)?

Q3. In what circumstances (if any) could you breach your client's confidentiality/legal professional privilege in order to make a disclosure of information to an appropriate authority?

FURTHER READING: For discussion of these issues, please see the worked examples at pg 32 – 40 (Paras 139 – 186) of the Counsel's Opinion, particularly Scenario C.