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WHISTLEBLOWING – AN UPDATE

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INTRODUCTION

1 Protected disclosure claims continue to keep employment lawyers, Tribunals and the EAT busy. The attractions of whistleblowing claims for claimants are well rehearsed: no qualification period for unfair dismissal claims and no cap on compensation, plus a whistleblowing claim can raise the publicity stakes for respondents.

2 In addition, a number of judicial decisions appeared to give a very broad scope for protected disclosure claims: in *Parkins v Sodexho Ltd* [2002] IRLR 109, it was held that an employee can make a protected disclosure about a breach of his own contract of employment, opening up the possibility that almost any grievance might amount to a protected disclosure. Similarly in *Babula v Waltham Forest College* [2007] ICR 1026, para 80, the Court of Appeal stated that an overly technical approach to what amounts to a protected disclosure would be 'both unrealistic and work against the policy of the statute'.

3 At the same time, Respondents aren't afraid to take up judicial time on technical points. Anyone who has advised on a whistleblowing case has probably pondered the distinction between allegations and information that first arose in *Cavendish Munro Professional Risk Management v Geduld* [2010] ICR 325.

4 I mention *Parkins, Babula* and *Geduld* in this introductory section because, although they are now old, and well-thumbed authorities, their ramifications continue to echo through whistleblowing law:

(i) The government sought to reverse the effect of *Parkins* in the Enterprise and Regulatory Reform Act 2013 by introducing the requirement in s.43B(1) of the Employment Rights Act 1996 ('ERA') that a protected disclosure has to be, in the reasonable belief of the worker making the disclosure, 'made in the public interest'.

(ii) The recent EAT decision in *Eiger Securities LLP v Korshunova* [2017] IRLR 115 may require reassessment of the impact of the Court of Appeal's decision in *Babula*, or at least illustrate that ETs and the EAT are still struggling to apply (what some might regard as) the reasonably straightforward guidance in *Babula*; and

(iii) *Geduld* was again considered by the EAT in *Kilraine v London Borough of Wandsworth* [2016] IRLR 422.

A QUICK SUMMARY OF THE LEGAL FRAMEWORK

5 Before going on to some of the recent case law, I have set out a quick introduction to (or refresher on) the statutory provisions on protected disclosures. This is obviously not a complete review of the law, but should, I hope, provide a framework which highlights the key requirements of a protected disclosure claim.

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A Protected Disclosure

6 Protected disclosures are defined in Part IVA, sections 43A to 43L of the ERA.

7 Under section 43A 'a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.' Worker is defined in section 230 of the ERA, plus there is an extended definition of worker for the purposes of protected disclosure claims in section 43K.

8 Section 43B(1) provides that:

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

9 Section 43C provides that 'a qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) to his employer or (b) [another responsible person]'.

10 In addition, a protected disclosure can be made to certain third parties in certain circumstances including legal advisers, Ministers if the Crown and prescribed persons (sections 43D to 43H).

11 Previously in order to amount to a protected disclosure, it was necessary that a qualifying disclosure was made in 'good faith'. However when section 43B was amended by the Enterprise and Regulatory Reform Act 2013 to include a requirement that the disclosure was made 'in the public interest', the government took the view that to have a double requirement (public interest *and* good faith) might undermine a worker's willingness to blow the whistle. Accordingly, good faith is no longer a formal requirement of a protected disclosure. However, a lack of good faith in an otherwise successful whistleblowing claim can lead to a reduction in compensation of up to 25%: see section 49(6A) in relation to detriment claims and section 123(6A) for unfair dismissal claims.

Whistleblowing Protections

Unfair Dismissal

12 Section 103A of the ERA 1996 provides that:

> 'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.'

13 In addition to unfair dismissal cases under section 103A, the effect of sections 105(1) and 105(6A) are that a dismissal will be automatically unfair where:

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(i) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,

(ii) the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(iii) the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that the employee made a protected disclosure.

Detriment

14 Section 47B of the ERA 1996 provides:

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

(1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

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

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) … this section does not apply where—

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(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of [Part X]).'

SOME RECENT CASES

Who Is Protected: The Definition of Worker

15 Section 43K provides an extended definition of 'worker' and 'employer' for the purposes of protected disclosure claims. Its purpose is to cover agency worker situations, certain employment situations in the NHS and work experience as part of certain training courses.

16 There have been two recent cases on the interpretation of section 43K(1)(a) (which is aimed at agency worker situations). The section provides that:

'(1) For the purposes of this Part 'worker' includes an individual *who is not a worker as defined by section 230(3)* but who—

(a) works or worked for a person in circumstances in which

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice *substantially determined not by him* but by the person for whom he works or worked, by the third person or by both of them…' (emphasis added)

17 This must be read together with section 43K(2)(a) which provides, in a situation falling within section 43K(1)(a), that the "employer" includes "the person *who substantially determines* or determined the terms on which he is or was engaged". (emphasis added)

18 A crucial issue in relation to these sections is whether a worker can work for more than one employer. The EAT came to different conclusions on this point in *Day v Lewisham and Greenwich NHS Trust* [2016] ICR 878, [2016] IRLR 415 and *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] ICR 1155, [2016] IRLR 742.

19 *Day* was not a classic agency situation. However, the facts were analogous. Dr Day was a specialist registrar (a training position) who worked under a contract of employment with Lewisham and Greenwich NHS Trust. He also had a training contract with Health Education England (HEE), who arranged and supervised the placement with the Trust, and were responsible for paying part of Dr Day's salary. Dr Day complained about patient safety both to the hospital and to the HEE. He brought claims against both the Trust and the HEE, including a claim that, as a result of his protected disclosures, he had been treated detrimentally by HEE. His claim against HEE was struck out on grounds that (i) he did not fall within the extended definition of 'worker' in s.43K(1)(a) and, in addition, (ii) HEE did not fall within the definition of employer in section 43K(2)(a). The EAT upheld this decision.

20 Langstaff J held that none of the extensions to the meaning of 'worker' in section 43K apply where the claimant is a 'worker' as defined by s.230(3) even if that is in relation to a different employer. Accordingly, Dr Day could not be a worker in relation to HEE as he was a worker in relation to the NHS Trust. In reaching this conclusion, Langstaff J stated:

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> 'If the section had been intended to add a category of employer against whom a person might act *in addition to others who were his employer*, there would be no need for the words 'who is not a worker as defined by s.230(3)'.' (paragraph 37)(emphasis added).

21 This might be seen as a surprising decision given the impact detrimental treatment by HEE could have on Dr Day's career. The decision was appealed, and judgment handed down on 5 May 2017. The Court of Appeal's decision is explained below, after looking at the EAT decision in *McTigue v University Hospital Bristol NHS Foundation Trust*.

22 In *McTigue* Simler J held that an agency worker can bring a whistleblowing claim against the end-user for whom she works, even where she is also an employee or worker of the agency. The Trust argued that this finding was precluded by the decision in *Day.* Interestingly, Simler J (perhaps politely side-stepping a disagreement with her predecessor as President of the EAT) held that the decision in *Day* did not mean that an agency worker could not be 'employed' by more than one employer for the purposes of a whistleblowing claim (i.e. employed by one under section 230(3) and by the other under section 43K).

23 She stated:

> '…the opening words in section 43K(1) mean that the provision is only engaged where an individual is not a worker within section 230(3) *in relation to the respondent in question*. If he or she is such a worker there is no need to extend the meaning of worker to afford protection *against that respondent*.' (emphasis added).

24 When *Day* went to the Court of Appeal, the Court preferred the approach in *McTigue* and confirmed that section 43K(1)(a) applied where an individual was not a worker under section 230(3) 'as against a given respondent'. The fact that the individual was also a worker of, for example, a recruitment agency, did not necessarily prevent him be a worker of the end-user.

25 Whether an individual in that situation is in fact a worker in relation to the end-user, and whether the end-user is also to be regarded as his employer, will depend on who substantially determines the terms of the engagement (see sections 43K(1)(a)(ii) and 43K(2)(a)).

26 One final note on this extended definition of worker. In *McTigue,* Simler J gave a helpful summary of the approach to section 43K (at paragraph 38):

> 'In conclusion, in the hope that it will assist tribunals dealing with these issues, it seems to me that, in determining whether an individual is a worker within section 43K(1)(a), the following questions should be addressed.
>
> (a) For whom does or did the individual work?
>
> (b) Is the individual a worker as defined by section 230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on section 43K in relation to that person. However, the fact that the individual is a section 230(3) worker in relation to one person does not prevent the individual from relying on section 43K in relation to another person, the respondent, for whom the individual also works.
>
> (c) If the individual is not a section 230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?

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(d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within section 43K(1)(a) .

(e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.

(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

(g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within section 43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under section 43K(2)(a).'

27 Two other reasonably recent cases on section 43K confirm that an individual will not be a worker if there is no contract governing the working relationship: *Sharpe v The Bishop of Worcester* [2015] ICR 1241, [2015] IRLR 663 related to a Church of England Rector, and *Gilham v Ministry of Justice* [2017] ICR 404, [2017] IRLR 23 related to a District Judge. *Gilham* is due to be heard by the Court of Appeal in October 2017. Note, however, that this does not mean that there must be a contract between the worker and the end-user: this definition covers normal agency situations including the common 4 party situation involving an end-user, agency, service company and the individual who does the work (see, e.g. *Croke v Hydro Aluminium Worcester* [207] ICR 1303).

What Amounts to a Disclosure (1): Information or Allegation?

28 In *Cavendish Munro Professional Risk Management v Geduld* [2010] ICR 325 the EAT drew a distinction between (i) a disclosure of information and (ii) the making of an allegation. The EAT explained this distinction in the following way (para 24):

'Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that: "You are not complying with health and safety requirements." In our view this would be an allegation not information.'

29 The approach in *Geduld* was subsequently endorsed in a number of cases. However, it is a distinction which is difficult to apply. The '*Geduld*' issue was again considered by the EAT in *Kilraine v London Borough of Wandsworth* [2016] IRLR 422. Here Langstaff J stated (paragraph 30):

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> 'I would caution some care in the application of the principle arising out of *Geduld v Cavendish Munro*. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between 'information' and 'allegation' is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point.'

30 On its face, that comment might suggest that in future there will be less focus on whether there is simply an allegation rather than the disclosure of information. However, Langstaff J went on to conclude that the alleged disclosure in issue in that case 'does not sensibly convey any information at all … It is simply far too vague…[the alleged disclosure] has to show or tend to show something that comes within the section.' As the June 2016 IRLR Highlights state: 'it is arguable that Mr Justice Langstaff has, with respect, fallen into the very trap he warned against.'

What Amounts to a Disclosure (2): Reasonable Belief

31 It is not enough for the worker simply to disclose information. He must have a ***reasonable belief*** that the disclosure is made in the public interest and that the information disclosed tends to show that a person 'has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…' or that 'a criminal offence has been committed, is being committed or is likely to be committed' etc.

32 A number of points arise in relation to the issue of reasonable belief:

(i) There must be a belief (which is actually held and reasonable) that both the information disclosed is correct and also that that information tends to show that there has been a breach or is likely to be a breach of the relevant legal obligation.

(ii) In *Babula v Waltham Forest College* [2007] ICR 1026 the Court of Appeal decided that it is not necessary that the worker's belief that there had been or was likely to be a breach of a legal obligation was *correct,* provided that belief was *genuinely* and *reasonably* held.

(iii) When considering the question of the worker's actual belief, and whether it was reasonable, the Tribunal must consider the context in which the disclosure was made. For example in *Royal Cornwall Hospitals NHS Trust v Watkinson* UKEAT/0378/10 the EAT stated:

> 'This issue [i.e. whether there is a qualifying disclosure] has to be considered not in isolation, but in the context of the entire evidence, including the previous history, so as to ascertain the factual matrix against which the disclosure has been made.'

33 In *Eiger Securities LLP v Korshunova* [2017] IRLR 115, the claimant was employed as a sales executive on the trading floor. She noticed that her username and password were being used by people including her managing director. She challenged him about using her computer screen in dealing with an external trader without identifying himself as not being her. She was dismissed and brought proceedings against the company. An employment tribunal held that the complaint was a qualifying disclosure and that the claimant genuinely

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believed that what the managing director did 'was a breach of the regulations governing their industry and in contravention of what she believed was a legal obligation to be transparent with clients.' However the EAT (Slade J) held that this did not meet the test in section 43B. She stated (para 46):

> 'In my judgment it is not obvious that not informing a client of the identity of the person whom they are dealing if the employee is trading from another person's computer is, as in *Bolton* [2006] IRLR 500, plainly a breach of a legal obligation. That being so, in order to fall within ERA s.43B(1)(b) as explained in *Blackbay* [2014] IRLR 416, *the ET should have identified the source of the legal obligation to which the claimant believed [the managing director] or the respondent were subject and how they had failed to comply with it*. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of a legal obligation.' (emphasis added)

What Amounts to a Disclosure (3): Public Interest

34 As explained above, the Enterprise and Regulatory Reform Act 2013 introduced a public interest test into section 43B of the ERA. Now a protected disclosure has to be, in the reasonable belief of the worker making the disclosure, 'made in the public interest'.

35 The meaning of these words was considered by the EAT (Supperstone J) in *Chesterton Global Ltd v Nurmohamed* [2015] ICR 920, [2015] IRLR 614. In that case the claimant suggested that discrepancies in the employer's profit and loss accounts indicated that the accounts were being manipulated for the benefit of shareholders to the detriment of over 100 senior managers including himself, who, as a result, received smaller commission payments.

36 Supperstone J noted (paragraph 36) that while the legislative history made it clear that the 'sole purpose' of the amendment to section 43B was 'intended to reverse the effect of *Parkins v Sodexho Ltd*…the words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications.' He further held that:

> (i) the question was not whether the disclosure per se was in the public interest but whether the employee had a reasonable belief that it was made in the public interest and that the information being disclosed met the criteria set out in section 43B(1)(a)-(f) (paragraph 28);
>
> (ii) the public interest test could be satisfied even where the belief turned out to be wrong or there was in fact no public interest in the disclosure being made, provided the employee's belief that the disclosure was made in the public interest was objectively reasonable (paragraph 34); and
>
> (iii) as a relatively small group might be sufficient to satisfy the public interest (paragraph 25), the tribunal had been entitled to conclude that the claimant had reasonably believed that the disclosures were in the public interest .

37 An appeal on the *Chesterton Global* decision is due to be heard on 8 June 2017.

38 The EAT also had to consider the public interest test in *Morgan v Royal Mencap Society* [2016] IRLR 428. In that case the claim had been struck out by the Employment Tribunal on

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the ground that Ms Morgan's complaints had been about the conditions in which she was being required to work, and while that was highly relevant to her, it was not a matter of public interest and could not be so even in Ms Morgan's reasonable belief. The EAT (Simler J) allowed the claimant's appeal. She stated (paragraphs 18 and 19):

> '18… there must be a belief that the disclosure is made in the public interest and a belief that the disclosure tends to show one or more of the relevant situations. The question is not whether the disclosure is actually in the public interest but whether the worker making it has the belief and whether the belief is reasonable. Both subjective beliefs must be reasonably held by the worker but yet may be wrong.
>
> 19 It is not therefore necessary for a tribunal to determine the public interest; rather, it is for a tribunal to determine whether a claimant's subjectively held belief that the disclosures were in the public interest was, when objectively viewed, reasonable. That is a fact sensitive question. That means that what is reasonable in one case may not be regarded as reasonable in another. The facts in a particular case may show that the worker's complaint about a matter affecting his or her contract or working conditions may have wider public interest implications.'

39 As the Employment Judge, on the strike out application, had failed to take the facts at their highest (such as considering the claimant's asserted belief that she was concerned that others would be affected by the working conditions), the appeal was allowed.

Whistleblowing and Unfair Dismissal: Whether the Dismissing Manager has Knowledge of the Protected Disclosure and Believes that it is Protected

40 The reason for a dismissal is, as explained in *Abernethy v Mott Hay and Anderson* [1974] ICR 323 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. Similarly Mummery LJ stated in *Kuzel v Roche Products Ltd* [2008] ICR 799, para 54, that 'the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.'

41 Under section 103A, the focus is on whether the reason or principal reason for dismissal was that the claimant made a protected disclosure.

42 The application of section 103A has been considered in two recent cases. The first case considered the extent to which the dismissing manager was aware of the protected disclosure, and the second case looked at whether the dismissing manager had to believe that the alleged disclosure was protected.

Royal Mail Group Ltd v Jhuti [2016] ICR 1043, [2016] IRLR 854 – Knowledge

43 In *Jhuti* the Tribunal had concluded that, while the claimant had been subjected to detriments by her line manager because she had made a protected disclosure, her dismissal (purportedly on capability grounds) was not automatically unfair because the dismissing manager made the decision to dismiss because she genuinely believed that the claimant had performed poorly. The EAT (Mitting J) held that (ICR Headnote):

> '…the "reason" for a dismissal was…the set of facts operating on the mind of the employer when dismissing; that in the majority of cases all that was necessary was to discern the facts known to the person who made the decision to dismiss, but where that person made the

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> decision in ignorance of the true facts, the decision having been manipulated by someone in a managerial position responsible for the employee and who was in possession of the true facts, there was no reason why the reason held by the manipulator could not be attributed to the employer; that, accordingly, in the present case, given the lack of information provided to the human resources manager and the tribunal's findings as to the motivation of the claimant's line manager, the dismissal did occur by reason of the fact that the claimant had made protected disclosures, principally to her line manager…'

44 Royal Mail has appealed against this decision, and a hearing is listed to take place on 29 June 2017.

Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401 – Belief

45 The background to this case was one of feuds and dysfunctional working relationships in a hospital department. The claimant, a cardiologist, made a number of complaints (which he later relied upon as amounting to protected disclosures) following the death of a patient during an operation. The Trust felt that the allegations were unsubstantiated, vexatious and part of a campaign against colleagues whom the claimant did not like. The claimant was dismissed following a disciplinary hearing, which was initiated in part in response to the Trust's view that he had made vexatious allegations. The Tribunal concluded that a number of the claimant's complaints amounted to protected disclosures (including that they were made in good faith – as all but one of the disclosures predated the changes to section 43B considered above). The Tribunal went on to conclude that the principal reason for the claimant's dismissal was that he made protected disclosures. Accordingly his dismissal was automatically unfair.

46 The decision of the Court of Appeal addresses a number of grounds of appeal. However the most important issue was the Trust's argument that the dismissal wadid not fall within section 103A because the dismissing managers genuinely believed that the claimant's disclosures were not protected (in part at least because the Trust believed that they were made in bad faith).

47 The Court of Appeal gave this argument short shrift. Underhill LJ stated (para 80):

> "[The Trust's argument is] plainly wrong. It is necessary in the context of section 103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. I accept that the first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if [the Trust] were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the employer itself believed that the

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disclosures for which the claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all. Even where he does, most often he will be convinced, human nature being what it is, that one or more circumstances are present that mean that the disclosure is unprotected – for example, that it was unreasonable for the employee to believe that the relevant "section 43B matter" was engaged; or that the disclosure was made in bad faith or was not in the public interest; or, in the case of disclosure under 43G, that one or more of the additional requirements for protection was not satisfied. I do not believe that Parliament can have intended employees to be unprotected in such cases. In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal."

48 So, while the reasonable belief of the employee is relevant to whether a disclosure is protected under section 43B, once a Tribunal determines that there was a protected disclosure, the employer's belief as to whether the disclosure was protected is irrelevant.

Whistleblowing and Remedies for Detriment

49 Section 49 of the ERA provides:

'(1) Where an employment tribunal finds a complaint under section 48 well founded, the tribunal— (a) shall make a declaration to that effect, and (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(2) … the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to— (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3) The loss shall be taken to include— (a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

…

(6) Where (a) the complaint is made under section 48(1A) [i.e. a protected disclosure detriment claim), (b) the detriment to which the worker is subjected is the termination of his worker's contract, and (c) that contract is not a contract of employment, any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A"

50 The interpretation of section 49 was considered in *Roberts v Wilsons Solicitors LLP* [2016] ICR 659, [2016] IRLR 586. The claimant was a solicitor in, and the managing partner and compliance officer of, the LLP. He was tasked with investigating allegations of bullying by the senior partner. The claimant produced a report for the Board, but before that could be

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discussed in detail, the Board voted to remove him from his post as managing partner (and did remove him from his role as compliance officer). He contended that this conduct made his position as a member of the LLP untenable and treated it as being in repudiatory breach of the members' agreement. This was not accepted as legally valid by the LLP, but they eventually expelled the claimant for non-attendance.

51 He brought a claim that he had been subjected to a detriment as a result of making a protected disclosure, pursuant to section 47B, and included in his claim for compensation damages for stress related illness and loss flowing from the cessation of his membership of the LLP.

52 The EAT (Simler J) stated that:

> '20 … where a tribunal finds a detriment complaint well founded it must make a declaration to that effect: section 49(1)(a) . In addition it may make an award of compensation under section 49(1)(b) in respect of the act or failure to act complained about. The amount of compensation awarded is determined by reference to what the tribunal considers just and equitable in all the circumstances having regard to the infringement and 'any loss which is attributable to the act or failure to act which infringed the complainant's right not to be subjected to a detriment'.
>
> 21 The language of section 49 is different from the language providing for compensation for the statutory tort of unlawful discrimination under the Equality Act 2010 (and its predecessor legislation). It is closer to the language of section 123(1) of the 1996 Act dealing with compensation for unfair dismissal. Nevertheless courts have treated the compensation principles applicable to unlawful discrimination claims as applicable in whistleblowing detriment claims: see *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210 and *Comr of Police of the Metropolis v Shaw* [2012] ICR 464 , para 13 (Underhill J, President), albeit that in the latter case the *665 Employment Appeal Tribunal expressed itself as being content to follow Virgo Fidelis since neither side contended that it was wrongly decided.
>
> …
>
> 26 The wording of section 49(2)(b) does not expressly adopt the ordinary common law principles or language of causation. Parliament has chosen to use the word "attributable" instead of cause or caused; no doubt for good reason. Attributable is an ordinary English word that is well understood and is capable of being applied flexibly by tribunals of fact on a broad common sense basis. The statutory test imposed by section 49(2)(b) provides that, in deciding what compensation should be awarded, tribunals have discretion to determine what is just and equitable in all the circumstances. But, in exercising that discretion, there are two mandatory considerations: first, they must have regard to the infringement itself, in other words the nature and gravity of that infringement; and, secondly, they must have regard to the loss attributable to the act or failure to act which infringed the individual's rights. So the connection that must be established between infringement and loss is expressed in wider language than that of pure causation, and not in terms of a "but for" approach.'

53 In the present case, although legally (based on the decision of *Flanagan v Liontrust Investment Partners LLP* [2015] Bus LR 1172) the claimant could not treat himself as discharged following acceptance of a repudiatory breach, Simler J held (paragraph 28) that:

> 'the fact that the claimant's purported resignation was not effective for the purposes of LLP law does not determine the question of what loss was attributable to the unlawful detriments on which he relied. If the unlawful "victimisation" of the claimant made his position untenable and led him to withdraw his labour, thereby exposing him to the likelihood of expulsion, it is hard to see why that should as a matter of law (or inevitable fact) be regarded as too indirect

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or unnatural a consequence to attract compensation in accordance with the statutory test, provided it is satisfied. In the particular circumstances asserted by the claimant, this seems, at least arguably, a natural and likely consequence of the unlawful conduct alleged.'

54 Accordingly, although the claimant could not legally treat himself as discharged from the LLP, he could pursue his whistleblowing claim and seek compensation for lost earnings.

CONCLUSION

55 The protected disclosure laws are now 18 years old. However, they continue to throw up new decisions (even if they are often on old points). Look out for Court of Appeal decisions in the next 3 to 9 months in *Day v Lewisham and Greenwich NHS Trust, Gilham v Ministry of Justice, Chesterton Global Ltd v Nurmohamed* and *Royal Mail Group Ltd v Jhuti*.

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