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WHISTLEBLOWING

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Supp.01 Like most other provisions of the ERA, the protected disclosure provisions apply only to England, Scotland and Wales, but not to Northern Ireland (s.244 ERA). The equivalent provisions in Northern Ireland are contained in the Employment Rights (Northern Ireland) Order 1996 (SI 1996/1919), in particular at Articles 67A to 67L, 70B, 71, 72, 134A and 157.

Supp.02 Until recently the Northern Ireland legislation did not incorporate the amendments made by ERRA. As such there remained a good faith test in relation to liability (other than in relation to disclosures in the course of legal advice – Article 67D), there was no public interest test and no vicarious or individual / agency liabilities. The legislation was amended by the Employment Act (Northern Ireland) 2016 (ss.13-17) so as to bring Northern Ireland into line with the rest of the UK in relation to the amendments made by ERRA. The changes were brought into force with effect from 1 October 2017 by the Employment Act (Northern Ireland) 2016 (Commencement No 1) Order (Northern Ireland) SI 2017/199.

Supp.03 However there appear to be no transitional provisions and this may cause difficulties. It is clear that the new provisions in the Employment Rights (Northern Ireland) Order 1996 could not apply in relation to an act or omission by a co-worker or agent which took place before 1st October 2017 so as to impose liability on that co-worker or agent (or their employer) for that act or omission. But other issues might well arise in relation to the new legislation. In particular there may be an issue as to whether the new provisions apply (a) in relation to qualifying disclosures made on or after 1 October 2017; or (b) where the detrimental act or deliberate failure to act was on or after that date.

Supp.04 When the new provisions were introduced in the rest of the UK, it was expressly provided that they applied only to qualifying disclosures made on or after the day that the new provisions came into force, being 23 June 2013 (s.24(6) ERRA). In summary, as explained further below, we consider that the same approach will apply at least in relation to those provisions affecting whether there is a protected disclosure (ie the introduction of the public interest test and the removal of the good faith requirement). There is a stronger argument that in relation to the provisions for vicarious and personal liability that the new provisions should apply to detrimental acts/ failures to act or dismissals on or after 1 October 2017.

Supp.05 Support for an approach which focusses on the date of the act/deliberate failure to act may be derived from the judgments of the Court of Session [2002] IRLR 344 and the Employment Appeal Tribunal [2002] ICR 149 in *Stolt Offshore Ltd v Miklaszewicz*. The disclosure which Mr Miklaszewicz's relied upon as constituting a protected disclosure had been made to the Inland Revenue in 1993, long before the coming into force of the amendments to the Employment Rights Act made by the Public Interest Disclosure Act 1998 on 2 July 1999 which introduced the protected disclosure provisions. However his dismissal took place after that date, on 15 September 2000. The EAT, and then the Court of Session, held that the fact that his disclosures pre-dated PIDA did not matter.

Supp.06 The Court of Session held (at paragraph 19) that the point of time which had greatest significance for the purposes of the legislation was that at which the employer dismissed the employee. It was the dismissal that triggered the employee's entitlement to invoke the statutory remedies conferred by the provisions of the 1996 Act inserted by the 1998 Act. The Court continued:-

> "The making of the disclosure requires to be considered at that point of time; and it is then that the criteria for treating it as a protected disclosure are applicable, on a proper construction of the relevant statutory provisions. While, therefore, an event which has taken place in the past may be relevant for the purpose of establishing that a dismissal has been unfair, the legislation is not in our opinion truly to be regarded as retrospective. What is affected by the legislation is not the original act of the employee in making the disclosure, but the act of the employer in dismissing the employee. When the matter is looked at in this way, there can be no unfairness to employers. As the Employment Appeal Tribunal pointed out in the present case, and in similar terms in *The Met Office v Edgar*, there is no unfairness to employers in this interpretation of the legislation. Any employer who, since 2 July 1999, is contemplating the dismissal (or victimisation) of an employee for making a qualifying disclosure must be taken to be aware that if he does so the disclosure will be treated as a protected disclosure. It is therefore immaterial whether the disclosure was made before or after 2 July 1999. It would appear to us to be consistent with the main purpose of the 1998 Act to approach the matter in this way, as to construe it in the manner suggested by counsel for the appellants would be to deprive employees, particularly no doubt in the early part of the period after the 1998 Act came into force, of an important protection which it was thought appropriate to confer on 'whistleblowers' in the public interest. We would add that the 1998 Act does not, in our view (and counsel for the respondent did not suggest otherwise), apply to a dismissal which took place before 2 July 1999."

Supp.07 More questionably the Court of Session also rejected an argument that the legislation could have no application to s.43F of the 1996 Act, since at the time of the disclosure relied upon there were no persons who were prescribed within the meaning of that section. There is no equivalent issue in relation to the Northern Ireland provisions in that bodies were prescribed for the purposes of s.43F before 1 October 2017. But it might be argued that the approach to s.43F ERA indicates that the date of the detrimental act is crucial even in relation to defining whether there was a protected disclosure.

Supp.08 Notwithstanding the approach in *Stolt* we consider that, as with the rest of the United Kingdom legislation, it is clear that the date of the qualifying disclosure is the crucial date at least in relation the new provisions affecting whether there was a protected disclosure, and the associated relegation of the good faith requirements to being a remedy issue. This follows from the strong presumption against legislation having retrospective effect: see *Wilson v First County Trust* [2004] 1 AC 816 (HL). If that was not the case, an employee who made what was at the time a protected disclosure could subsequently lose protection by virtue of retrospective application of the public interest test. Nor does the approach in *Stolt* to s.43F provide any persuasive support for a different approach. In that case it was a matter of construing the legislation so as to provide for protection where there would otherwise be none. There was no question of retrospectively removing protection.

Supp.09 The same would apply to the provisions for a reduction of compensation for disclosures not made in good faith. Construing the legislation so as to avoid retrospective effect, lack of good faith should not lead to a reduction of compensation where that would have been the case at the time the disclosure was made. In practice, that would only affect disclosures made in the course of legal advice within s.43D ERA, being the only category where there was no good faith liability requirement under the pre-amendment provisions.

Supp.10 Would a different test apply to the other provisions ie the introduction of vicarious and personal liability for agents/workers and the provision for a reduction of compensation for disclosures not made in good faith? There are three possibilities:

1. Even if there is a detrimental act/ deliberate failure to act on or after 1 October 2017, there is no liability unless it is in relation to a qualifying disclosure made on or after that date.

2. There is liability if the detrimental act/ failure to act was on or after 1 October 2017 even if it is on the grounds of a disclosure prior to that date, provided that the disclosure was a protected disclosure on the basis of the provisions in force at the time (eg a disclosure made in good faith to the employer in relation to a breach of the employee's contract of employment, but where the worker does not hold a reasonable belief that the disclosure was made in the public interest).

3. There is liability if the detrimental act/ deliberate failure to act was on or after 1 October 2017 and is on the ground of a disclosure prior to that date, provided that

the disclosure was a protected disclosure on the basis of the provisions in force on or after 1 October 2017 (including a requirement that there was a reasonable belief that the disclosure was made in the public interest, even if not made in good faith).

Supp.11 The first of these alternatives is the approach adopted in relation to the legislation in the rest of the UK (save that the relevant date is 23 June 2013). It may be argued that in the absence of some clear indication otherwise, a consistent approach is to be expected across the new provisions. On that basis, given that it is clear the qualifying disclosure is the crucial date for the provisions relating to the test for protected disclosures and the reduction of compensation for good faith, that may be taken as indicating the approach to be taken to the amendment provisions just as in the legislation for the rest of the UK.

Supp.12 However the approach in *Stolt* might be relied upon instead to support the second or third alternatives. As in *Stolt* it can be said that there would be no retrospective impact as against the co-worker or agent held personally liable (or the employer held vicariously liable for their conduct) as it would apply to their conduct only on or after 1 October 2017. Indeed it would be unattractive for a co-worker who has engaged in acts of protected disclosure victimization after the personal liability provisions came into force to contend that they should escape liability merely because the protected disclosure was made at an earlier date.

Supp.13 As between the second and third alternatives, the second alternative may be viewed as the more natural approach, and the approach which best avoids retrospectivity. But it can be argued that the introduction, exceptionally, of personal and vicarious liability was tied to the emphasis on the public interest element of protected disclosures. In the absence of clear provision to that effect, it may be thought strange if personal liability introduced at the same time as amendments to reinforce the public interest element, could result in liability based on the pre-amendment definition of protected disclosure.

Supp.14 The third alternative avoids that defect in the sense that personal liability is then tied to the making of a protected disclosure of the type contemplated by the legislation brought into force at the same time as the personal liability provisions. There is an element of retrospectivity in the sense that whether a disclosure is protected is not assessed by reference to the position at the time the disclosure was made. But so far as concerns the victimized worker, that is preferable to there being no claim for personal liability at all, as would otherwise be the case for a pre-October 2017 disclosures if the first alternative was adopted. As noted above, there is no retrospectivity so far as concerns the co-worker or agent made liable. In this respect there is a close analogy with the approach in *Stolt* that liability could be established even though this was on the basis of disclosures made prior to the Act coming into force.

Republic of Ireland

Supp.15 The Republic of Ireland introduced specific whistleblowing legislation for the first time by the Protected Disclosures Act 2014, which came into force on 15 July 2014. Previous legislation was piecemeal and related to specific sectors. The legislation broadly adopts the structure of the UK legislation. But there are some interesting differences in approach. Notably:

1. A protected disclosure is defined as a disclosure of "relevant information" and is specifically confined to information which came to the attention of the worker in connection with the worker's employment (s.5(2)(b)). We suggest that is unduly restrictive.
2. As with the UK legislation the worker must reasonably believe that the information tends to show one of an exhaustive list of relevant failures, or as they are called "relevant wrongdoings". However there are some significant differences within the list of relevant wrongdoings:
    2.1 There is no separate condition of a reasonable belief that the disclosure in made in the public interest. Instead in relation to past, ongoing or likely future breach of a legal obligation there is a specific exception that this does not cover an obligation arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally work or services (s.5(3)). This is the approach that was specifically rejected when amending the ERA to introduce the public interest test.
    2.2 There are two additional categories of "relevant wrongdoing" which are not standalone "relevant failures" under the ERA, namely
        (a) a past, ongoing or likely future an unlawful or otherwise improper use of funds or resources of a public body, or other public money (s.5(3)(f)); and
        (b) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement (s.5(3)(g)).
    2.3 There is a specific exclusion that a matter is not "relevant wrongdoing", and therefore cannot be the subject of a protected disclosure, if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employee (s.5(5)). This therefore substantially removes from protection disclosures by those who may routinely make what in the UK would be a protected disclosure by reason of carrying out their ordinary work duties.
    2.4 Mirroring the removal of the good faith test in the ERA provisions, there is an express provision that the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure (s.5(7)) but there can be a reduction of compensation of up to 25% if investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure (sch 2 para 1(3)).
    2.5 The maximum compensation for unfair dismissal due to a protected disclosure is 260 weeks salary.
    2.6 Personal liability is not tied to the concept of being an agent or co-worker and nor is protection limited to where a worker himself or herself made the

disclosure. Instead liability in tort is imposed if a person causes detriment to another person because that other person, or a third party, made a protected disclosure (s.13).

2.7 Specific provision is made for protection of the identity of the maker of a protected disclosure (s.16).

Chapter 3 Protectable Information
Paragraphs 3.05 to 3.45

Supp.16 See the notes to paragraph 9.19 of the Main Work on *Beatt* (**Supp.142-Supp.157**).

Paragraphs 3.52, 3.79, 3.118: Reasonable belief and truth or falsity as a useful evidential tool; Legal obligation

Supp.17 In *(1) Chesterton Global Limited and (2) Verman v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ 979 [2017] I.R.L.R. 837, Underhill LJ considered that, provided that the worker held a belief when making a disclosure that doing so was in the public interest, it would be possible to show that the belief was reasonable by reference to matters that the worker did *not* have in mind at the time when the disclosure was made (see para **Supp.35.3.** below). That reasoning also carries implications for the approach to the requirement that there be a reasonable belief test as to whether the information disclosed tends to show a relevant failure. It suggests that it is open to a worker who can show on one basis that she or he had a subjective belief that the information disclosed tended to show a relevant failure, to assert after the event that this belief was reasonable on some other basis which was not in the worker's mind at the time of making the disclosure.

Supp.18 We suggest that the following scenarios merit separate consideration:

1. Where the worker believed that there was a relevant failure under one heading and subsequently seeks to show that this view was reasonable under the same heading on but on a different basis. An example might be where the worker believed that the information disclosed tended to show a failure to comply with a particular legal obligation but subsequently sought to demonstrate that he or she could have contemplated a failure to comply with a different legal obligation.

2. Where a worker held a subjective belief at the time under one head of relevant failure (eg breach of a legal obligation) but then seeks to assert that the belief was reasonable on the basis that there was a relevant failure under a different heading (eg that there was a danger to health and safety) which was not in the worker's mind at the time of disclosure. Where the worker's belief was founded on a set of facts that could not reasonably have grounded such a belief, but there were other facts not known to the worker at the time, or at least not taken into account by the worker, which could have grounded such a belief. Eg a worker makes a disclosure about testing carried out on cars in the belief that the tests describe show that there

is inadequate testing of the car's brakes. In fact the tests are appropriate to test the brakes and the facts known to the worker do not support a belief that they are not but the testing is inadequate to ensure that the wheel nuts will not come undone.

Supp.19 In relation to the first category (a different legal obligation might have been contemplated), it would seem to follow from the approach to public interest adopted in *Chesterton*, that if the worker subjectively believed that the information tended to show (eg) non-compliance with a legal obligation, in relation to whether that belief was reasonable the worker should not be constrained by those matters taken into account at the time of the disclosure. As noted at paragraph 3.118 in the Main Work, in *Eiger Securities LLP v Korshunova* [2017] IRLR 115, the EAT emphasised that save in obvious cases, "a necessary precursor" to the assessment of whether the claimant held a reasonable belief is:

- identification of the nature of the legal obligation the claimant believed to apply; and
- how it was believed there had been a failure to comply was.

Supp.20 The reasoning in *Chesterton* indicates that this now needs to be read subject to the caveat that:

> (a) whilst (i) identification of the legal obligation in play is relevant in assessing reasonableness of the belief and (ii) in assessing whether there was the requisite subjective belief, it is necessary to identify what the claimant had in mind at the time of the disclosure;
>
> (b) if the requisite subjective belief is established, it might be shown to be reasonable by reference to a legal obligation other than one which the worker had in mind at the time of the disclosure.

Supp.21 We suggest that the same should apply in relation to the second category at **Supp.18** above (where a different category of relevant failure might reasonably have been invoked). In relation to subjective belief, subject to the requirement that there was a disclosure of information, all that is required is that it was believed that the information tended to show one or more of the relevant failures. Once that is done, the approach in *Chesterton* indicates that it is open to the worker to show that the view was reasonable on a different basis to that held at the time. Once it is concluded that the worker is not confined to the factors operating on the worker's mind when making the disclosure for the purposes of establishing reasonableness of the belief, there would appear to be no difference in principle between relying on a different basis under the same head, and relying on a different head of relevant failure.

Supp.22 Different considerations arise in relation to the third category. There are, we suggest, two important parameters which limit the scope to rely on after the event considerations in this category:

- The information (ie facts) set out in the disclosure: the worker's reasonable belief must be based on what that information tends to show; and

- The principle that reasonableness of belief is to be assessed from the perspective of the particular worker, which includes making the assessment on the basis of the facts as they were reasonably understood by the worker (subject to considering whether that understanding was reasonable and considering whether there ought reasonably to have been further investigation by him which may have revealed other matters): see *Darnton v University of Surrey* [2003] ICR 615 (EAT); *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT).

Supp.23 Both these factors are crucial to the scheme of the protected disclosure legislation. So far as concerns the second factor, it is essential to the scheme that workers who may only have part of the evidential picture are protected in raising concerns with those who may be better able to investigate further. It equally follows from this, and the emphasis on the requirement to disclose information, that it cannot be sufficient for a worker to say that although the facts disclosed did not sustain a reasonable belief, the disclosure should be protected in any event. There would seem to be no difference in principle between the position of a worker who makes an allegation without disclosing *any* supporting facts, and that of a worker who only discloses facts that objectively do not tend to show a relevant failure. It is established that the truth or falsity of the allegation is a relevant evidential tool in order to test the reasonableness of the belief as to what the information disclosed. But it is another matter to say that the reasonableness of belief is made out because there were different facts which were unknown to the worker (and therefore not disclosed) which would have sustained a reasonable belief.

Supp.24 The position may be illustrated by the following example. Suppose a worker in a school makes a disclosure of information of something she has seen or heard which she believes tends to show that a male primary teacher is a risk to the children in the school. The disclosure is coloured by the worker's prejudice arising from the fact that the primary school teacher is male and gay. The facts referred to in the information disclosed could not reasonably sustain the belief that the colleague is actually a danger. Either the matters relied upon are innocuous or the information could easily have been checked by the worker and found to be incorrect. However as it later turns out the allegation was well-founded, and the colleague admits to being a paedophile. It may be argued that the fact that paedophilic tendencies are thus established can be relied upon as an evidential tool against which to assess whether the facts contained in information which the worker disclosed were indeed innocuous or whether the worker's belief in the truth of facts put forward was reasonable. But since a reasonable belief could not have been held on the facts which were actually disclosed by the worker, the statutory test of reasonable belief is not satisfied.

Supp.25 However the situation may be more nuanced. That is illustrated by returning to the example above, of the worker who makes a disclosure believed to show

inadequate brake testing. If the particular matters identified were innocuous or insufficient to indicate inadequate testing, it would not, we suggest, be sufficient to make the disclosure protected either that (a) the brake testing was in fact (in other respects) inadequate or (b) other facts could have been set out which did show the testing was inadequate (whether or not within the worker's knowledge at the time of making the disclosure). But if the information set out did show the testing to be inadequate, albeit not for the reasons which the worker thought was the case or in the respects which the worker believed it to be the case, it would in our view, consistently with the approach in *Chesterton*, be possible for the worker to assert and the tribunal to find that there was a qualifying disclosure. The assessment would still be made on the basis of the facts known and disclosed by the worker, since those facts were part of the disclosure even if the implications were not fully understood by the worker.

Chapter 4: The Public Interest Test

Supp.26 See now *(1) Chesterton Global Limited and (2) Verman v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ 979 [2017] I.R.L.R. 837, where the Court of Appeal dismissed Chesterton's appeal. The decision of the EAT in *Chesterton* is discussed in the Main Work at 4.16 to 4.93, which now needs to be read as subject to what follows.

Supp.27 Underhill LJ gave the leading judgment of the Court. Beatson LJ gave a concurring judgment, agreeing with the approach taken by Underhill LJ and making some additional observations (which are referred to below). Black LJ agreed with both judgments.

The facts in Chesterton

Supp.28 The relevant facts in *Chesterton* are summarised at paragraphs 4.16 to 4.22 of the Main Work. In the Court of Appeal, Underhill LJ identified the following key elements:

- Mr Nurmohamed was employed as Director of Chesterton's Mayfair office. In 2013 Chesterton had introduced a new commission system which Mr Nurmohamed believed would have a serious adverse impact on his own earnings. Although Mr Nurmohamed objected to this, he ultimately agreed to the new system.
- Against that background, in the months following the introduction of the new system, Mr Nurmohamed monitored Chesterton's internal accounts.
- At a meeting on 14 August 2013 with Patricia Farley, the director responsible for the London area, Mr Nurmohamed demonstrated a number of what he said were discrepancies in the monthly accounts. These appeared to show that the profitability of the Mayfair office was being artificially suppressed so as to reduce the level of commission. Two examples were (a) a depreciation charge which was higher than budgeted for and (b) the inclusion of a figure for staff bonus when none had been paid. Mr Nurmohamed described this to Mr Farley as "manipulating the accounts to the benefit of the shareholders". The employment tribunal found that there was a

genuine and reasonable belief that this manipulation was occurring (without making any finding as to whether this was correct).

- Mr Nurmohamed repeated essentially the same disclosures to another director on 24 September 2013 and again to Mr Farley on 8 October 2013. He explained by reference to (inter alia) the monthly management accounts, how the commission accountant was being supplied with wholly inaccurate profit and loss figures to calculate commissions, transitional payments and profit bonus calculations. Mr Nurmohamed said that this affected over 100 senior managers earnings and that he believed that Chesterton was deliberately misstating between £2 and £3 million of actual costs and liabilities throughout the entire office and department network.
- The employment tribunal concluded that although the person that Mr Nurmohamed was most concerned about was himself, it was not the case that all he was doing was arguing about his own earnings. He believed that the disclosure was in the interests of the 100 senior managers and he had them in mind when making the disclosure.
- The employment tribunal also acknowledged that in the event of a sale of Chesterton's business it was possible that potential purchasers might be misled by misstatements in the accounts. However the employment tribunal left out this group in assessing the public interest issue on the basis that there was no evidence that Mr Nurmohamed had that issue in mind at the time of making the disclosure.

The decision in Chesterton

Supp.29 The employment tribunal reasoned that a matter public interest could not mean something which was only of interest to the entirety of the public: that would be far too narrow. It would be sufficient therefore if a section of the public was affected. Here the tribunal was satisfied that in the circumstances the 100 senior managers was a sufficient group of the public, such that Mr Nurmohamed held the requisite subjective belief that the disclosure affecting them was made in the public interest.

Supp.30 In upholding the ET's decision, Underhill LJ stated (at paragraph 38) that viewed in the context of the ET's factual findings this was not to be taken as meaning the matter was in the public interest simply because of the number of employees affected. There were other features which supported the conclusion that the disclosure was reasonably believed to be in the public interest in that:

- There was disclosure of what was said to be *deliberate* wrongdoing.
- The alleged wrongdoing took the form of mis-statements in the accounts to the tune of £2m-£3m. Whilst it was not clear from the ET's reasons what this figure related to, it was apparent that "the Claimant was evidently alleging manipulation on a substantial scale".
- If the accounts were the statutory accounts, even of a private company, the disclosure of such a mis-statement would "unquestionably be in the public interest". The position here was "less black-and-white" because the accounts were only internal. However "internal accounts feed into the statutory accounts"
- The disclosure was concerned with "a very substantial and prominent business in the London property market."

Supp.31 Underhill LJ added that it was debateable whether the ET had actually fed those factors into its assessment but, even if it did not, they would only have reinforced the conclusion which it came to be based on numbers alone, so that any error of law in its reasoning was immaterial.

Supp.32 In reaching that conclusion the Court of Appeal rejected the approach (advanced by PCAW), that the only effect of the public interest test was to exclude cases of an individual worker whose grievance was unique to him. On the approach advanced by PCAW the disclosure would have been regarded as "in the public interest" if it was in the interests of anyone else besides the worker making the disclosure.

Supp.33 The Court of Appeal also rejected the polar opposite view advanced on behalf of Chesterton that the number of other workers sharing the same interest as the worker making the disclosure could never of itself be sufficient to render the disclosure in the public interest. Nor did the Court accept Chesterton's argument that the interests served must necessarily "extend outside the workplace" in the sense of furthering the interests of persons other than the workers themselves *qua* workers. Underhill LJ stated (at paragraph 36) that he was not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of employees share the same interest, albeit that a tribunal should be cautious about reaching such a conclusion.

Supp.34 In his concurring judgment, Beatson LJ (at paragraphs 41 to 44) acknowledged that both of these polar opposite views would have the advantage of certainty. But they suffered from the disadvantage that they could "ignore substance and lead to undue formalism". That was particularly inappropriate where the legislation uses "open-textured terms such as 'public interest'" and seeks to protect the reasonable beliefs of the worker making the disclosure. Essentially this would be to fasten on to a feature or features present in a plain case and treat them as necessary or sufficient in other cases. That would achieve a measure of certainty only at the cost of blindly prejudging the outcome in the range of future cases.

The Court of Appeal's guidance

Supp.35 The Court of Appeal therefore adopted what Beatson LJ (at paragraph 44) referred to as "a more nuanced approach". We set out below the guidance to be drawn from the Court of Appeal's decision (with comments interposed):

1. **The key questions**: The Tribunal has to ask (per Underhill LJ at para 27):
   - 1.1 whether the worker believed, at the time of making the disclosure that it was in the public interest and
   - 1.2 whether, if so, that belief was reasonable.

   Comment: It might be observed that the formulation omitted the word "made" from the test of "made in the public interest". That word carries an ambiguity. It might be regarded as focussing on the reasons why the disclosure was made (or the

motive for making it). Alternatively, it could be regarded as focussing on outcome: whether it was believed that making the disclosure in the public interest irrespective of the reasons for making it. The omission of the word "made" implicitly adopted the latter approach, as was subsequently confirmed in the dicta relating to the approach to motive (see below). That was in turn consistent with the fact that good faith has been relegated to only being a remedy issue.

2. **The subjective element:**
   2.1 The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believed that to be so are "not of the essence" (per Underhill LJ at para 29).
   2.2 However if the worker cannot give credible reasons for why it was thought at the time that the disclosure was in the public interest then "that might cast doubt on whether he really thought so at all; but the significance is evidential not substantive".

Comment: This aspect of the reasoning may be difficult to apply in practice because, save where legal advice has been taken before making the disclosure, the worker may not have formulated a view specifically in terms of the public interest. Given the range of circumstances in which the legislation is expected to apply, there needs to be sufficient flexibility to deal with this and to permit an assessment that that the factors which the worker did have in mind can nevertheless be regarded as equating to the public interest despite not having been precisely formulated in those terms at the time. This aspect of the reasoning is considered further at **Supp.36-Supp.38** below.

3. **The objective element:** (per Underhill LJ at para 28):
   3.1 There might be more than one reasonable view as to whether a particular disclosure was in the public interest, particularly given that that question is "of its nature so broad-textured".
   3.2 The tribunal should therefore be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. But it is not helpful to resort to tests such as the range of reasonable responses or the *Wednesbury* approach (i.e. whether no reasonable employee in the position of the claimant could have held that view).
   3.3 The tribunal may legitimately form its own view on whether the disclosure was in the public interest. But whilst that may factor into its thinking in assessing reasonableness, it is not determinative.

Comment: We suggest that the observation that the Tribunal's own view is not determinative requires some qualification. If the Tribunal concludes that the making of the disclosure was in the public interest, that would seem in practice to be determinative, subject only to whether the worker held a subjective belief that the disclosure was in the public interest.

4. **After the event justification** (per Underhill LJ at para 29): So far as concerns the objective element as to whether the belief was reasonable, the claimant and the tribunal are not restricted to taking into account only the factors which the worker had in mind at the time of making the disclosure. Even if the tribunal finds that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify that belief, it may nevertheless go on to find it to have been reasonable for different reasons which the worker had not articulated to himself at the time. This is because "all that matters is that his (subjective) belief was (objectively) reasonable."

   Comment: This aspect of Underhill LJ's reasoning is to be read together with the view that for the subjective element it is sufficient to have a belief that disclosure is in the public interest. We comment on it further below (at **Supp.39-Supp.42**) under the heading "*After the event justification*".

5. **Motive:** As to the inter-relation with the public interest test and motive for making the disclosure (per Underhill LJ at paras 15-17, 30):

   5.1 While the worker had to have a genuine (and reasonable) belief that the disclosure was in the public interest, that did not have to be the worker's predominant motive in making it. Thus on the facts in *Chesterton* the claim did not fail merely because, as the ET recorded at paragraph 155, the person who Mr Nurmohamed was most concerned about in making the disclosure was himself.

   5.2 As such, a disclosure could be made in the reasonable belief that it was in the public interest even though made otherwise than in good faith. That is apparent from the incorporation of the new ss.49(6A) and 123(6A) ERA, which make good faith a remedies issue. If it were otherwise those provisions could never bite.

   5.3 Underhill LJ was inclined to think that the belief that the disclosure was in the public interest did not in fact have to form any part of the worker's motivation because the phrase "in the belief" was not the same as "motivated by the belief". However whether that is the case was left open to be decided in future cases. Underhill LJ commented that it was in any event "hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

Comment:

(1) The approach here appears to confirm the view (expressed in the Main Work) that the statutory test may be best understood as meaning in effect that there must be a reasonable belief that it is in the public interest that the disclosure be made. Viewed in that way, it would indeed seem to follow that the motivation for making the disclosure does not enter into the equation. In practice, however, at

least in marginal cases where the public interest is unclear, any factors bearing on whether the disclosure was made for an ulterior reason are also likely to be evidentially relevant to whether the worker in fact held the requisite belief that making the disclosure was in the public interest. In marginal cases, where it is not obvious that the disclosure furthered the public interest, it is still likely to be helpful to consider whether the claimant acted in a way to be expected if it was believed that the disclosure was made in the public interest: see eg *Muchesa v Central and Cecil Housing Care Support* (EAT/0443/07, 22 August 2008), considered in the Main Work at paragraph 3.70.

(2) It should also be borne in mind that for wider disclosures under s.43G and 43L, motive remains part of the test for protection in that it is a condition that the disclosure was not made for personal gain.

(3) In an extreme case, motive made also be relevant by virtue of s.43B(3) ERA which provides that a disclosure will not be a qualifying disclosure if the person making the disclosure commits an offence in making it. That would cover a situation where the disclosure is made as part of an act of blackmail. That is defined in s.21 of the Theft Act 1986 as where, with a view to gain for himself or another or with intent to cause loss to another, a person makes any unwarranted demand with menaces. That might apply if a worker was to inform an employer that he is aware of certain damaging information and make threats about what will be done with that information unless a ransom is paid.

6. **Meaning of "in the public interest"** (per Underhill LJ paras 31):

6.1 The phrase "in the public interest" has been left for tribunals to apply "as a matter of educated impression". There is not much value in trying to provide a gloss on the phrase.

6.2 Nor is there assistance to be gained from the use of the phrase in difference contexts such as the *Reynolds* defence (or its statutory equivalent in the Defamation Act 2013) or the Charity Commission's guidance as to "public benefit".

Comment: It is understandable that the Court considered that other contexts are not helpful even though the Defamation Act 2013 received Royal Assent on the same day as ERRA. There are considerations which are specific to whistleblowing that do not apply in the same way as in other contexts. Notably (a) there is a structure with different layers of protection depending on to whom the disclosure is made and (b) in other contexts the public interest defence is typically a defence to other conduct which on its face would otherwise be wrongful. It may however be going too far if it is suggested that there are no lessons to be learned from other contexts. Thus the Defamation Act 2013, s.4 has a two-fold test that there must be a reasonable belief both that it was on a matter of public interest and made in circumstances such that it was in the public interest to make it. This highlights the fact that the particular circumstances as well as the subject

matter might be relevant. The issue, and illustrations of the circumstances in which it might arise, is discussed at paragraphs 4.83 to 4.92 of the Main Work.

6.3 (Per Underhill LJ at paras 10-13, 31): The phrase is to be interpreted having regard to the context which, as is apparent from the legislative history, is that:

> "the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest".

It was this distinction which the legislature was drawing when, in effect, it sought to reverse the decision in *Parkins v Sodexho* [2002] IRLR 109 (EAT).

6.4 As made clear in the Parliamentary materials:

(a) A disclosure relating to the worker's own contractual rights could still be made in the public interest, since it could still engage wider public interest issues.

(b) The amendment was not concerned only with contractual issues. It could also exclude other disclosures. In *Parkins v Sodexho* itself the disclosure could have been reframed as a health and safety issue.

7. **Features going beyond the personal:** (Per Underhill LJ at para 37, Beatson LJ concurring at para 40):

> "… the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character[1]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case …"

8. **Key factors** (per Underhill LJ at paras 34, 35, 37; Per Beatson LJ para 41): Whilst the tribunal therefore would need to consider all the circumstances in determining whether it was reasonably believed that disclosure was in the public interest, the following factors would normally be relevant:

> "(a) the numbers in the group whose interests the disclosure served …
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial

[1] In a footnote, Underhill LJ noted that: "Although disclosures tending to show breaches of the worker's own contract are the paradigm of disclosures of a "private" or "personal" character, they need not be the only kind: see the Minister's reference to disclosures "of minor breaches of health and safety legislation … of no interest to the wider public"."

> wrongdoing affecting the same number of people, and even more so if the effect is marginal or indirect;
> (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
> (d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

9. **Significance of numbers:** As to the first of these considerations (the number in the group whose interests are affected):

9.1 The fact that others are affected is of "major importance" (per Beatson LJ at para 41) but the fact that no one else is affected is not necessarily inconsistent with the disclosure being in the public interest. The question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers sharing the interest. Where the interest involved is personal in character it does not change its character simply because it is shared by another person (per Underhill LJ at para 35)

9.2 (Per Underhill LJ at paras 35 to 37): It does not however follow that the mere multiplicity of persons whose interests are served by the disclosure of (eg) a breach of the contract of employment can never, by itself, convert a personal interest into a matter of public interest. However ETs should be cautious about reaching the conclusion that on the basis only of the number of employees affected by a breach of a contract of employment, a matter is one of public interest.

9.3 In practice the issue is not likely often to arise in that stark way because: "The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest."

9.4 Although in the ET there was reference to who the disclosure was "of interest to", that is not the relevant question (and was not what the ET meant). Whilst it is relevant to consider the number who are affected by the matters which are the subject of disclosure, that is different from focussing on what the public might find interesting (per Underhill LJ at para 22, fn 4).

***Discussion*:**

Subjective belief in the public interest

Supp.36 A potentially important difficulty with the approach adopted by Underhill LJ is the emphasis that all that it required in relation to subjective belief is a belief that the disclosure is made in the public interest. As we note in the Main Work (at paragraphs 4.67 to 4.69) the legislation must be capable of being applied in a sufficiently flexible

way to cover a situation where a worker makes a disclosure before having taken legal advice. In those circumstances it will often be the case that the worker will not have formulated any belief in terms of "the public interest" as such. Yet the worker may still believe that the disclosure is of wider benefit than the worker's own personal interests. The set of beliefs may be such that it can be regarded as equating to a belief that disclosure is in the public interest even though the worker did not specifically consider the issue in precisely those terms. Otherwise the purposes of the legislation in encouraging workers to raise the alarm with an appropriate person would be seriously undermined.

Supp.37 In *Chesterton* itself there does not appear to have been any finding that at the time of making the disclosure Mr Nurmohamed specifically considered the question of whether the disclosure was "in the public interest" as such. There was a rather more generalised finding that he considered that the matter disclosed was one of interest not just to himself but around 100 senior managers. The employment tribunal proceeded to find that, in the circumstances (including the belief as to deliberate manipulation of the accounts) this amounted to a belief that the disclosure was in the public interest on the basis that it was sufficient for a matter to be in the public interest that it affected a section of the public and 100 senior managers since they could constitute a section of the public (paragraphs 147 and 151 of the ET's reasons). The appeal did not focus on that aspect of the tribunal's decision. Instead it proceeded on the basis of a finding of that there was a subjective belief that disclosure was in the public interest and focussed on whether that belief was reasonable. On that basis it was able to side-step any question of whether the factors actually taken into account by Mr Nurmohamed at the time should have been regarded as sufficient to equate to the requisite subjective belief. But nevertheless we suggest it is illustrative of the need to piece together the factors that the worker had in mind and to assess whether it is to be regarded as equating to a belief that disclosure was in the public interest.

Supp.38 In practice therefore, in cases where the worker has not specifically formulated a view in terms of the public interest, in assessing whether there was the requisite subjective belief, the tribunal (and the parties and those advising them) will need to identify the factors operating on the mind of the worker which may be said to engage some wider interest beyond the worker's own personal position, and to assess whether those considerations amounted in substance to a belief that the disclosure was in the public interest even if not (even inwardly) formulated in those terms at the time. See the example given at 4.67 of the Main Text. As we suggest in the Main Work (at paragraph **4.67**), and applying the reasoning in *Chesterton* as to the mischief which the amendment was intended to address, it will be necessary, before moving on to the question of whether the requisite belief was reasonable:

(a) to identify those aspects of the matters operating on the worker's mind, or his or her set of beliefs at the time of the disclosure, which indicate that the disclosure was believed to be of wider interest than the worker's own situation; and

(b) by reference only to those factors, to assess having regard in particular (but not necessarily exclusively) to the four fold considerations identified in *Chesterton* at

paragraph 34 (see **Supp.35.8** above) whether that set of beliefs amounted to a belief that disclosure was in the public interest.

After the event justification

Supp.39 One of the more controversial elements of the approach adopted by Underhill LJ was the view (at paragraph 29) that a belief that the disclosure was in the public interest could be shown to be objectively reasonable on the basis of matters which were not in the worker's mind at the time of making the disclosure. That view also has potential ramifications for the approach to the reasonable belief test in relation to whether the information tended to show a relevant failure (see **Supp.17-Supp.25** above). The approach adopted might be regarded as connected with the emphasis that all that is required by way of the subjective element is the belief that disclosure was in the public interest. Where the belief is formulated in those broad terms, or some equivalent such as that making the disclose was "the right thing to do", it is understandable and indeed perhaps essential that it should be available to the work to draw on other factors in support of that broad belief, even though they had not been specifically formulated at the time of making the disclosure. It is less obvious that this should be the case where the worker has focussed on specific matters to support the belief (such as, in *Chesterton*, the interests of the other senior managers). But it is clear from the reasoning in *Chesterton* that after the event justification should also be available in that situation.

Supp.40 However the scope for after the event justification of reasonable belief is subject to some limits. First, as set out above, it is necessary to establish the requisite subjective belief. In cases where the public interest element is not obvious, and where the worker has not formulated a view precisely in terms of "the public interest", it will be necessary to assess whether the factors the worker had in mind beyond that worker's own personal interests amounted to a belief that disclosure was in the public interest. *Chesterton* itself provides a good example of how that issue is likely to arise. Underhill LJ noted it had been observed on behalf of Mr Nurmohamed that it was wrong for the tribunal to have excluded from its consideration of the public interest the interests of potential buyers of Chesterton's business simply on the basis that Mr Nurmohamed did not have them in mind. On the basis that, as the tribunal found, he believed that the disclosure was in the public interest, it was open to him to advance additional reasons supporting the reasonableness of that view. Underhill LJ noted that it was accepted that this point had not been raised in the Respondent's Notice either in the EAT or before the Court of Appeal. For that reason it was only dealt with by way of footnote. However it is apparent from Underhill LJ's reasoning that he considered that the impact on potential buyers could be taken into account. But the premise of the argument was that the tribunal had found that the disclosure was made in the public interest. Factors which Mr Nurmohamed did not have in mind, such as the interest of potential buyers, could have no bearing on whether there was a subjective belief that disclosure was in the public interest.

Supp.41 Further, as Underhill LJ noted, the public interest reasonable belief test is to be read on the basis that it fits within the pre-existing structure including the requirement for a reasonable belief that the information tends to show a relevant failure. In that context it is established that the tribunal must consider the question from the

perspective of the worker making the disclosure: see *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT). One important aspect of this is that it is necessary to assess reasonableness by reference to the facts as they were reasonably understood by the worker, albeit that the truth or otherwise of an allegation may be a useful evidential tool: see *Darnton v University of Surrey* [2003] ICR 615 (EAT). That is an essential aspect of the legislation in recognising that the worker may only have part of the evidential picture. Thus if there were facts of which the worker was not aware and could not reasonably have been aware which made the disclosure contrary to the public interest, the existence of those factors would not undermine reasonableness of the worker's belief. Equally this would suggest that the belief in the public interest cannot be shown to be reasonable by reference to facts of which the worker was unaware, as opposed to relying on factors of which the worker was aware but the relevance of which had not been specifically identified by the worker at the time of the disclosure.

Supp.42 The position may be illustrated by the following example. Suppose a collective grievance is raised by a group of drivers complaining that overtime is being withheld. The drivers subsequently argue that this grievance was a qualifying disclosure of information tending to show a relevant failure on the part of the employer. After the disclosure is made, it emerges that there is some evidence that the reason for withholding the overtime from certain workers was by way of retaliation for their being scrupulous in carrying out safety checks.[2] In our view, if this was not known by the drivers at the time of making the disclosure, there would be no basis for their relying upon it in support of the contention that their disclosure was made in the public interest. The position would however be otherwise if the disclosure itself set out the facts which tended to suggest that there had been victimisation for carrying out the health and safety checks. Even if the workers had not made the connection between matters set out in the disclosure so as to register there was evidence of a pattern of victimisation, applying the reasoning in *Chesterton* it would still be available to them to make that argument.

Certainty as against flexibility

Supp.43 Once the Court of Appeal had decided to read the ET's judgment on the basis that the "other features" set out at **Supp.30** (to which the Tribunal had referred but had not expressly included in its reasoning) were to be taken into account on the question of reasonable belief, Chesterton's appeal was surely doomed. It is true that the Court of Appeal has chosen not to offer the certainty that would have flowed from accepting either of the bright lines in PCAW's approach or that taken on behalf of Chesterton. But the reasons for that course were, we suggest, convincing and the element of uncertainty that remains flows from the terms of the amended legislation.

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[2] This example is loosely drawn by adapting the situation in *Underwood v Wincanton* (UKEAT/0163/15). In that case Recorder Luba QC considered that within the matters disclosed there seemed to be a suggestion that "overtime was being withheld specifically from those drivers who were seen to be awkward by reason of being scrupulous about the safety and roadworthiness of their vehicles." It should however be noted that there was no finding that there was any substance to that allegation and the issue came before the EAT prior to any evidence being heard.

Supp.44 PCAW's position would have involved treating every collective grievance as necessarily involving a matter of public interest. That would plainly been contrary to the legislative intention in introducing a public interest test. The rejection of the approach advanced on behalf of Chesterton is more controversial. On any view the approach of requiring an effect on a worker qua worker would need some qualification. At minimum for example it could not be applied to treatment that amounted to a criminal office. To take an extreme example, plainly a disclosure as to a worker being subjected to conditions amounting to modern slavery within the meaning of the Modern Slavery Act 2015 would satisfy the public interest requirement. But more broadly we suggest that the Court's reasoning was persuasive in emphasising that, given the broad-textured nature of the test and the range of circumstances in which the issue may arise, it would be inappropriate to require that there be some wider interest beyond that qua worker in every case or to insist that the number of employees effected could never be a sufficient consideration. Any other conclusion would have meant that, however extreme the exploitation of a worker qua worker, and however many people this applied to, there could be no reasonable belief as to a wider public interest.

Supp.45 Beatson LJ referred (at paragraph 41) to the potential chilling effect if adopting the approach contended for by Chesterton. It might be said that equally the lack of certainty in the application of the test may have a chilling effect for those considering making a public interest disclosure. But this risk is qualified by the latitude afforded by the reasonable belief test, together with the fact that the issue is only likely to arise in borderline cases where the matters disclosed appear on their face to raise matters focussing on the private concerns of the employee raising the disclosure and/or their colleagues. The fact that it was acknowledged that matters of an ostensibly "personal" character could (as is *Parkins v Sodexho*) include "minor breaches of health and safety" points to the potentially difficult borderline issues that may arise. But the approach at least avoids the pitfall associated with the previous good faith of encouraging a focus on the motives of the messenger rather than the substance of the whistleblower's disclosure.

Supp.46 In some respects the lack of certainty may be more problematic when viewed from the employer's perspective. This follows from the reasonable belief test. From the employee's perspective it is possible to take into account the set of beliefs on the basis of which it is contended that the disclosure was made in the public interest. But the employer may not be privy to those beliefs if they are not identified by the worker at the time the disclosure is made. To some extent the same issue arises in the context of whether there is a reasonable belief as to whether the information disclosed tends to show a relevant failure. But at least in that context it is possible to focus on what the information "tends to show". By contrast there is no legislative requirement for the worker to spell out that it is believed that the disclosure is in the public interest or to set out the factors which engender that belief (though failure to do so may be evidentially relevant to whether in fact the belief was actually held; indeed in *Chesterton* the impact on other senior managers was referred to in the course of Mr Nurmohamed's disclosures). Further it is no answer to a protected disclosure claim that the employer genuinely did not believe that what was disclosed amounted to a protected disclosure: see *Beatt* (considered

below at **Supp.142-Supp.157**). This reinforces the need for robust whistleblowing and grievance procedures. Whilst the failure to use a whistleblowing procedure is far from conclusive, if a procedure is used this will serve to flag up that the worker believes she or he is making a protected disclosure. Equally whilst the fact of not using a grievance procedure cannot safely be taken as indicating that there is no belief that the disclosure is in the public interest, (a) investigation of the apparently private concerns may flag up the potential wider interest being asserted or (b) may identify the concerns in sufficient detail to make it more difficult at a later stage to assert some wider public interest concern. In practice though, the prudent course from the employer's perspective, is to be alert to the risk of a protected disclosure being asserted in each case where, aside from the public interest requirement, the other conditions for a protected disclosure are likely to be satisfied, albeit that by reference to the criteria at **Supp.35.8** above it may be possible to assess the risk as being at a low level.

Has the Court of Appeal raised the bar for protection?

Supp.47 On one view, the EAT's judgment in *Chesterton* might be said to have proceeded on the same basis as that advanced by PCAW in the Court of Appeal. Supperstone J commented (at para 36) that:

> "The words "in the public interest" were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications."

Supp.48 We suggest in the Main Work (at 4.26 to 4.28) that, read as a whole, the EAT were not saying that it would always be sufficient to establish that the interests of someone other than the claimant was affected. That would be inconsistent with the emphasis on the need for a fact-sensitive approach. Consistently with this, the Court of Appeal's approach required that where the disclosure relates to the worker's own contract of employment, or some other interest of a personal character, that there be additional factors capable of taking the matter into the realms of a wider public interest. In broad terms the approach may be said to reflect a tension between two competing policy considerations. On the one hand lies the concern not to impose a test that will have a chilling effect which could deter those capable of raising the alarm from coming forward, or which could, through laying down over rigid rules, lead to protection being withheld in deserving cases. As against this is the consideration that the public interest test plays a crucial role in differentiating those cases that are deserving of the wider and deeper protection available in the whistleblowing provisions precisely because of the public interest element. To that end the test must be meaningful. In turn the non-exhaustive four-fold criteria provide a means of trying to give substance to the test, as a "useful tool" to measure whether what on its face appears to be a disclosure raising a matter of private concern, can reasonably be said to engage a wider public interest. The broad nature of the relevant factors identified as bearing on the public interest test (**Supp.35.8**), allows fairly wide scope for arguments to be raised that a wide variety of disclosures may properly be regarded as being raised in the public interest despite being focussed on the position or treatment only of claimant and fellow workers. But the tenor of the decision, in particular at paragraphs 36 and 37, is that whilst allowing for the latitude inherent in a test of

"reasonable belief", a cautious approach by tribunals is to be expected before accepting that disclosures in relation to matters which on their face appear to be essentially personal in nature are to be treated as engaging a wider public interest.

Supp.49 One instance of a difference when compared with the approach advocated by PCAW would be a case where the disclosure essentially raises a collective grievance with no wider factor that could reasonably be taken to engage the wider public interest. As Underhill LJ implicitly recognised, there was a degree of tension between the acceptance that in some cases mere numbers of employees affected could make disclosure a matter of public interest, and the fact that a private interest does not necessarily become a matter of public interest merely because the private interest was shared (or believed to be shared) with his or her colleagues (however many colleagues there were). The "note of caution" Underhill LJ sounded indicates that, in practice, it would be unwise to rely merely on the number of employees affected rather than also identifying other features of the situation such as the seriousness of the wrongdoing. Indeed the tenor of Underhill LJ's judgment may suggest that absent the findings as to the "other features" (including alleged deliberate manipulation of the accounts on a wide scale) he might not have agreed with the ET's view that on the facts of this case Mr Nurmohamed had the requisite reasonable belief. But as he noted, where the numbers affected are very large it will often be possible to identify some wider feature.

Supp.50 The application of the Court of Appeal's guidance would not, we suggest, have affected the outcome in the two other cases which have reached the EAT on this issue: *Underwood v. Wincanton plc* (UKEAT/0163/15) and *Morgan v. Royal Mencap Society* [2016] IRLR 428. Both of these cases were appeals from decisions by employment judges to strike out the claims based on the disclosures in issue because there was no reasonable prospect of the claimants establishing that they had a reasonable belief that the making of the disclosure was in the public interest. In both cases the EAT judges recognised the limitations of a summary adjudication of that issue. There were questions which could only be answered if the tribunal received and considered full and tested oral evidence:

- In *Underwood*, whilst the disclosures were made as part of a collective workplace grievance as to overtime, Recorder Luba QC considered (at para 23) that evidence needed to be heard in part because there appeared to be a suggestion in the disclosures of overtime being withheld from drivers who were scrupulous about safety.
- In *Morgan*, Simler P was unpersuaded that it could be said that no reasonable person could have believed that the matters which Ms Morgan was raising about the risk of injury to others engaged the public interest. There had been an assertion by Ms Morgan that others could be affected by the same or similar working conditions, and she identified a number of ways in which the public interest was in her belief engaged. Those factual matters which the worker relied upon might not be established ultimately. But whether they were or not would depend upon the evidence about how other workstations were organised, how

other employees might or might not be affected by cramped conditions and what Ms Morgan's belief was about all of that. It might in the particular circumstances of the case be demonstrated that Ms Morgan's own alleged complaint had wider public interest implications in the context of other members of the workforce or in the other ways that she asserted it was engaged.

Supp.51 Notwithstanding the legislative intention to reverse the decision in *Parkins v Sodexho*, even on facts similar to that case a factual enquiry would still be required as to whether it was believed that the disclosure was made in the public interest (taking into account that the disclosures concerned health and safety concerns) and the reasonableness of any such belief.

Summary propositions

Supp.52 At the conclusion of Chapter 4 of the Main Work (at para **4.93**) we set out 9 propositions summarising a suggested approach to the application of the public interest test. We suggest that those propositions remain appropriate in the light of the reasoning in the Court of Appeal in *Chesterton*. Indeed propositions 1, 4, 7 and 8 derive specific support from the reasoning of the Court of Appeal in *Chesterton*. However propositions 2 and 5 may now usefully be supplemented as follows:

- Proposition 2 (that it is not for the tribunal to assess what is in the public interest) is to be read in the sense that the tribunal/court should not substitute its own view. Put another way, the tribunal may form its own view but it is not determinative (at least in relation to whether a belief that the disclosure was made in the public interest was not reasonable).

- Proposition 5: This proposition suggests that the starting point is to identify the set of beliefs that are relied upon by the worker as indicating that the disclosure was made in the public interest. We consider that this continues to hold true. Further:

  - This will be important as the starting point in identifying whether the set of beliefs, or factors operating on the mind of the worker, amounted to a belief that the disclosure was made in the public interest, at least in the common case where the worker has not specifically formulated a view in terms of "the public interest".

  - The fourfold considerations identified in *Chesterton* are likely to be relevant i.e. (a) the number in the group whose interests the disclosure served, (b) the nature of the interests affected and the extent to which they are affected by the relevant failure, (c) the nature of wrongdoing and whether it was deliberate and (d) the identity of the alleged wrongdoer. These considerations should not be regarded as exhaustive. Other factors may arise on facts of any particular case such as factors bearing on the

circumstances in which the disclosure was made (see paragraphs 4.83 to 4.92 of the Main Work).

- Those considerations are relevant both to whether those beliefs can be regarded as amounting to a (subjective) belief that the disclosure was in the public interest and as to whether that belief was reasonable.

- In relation to whether the belief was reasonable, but not in relation to whether the worker's beliefs at the time of making the disclosure amounted to a belief that it was made in the public interest, it is permissible to have regard to factors or beliefs other than those operating on the mind of the worker at the time of making the disclosure provided that this is based on facts known, or perhaps reasonably available, to the worker at the time of making the disclosure.

- A useful evidential tool in marginal cases (ie those where on its face the disclosure appears to focus on personal concerns) is to compare how the worker acted with that which would be expected of the worker if s/he believed she was making a disclosure in the public interest.

Chapter 5: The three tiers of protection
Paragraph 5.57: prescribed persons

Supp.53 The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2017, SI 2017/880, comes into force on 1 October 2017 amending the list of persons a disclosure can be made to by a potential whistleblower.

Chapter 6: Who is protected under PIDA?

Paragraph 6.20
Supp.54 See now *Day v (1) Lewisham and Greenwich NHS Trust and (2) Health Education England* [2017] EWCA Civ 329, [2017] ICR 917. The Court has essentially approved the reasoning of Simler P in *McTigue v. University Hospital Bristol NHS Foundation Trust* [2016] ICR 1155 (EAT) on the issue of whether s.43K could be relied upon where the claimant also had another employer. We argued in the text that this was clearly the preferred approach. Lord Justice Elias gave the leading judgment with which Gloster LJ and Moylan J agreed.

Supp.55 It was acknowledged on both sides in the Court of Appeal that the opening words of s.43K(1) had to have *some* limitation on them: they could not be read literally. Otherwise, as Elias LJ pointed out, an agency worker (qualifying as a worker under s.43K against the agency) who had a second, unrelated, job serving in a restaurant in the evenings would be precluded from seeking to rely upon the extended definition of worker with respect to the agency work. Consistently with the approach taken by Simler P in *McTigue*, Elias LJ accepted the contention on behalf of Dr Day that the provision needed to be interpreted in the sense that "worker includes an individual who *as against a*

given respondent is not a worker as defined by section 230(3)" (our emphasis). Elias LJ gave three reasons for this conclusion:

- the whistleblowing legislation should be given a purposive construction: that did not permit the court to distort the language of a statute on the vague premise that action against whistleblowers is undesirable and should be forbidden. But here *some* words needed to be read into the provision because a literal construction could not be what Parliament intended.
- a worker might need protection against the introducer even if he had protection against the end-user if, as was alleged by Dr Day in this case, the victimisation came from the introducer itself.
- Dr Day could in principle be employed by both the end-user and the third party introducer (see above) and there was no obvious rationale in a provision which said that if the individual was a s.230(3) worker in respect of either the end-user or the third party, he could not rely upon the extended definition against the other. If it did have that effect the odd consequence would be that (a) if s/he is not a s.230(3) worker with respect to either, s/he may fall within the extended s. 43K definition of worker in respect of both and each may be an employer, but (b) if s/he was a s. 230(3) worker with effect to one of them, s/he could not be a s. 43K worker with respect to the other.

Supp.56 What, then, was the intention of the opening words of s.43K? In Elias LJ's view it was understandable that Parliament might want to make it clear that the section was simply extending the standard definition and that there was no need to engage with s.43K at all if the worker fell within the scope of s. 230(3).

Paragraphs 6.47 to 6.53

Supp.57 The other aspect of the appeal in *Day* concerned the issues raised in s.43K(1)(a)(ii) and s.43K(2) as to who "substantially determined" the terms. Elias LJ emphasised that neither of these provisions require a comparison between the parties, other than the claimant, who exercise some influence over the terms on which the doctor was engaged. The focus of 43K(1)(a)(ii) is on excluding cases where the terms on which the individual is engaged are substantially determined by the worker himself. Clearly if that is the case, he cannot bring himself within this extended definition of "worker". Elias LJ commented (at para 11) that this is so even if the end-user and/or introducer can also be said substantially to determine the terms of engagement. We return to this below because it highlights a potentially significant difference from the line of previous EAT decisions. Elias LJ commented that only an individual who is not a "substantial" participant in determining the terms of engagement is assisted by s.43K(1)(a). If that is not the case, the condition for protection is satisfied. S.43K(1)(a)(ii) envisages that either or both the introducer or end user may be regarded as the employer, either because the introducer and the end-user determine the terms jointly, or because each determines different terms but each to a substantial extent.

Supp.58 On behalf of HEE it was submitted that notwithstanding that both introducer and end-user might substantially determine the terms of engagement, the

definition of employer in s.43K(2)(a) was limited to the person (if there was more than one) who played the greater role in determining the terms of engagement. This, it was argued, followed from the reference to "the person" in that sub-section. Elias LJ rejected this: s.6 of the Interpretation Act 1978 provides that the singular includes the plural unless the contrary intention appears. In Elias LJ's judgment it did not do so in this instance. Indeed HEE's construction involved impermissibly giving a different meaning to "substantially determines" in s.43K (1) than in s.43K (2). Elias LJ considered that in some cases both the introducer and the end-user would be employers and each would be subject to the whistleblowing provisions.

Supp.59 Turning to the approach to s.43K(2) ERA, the Court of Appeal concluded that the tribunal and ET had incorrectly approached the question by asking who, as between the HEE and Lewisham, played the greater role in determining the terms and that the EAT's analysis was 'at least consistent' with that incorrect approach. There had been a failure to acknowledge that more than one party (other than the claimant) could substantially determine the terms and asking whether HEE had done so. That may be viewed as a harsh reading of the EAT's judgment, which did not in terms refer to any comparison and instead (at para 14) relied on the employment tribunal's findings of fact that HEE was not responsible either for the terms governing training of doctors (the Gold Guide) or the terms and conditions on which the work was performed. However, Elias LJ placed reliance on the absence of any self-direction on the part of the ET that there could be more than one employer under s.43K(2) when taken together with the content of the parties' skeleton arguments below.

Supp.60 But Elias LJ did not agree that if the correct test had been adopted, the inevitable conclusion would have been that the ET must have found in Dr Day's favour. In doing so he referred to an issue which emerged during the course of submissions: when considering the terms on which the person is engaged, is the tribunal limited to considering contractual terms and required to ignore other matters which might affect the way in which the work is carried out but are not contractual in nature? The argument for that approach was that in *Sharpe v Bishop of Worcester* [2015] ICR 1421 (considered in the Main Work at paragraph 6.32) the Court of Appeal had held that in order for s.43K to bite, there must at least be *a contract of some sort* with the putative employer. Reading between the lines, it may be that Elias LJ was sceptical of that reading of the decision in *Sharpe*. We suggest that scepticism was well-founded. *Sharpe* was dealing with the situation where the terms on which the work was carried out was not determined by a contract at all (it being an office held). That may be contrasted with the typical agency relationship where the relevant terms are contained in contracts at least between worker and agency and between agency and end-user, but there may be no direct contractual relationship between worker and end-user. Nothing in *Sharpe* determines that s.43K(1)(a) cannot apply in such a situation.

Supp.61 In any event Elias LJ concluded that even if some of the terms of engagement had to be contractual (following the assumption in *Sharpe* that the relationship needs to be contractual) he did not accept that it followed that a tribunal should limit itself to focusing solely on the contractual terms. S.43K required the

tribunal to focus on what happens in practice, and "*a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work*". That guidance was welcome since, as Elias LJ noted, it avoids sterile debate as to, for example, the contractual status of an instruction as to how work is to be done.

Supp.62 The guidance provided by the Court of Appeal on the test of who "substantially determined" the terms has, to a considerable degree, endorsed the approach that had been established in a trio of EAT decisions: *Keppel Seghers UK Ltd v Hinds* [2014] IRLR 754; *Day* and *McTigue*. But in one potentially significant respect there was a departure.

Supp.63 The wording of s.43K(1)(a)(ii) requires that two conditions be satisfied: (a) that the claimant does not (in practice) substantially determine the terms and (b) that the other parties (or one of them) do (or does). In *Day* the EAT Langstaff J concluded (at para 40) that the test in 43K(1)(a)(ii) implicitly requires a comparison as between (a) the claimant on the one hand, and (b) the other person or persons, who are involved in determining the terms on which the claimant is or was engaged to do the work. If cumulatively the other persons determine the terms more than the worker, then the condition in s.43K(1)(a)(ii) is satisfied. That view was followed by Simler P in *McTigue* at para 34. But as noted above, Elias LJ reasoned (at para 11) that for the purposes of s.43K(1)(a)(ii), the worker might be found to have substantially determined the terms even if the end-user and/or introducer (or both cumulatively) also did so. It would seem that on this view, the claimant could fail at the s.43K(1)(a)(ii) hurdle if found to have made a "substantial" contribution to the determination of the terms, even if the worker has a lesser influence than the other parties, or the others taken together. Further, since on Elias LJ's analysis (at para 11) the introducer and end user might each be found to have substantially determined the terms by reason of each determining different terms, it would seem that the worker could in principle be found to have substantially determined the terms on the basis of determining only some of the terms. In all, unless (adopting a purposive approach) a different standard can be applied as between the end-user/ introducer and the worker to the test of whether they substantially determine the terms, the effect therefore appears to be to make it potentially more difficult to rely on s.43K(1)(a).

Supp.64 However that still begs the question as to what is meant in this context by the term "substantially". This question was not directly addressed in the Court of Appeal. Instead the Court was content to leave the matter to be addressed on remission as a question of fact, taking into account the suggestion of considering the matter in the round based on a relatively broad assessment.

Supp.65 In the EAT in *Day* it was argued that the term "substantially" should be given the same meaning as in relation to the definition of disability in the Equality Act 2010, as meaning "more than merely trivial". Langstaff J concluded that the issue did not arise (at least in relation to s.43K(1)(a)(ii)) because the question was determined by the comparison between (a) the claimant and (b) the other parties. Nor was it addressed in

relation to s.43K(2) ERA – which lends some support for the Court of Appeal's view that a comparison had impermissibly been applied to determine who had the greater influence as between the two respondents.

Supp.66 The question as to the meaning of the term "substantially" does squarely arise on the approach taken by Elias LJ. We suggest that Langstaff J was right to say, in the EAT in *Day* (at para 40), that in context "substantially" cannot mean simply "more than trivial". Any other view would be inconsistent with the purposive approach to the legislation which the Court of Appeal in *Day* approved.

Supp.67 More broadly, the issue highlights a quandary when it comes to considering the approach which may best meet the purposes of the legislation. It may be assumed that the term "substantially" has the same meaning for the purposes of s.43K(1)(a)(ii) and s.43K(2). As such, the lower the threshold is set the more likely it is that the claimant may be found to meet the threshold of substantially determining the terms, so that no question arises under s.43K(2). Conversely, the higher the threshold is set, the more likely it will be that the conditions in s.43K(1)(a) are satisfied, but equally the more difficult it may be to show that a particular respondent (in this case HEE) substantially determined the terms.

Supp.68 Taken together with the guidance given by the Court of Appeal in *Day* we suggest that the following applies:

1. It is neither sufficient to show that the threshold is something more than trivial, nor is it necessary that the influence must be greater than that of the other parties whether viewed individually or cumulatively.
2. A comparison of the influence exercised by the claimant, compared to the other parties may still be relevant. If the claimant in practice had a greater influence over the terms than the cumulative influence of the other parties, that would no doubt be sufficient (though not necessary) to show that the influence over the terms was substantial.
3. The tribunal is given a wide latitude to determine whether the threshold is met (a) by the claimant under s.43K(1)(a) or (b) by one or more respondents under s.43K(2). A relatively broad brush assessment is required having regard to all factors bearing on the terms on which the worker was engaged to carry out the work.
4. Whilst in *Day* the only issue on remission concerned whether HEE substantially determined the terms, in future cases parties may need to give careful consideration on the facts as to how best to pitch the case as to what amounted to substantially determining the terms. Whilst it may suit the respondent to argue for a low threshold in order to assert that the claimant substantially determined the terms under s.43K(1)(a)(ii), depending on the facts, the arguments may then rebound against the same respondent when attention turns to s.43K(2) ERA.

Paragraphs 6.86 to 6.72

Supp.69 See now *P v Commissioner of Police of the Metropolis* [2017] UKSC 65 in which the appeal against the decision of the Court of Appeal was allowed and the case remitted to the employment tribunal. The substantive speech was that of Lord Reed with which the other SCJs agreed. Lord Reed said that the principle of equivalence entailed that police officers must have the right to bring claims of treatment contrary to the Directive before Employment Tribunals, since those tribunals are the specialist forum for analogous claims of discriminatory treatment under our domestic law. They are expert in the assessment of claims of discriminatory treatment, and have the power to award a range of remedies including the payment of compensation, even in cases where the dismissal or other disciplinary action itself stands. They therefore fulfil the requirements of the principle of effectiveness. To leave police officers with only a right of appeal to the Police Appeals Tribunal would not comply either with the principle of equivalence, since analogous complaints under domestic law can be made to an Employment Tribunal, nor with the principle of effectiveness, since (for example) the Police Appeals Tribunal cannot grant any remedy in cases where the discriminatory conduct is not such as to vitiate the decision of the misconduct panel.

Supp.70 It was not contended that the United Kingdom could deny police officers an effective and equivalent remedy where their rights under the Directive have been infringed. Even if it was designed to protect the officer under investigation, the creation of a statutory process which entrusted disciplinary functions in relation to police officers to persons whose conduct might arguably attract judicial immunity under domestic law could not have the effect of barring complaints by the officers to an Employment Tribunal that they have been treated by those persons in a manner which is contrary to the Directive. National rules in relation to judicial immunity could be applied in accordance with EU law only in so far as they are consistent with EU law: *Köbler v Austria* (Case C-224/01) [2004] QB 848; [2003] ECR I-10239. The reasoning of the Court of Appeal in *Heath* was not correct in relation to EU law.

Supp.71 S.42(1) of the Equality Act 2010 had to be interpreted as applying to the exercise of disciplinary functions by misconduct panels in relation to police constables. That ran with the grain of the legislation, and was warranted under EU law in accordance with *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C- 106/89) [1990] ECR I-4135. In particular, s.42(1) could be interpreted so as to conform with the Directive if read as if certain additional words (italicised in the following version) were present:

> "(1) For the purposes of this Part, holding the office of constable is to be treated as employment -
>
> (a) by the chief officer, in respect of any act done by the chief officer *or (so far as such acts fall within the scope of the Framework Directive) by persons conducting a misconduct meeting or misconduct hearing* in relation to a constable or appointment to the office of constable;
>
> (b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable."

So interpreted, the Act overrode, by force of statute, any bar to the bringing of complaints under the Directive against the chief officer which might otherwise arise by reason of any judicial immunity attaching to the panel under the common law.

Supp.72 Lord Reed emphasized that this conforming interpretation had to be understood broadly: the court was not amending the legislation, and the italicized words were not to be treated as though they had been enacted. The expressions "misconduct meeting" and "misconduct hearing", for example, have not been defined by reference to the relevant regulations. Nor is the use of those expressions intended to exclude the adoption of a similar approach in relation to other types of panel if that was necessary in order to comply with the Directive. The italicized words were merely intended to indicate how s.42(1) should be interpreted in a case such as the present, in order to avoid a violation of EU law.

Paragraph 6.122 and 6.131

Supp.73 The EAT's decision in *Jeffery v The British Council* [2016] IRLR 935 (see 6.131 of the Main Work) is being appealed to the Court of Appeal. The appeal will be heard over 15th-16th May 2018 together with an appeal (with permission of Underhill LJ, A2/2017/1650) from the decision of the EAT in *Green v SIG Trading Ltd* (UKEAT/0282/16/DA, 24 May 2017). In *Green* the EAT held that the ET had disregarded the fact that the parties had agreed the employee's contract should be governed by English law. Whilst the ultimate assessment as to the weight to be given to this and the other factors was for the ET, the apparent failure in their judgment to have regard to the parties' agreement made their conclusion unsafe.

Chapters 7 and 8

Instructing or procuring a dismissal as a detriment and co-worker liability for dismissals

Paragraphs 7.06 to 7.08, 7.163 to 7.190 (and 8.06 to 8.08, 8.17, 9.12 to 9.15, 9.27)

Unfair dismissal, tainted information and manipulation

Supp.74 At paragraphs **7.163 to 7.189** of the main work we address the issues that have arisen in several cases which have dealt with the problem of attributing to the decision maker faulty information being provided to him/her (referred to by Underhill LJ in *Reynolds v CLFIS (UK) Limited* [2015] ICR 1010 (CA) as cases of "tainted information"). That may take various forms, including at the extreme end, the decision maker being manipulated by a third party in response to a protected disclosure, or as it was put (again by Underhill LJ) in *Co operative Group Ltd v Baddeley* [2014] EWCA Civ 658, an *Iago* case. The leading guidance where such issues arise in relation to protected disclosure unfair dismissal claims is now the Court of Appeal's decision of 20 October 2017 in *Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632, reversing the decision on Mitting J in the EAT [2016] ICR 1043 (considered at **7.174 to 7.190** in the main work). In the Court of Appeal Underhill LJ gave the only substantive judgment, with which Jackson and Moylan LJJ agreed. The focus of the decision was on the approach to unfair dismissal claims in a case where the claimant, Ms Jhuti, had been dismissed on

grounds of poor performance and the dismissing officer (Ms Vickers) was unaware that the claimant had been set up to fail by her manager (Mr Widmer) by reason of protected disclosures. Underhill LJ noted that that the first stage of the exercise required by s.98 ERA, and also by s.103A ERA, involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss (i.e. what was the reason for the dismissal). He cited the classic formulation of Cairns LJ in *Abernethy* and his own judgment in *Beatt* where he had said that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so. He explained that in referring to "motivation" he meant for these purposes the mental processes that cause the employer ‑ or, more accurately, the person(s) responsible for the dismissal decision ‑ to dismiss the claimant.

Supp.75 The EAT had concluded that, notwithstanding that Mr Widmer was not the dismissing officer, on the basis that he had set up "a paper trail which set her to fail" it followed that protected disclosures were the principal reason for the dismissal. As we noted in the main work (at **7.177-7.180**), that begged a question as to how the decision could be reconciled with the reasoning of the Court of Appeal in *Orr v Milton Keynes DC* [2011] ICR 704. *Orr* had not been cited in *Jhuti* in either the ET or the EAT. But it was relied upon in the Court of Appeal by Royal Mail in support of the contention that it was settled law that in any case of unfair dismissal the only relevant consideration was what had motivated (in the sense referred to above) the person or persons taking the decision to dismiss. Underhill LJ said (at para 47) that the essential ratio of *Orr* was that the person whose knowledge or state of mind was *for the purpose of s.98* intended to count as the knowledge or state of mind of the employer was the person who was deputed to carry out the employer's functions under s.98. Thus, contended Royal Mail, it was illegitimate to consider the mental processes of anyone other than the decision-taker(s) and, since the relevant language was identical, the same principle applied to s.103A ERA.

Supp.76 Underhill LJ accepted that *Orr* was not concerned as such with the issue of whose reasoning was relevant as regards s.98(1) ERA. Instead it was a decision on whether the dismissal was reasonable. Mr Orr had been dismissed for behaving in an abusive and insubordinate manner. A potential mitigating factor was that his misconduct had been in response to certain conduct by his line manager, Mr Madden, relating to the way in which he had gone about reducing Mr Orr's hours and the manner in which he had spoken to Mr Orr. By a majority the Court of Appeal in *Orr* held that this conduct, and knowledge of it, was not to be attributed to the employer in relation to fairness of dismissal, since it was not known to the dismissing officer. This was said to follow from the approach envisaged by Lord Hoffmann in the Privy Council decision of *Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. In relation to the issue of what acts or state of mind could be attributed to the employer, Lord Hoffmann focussed on the question of "[w]hose act (or knowledge or state of mind) was *for this purpose* intended by the legislation in question] to count as the act etc. of the company?".

Supp.77 Although *Orr* was therefore not directly a decision on the reason for dismissal, Underhill LJ in *Jhuti* concluded that it was equally applicable to that issue. This was because the two stages of the process required by s.98 ERA were inextricably linked; in considering fairness the tribunal is engaged in considering by reference to the reason for dismissal, whether the employer acted reasonably in treating that reason as sufficient to dismiss. As such he considered (at para 56) that:

> "It would be incoherent and unworkable if, in deciding – as the reasonableness question requires – what beliefs were (reasonably) held or facts (reasonably) known by the employer, it were permissible to look at the mental processes of a different person."

Supp.78 Accordingly, for the purpose of determining "the reason for the dismissal" under s.98 (1) ERA, the tribunal could not take into account the mental processes of someone such as Mr Widmer who was not involved in the disciplinary process. The same applied for the purposes of a claim based on s.103A, since this was part of the unfair dismissal provisions (Part X) and there was no justification for taking a different approach to the meaning of the reason for dismissal in s.103A to that applicable elsewhere in Part X. It followed that Mitting J's reasoning could not be sustained. Even if Mr Widmer's conduct constituted a deliberate attempt to procure Ms Jhuti's dismissal because she had made a protected disclosure (although Underhill LJ thought that might in fact be going rather further than the ET's findings allowed), that motivation could not be attributed to Royal Mail as the employer since it was not shared by Ms Vickers, who was the person deputed by Royal Mail to take the dismissal decision.

Supp.79 Underhill LJ did recognise that the class of persons whose knowledge or mental processes were relevant might not be confined to the dismissing officer(s). At paragraph 59 onward, Underhill LJ set out his analysis of "manipulation" cases by reference to the status and role of the putative "manipulator":-

- *Dismissal procured by manipulation by a colleague of the claimant worker (with no relevant managerial responsibility for the claimant) achieved by presenting false evidence by which the decision-taker was innocently (and reasonably) misled.*

In such a case the manipulator's motivation could not be attributed to the employer for the purpose of the unfair dismissal regime, whether to impugn the reasonableness of the decision to dismiss under s.98 (4), or in relation to the reason for dismissal. An employee in such a situation would have had suffered an injustice at the hands of the manipulator (the "Iago figure") and might have other remedies (as to which see **Supp.85-125** below) but *the employer* had not acted unfairly.

- *Where the manipulator is the victim's line manager but did not himself have responsibility for the dismissal*.

Whilst Underhill LJ could see the force of the argument for attributing the manipulator's motivation to the employer, because it had delegated authority to him or her to manage the employee in question, he concluded that was precisely the

argument that had appealed to Sedley LJ in *Orr* but which the majority in that case rejected. Again, therefore, the motivation of the manager (Mr Widmer) could not be attributed to the employer.

- *Where the manipulator is "a manager with some responsibility for the investigation", albeit not the actual decision-taker*.

There might be cases where someone other than the ultimate decision-taker had a formal role in the decision-making process, e.g. where manager 'A' was given responsibility for investigating allegations of misconduct which were then presented to manager 'B' as the factual basis (albeit, typically, challengeable at a hearing) for a disciplinary decision. In such a situation there would be a strong case for attributing to the employer both the motivation and the knowledge of 'A', even if they are not shared by B. That would consistent with the *ratio* in *Orr*. In such a case, applying the approach in *Meridian Global*, the conduct of the investigation was part of the deputed "functions under section 98". However, although Mr Widmer had supplied documents to the HR department which it in turn passed to Ms Vickers, and responded to her query about the TMI complaint, that did not make him an investigator.

- *Where someone at or near the top of the management hierarchy – say, to take the most extreme case, the CEO – procured a worker's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-taker*

In such a case the CEO, despite his or her seniority, would not have formal responsibility for making the dismissal decision: the facts in *Orr* had not raised this issue and there might well be an argument for distinguishing the case of a manager in such a senior position: but (as in the case of the previous scenario) the issue did not arise on the facts of *Jhuti.*

Supp.80 Underhill LJ acknowledged that it might seem wrong that Royal Mail should not be liable for unfair dismissal in circumstances such as the ET found in *Jhuti.* but there was an important point of principle involved. The statutory right not to be unfairly dismissed depended on there being unfairness (as defined) *on the part of the employer*; and unfair or even unlawful conduct on the part of individual colleagues or managers was immaterial unless it could properly be attributed to the employer. A principle had to be identified as to how to draw the line between those whose conduct could and could not be so attributed. That had been done in *Orr* on a careful and fully reasoned basis and the *Jhuti* Court of Appeal had to abide by that decision. Royal Mail's appeal was therefore allowed.

Supp.81 The reliance on the decision in *Orr* might be questioned given that Underhill LJ allowed for the possibility that the mental processes of individuals other than the dismissing officer could be important; whether by reference to someone with responsibility for the investigation or, possibly, someone at or near the top of the management hierarchy who procures the dismissal. Having allowed for those exceptions,

it may be said that there is nothing incoherent in allowing further exceptions to cover cases where someone else exercising the employer's authority, such as the line manager in Ms Jhuti's case, procures the dismissal (although procurement was not found in her case). The decision in *Orr* might then have been distinguished on that basis that *Orr* did not concern a manager being found to have deliberately procured a dismissal. One possible approach in such a case might have been to recognise that a manager, acting on behalf of the employer (albeit abusing the employer's authority), may played a key role in the process leading to the dismissal, just as much as would be the case in relation to an investigating officer. There might then have been scope to proceed to ask who in substance brought about the dismissal, and then to pose the *Meridian* question of whether for the purposes of the legislation that person can be regarded as counting as the employer. It may be argued that it is wholly consistent with the purposes of the unfair dismissal legislation to focus on the substance of who brought about the dismissal, and where it results from an exercise of managerial authority to attribute that as an act of the employer. Indeed, had Ms Jhuti resigned in response to Mr Widmer's conduct, subject to any issues as to having affirmed the contract, it is unlikely that based on its findings of fact, a tribunal would have had difficulty in concluding that there was a constructive dismissal giving rise to a successful s.103A claim. That approach would in turn leave open distinctive unfair dismissal remedies of interim relief, reinstatement and re-engagement.

Supp.82 Further, the considerations which led the Court of Appeal in *Reynolds v CLFIS (UK) Limited* [2015] ICR 1010 (CA) (see **Supp.112-115** below), in a discrimination context, to shy away from allowing liability on a composite basis (combining the act of dismissal of a dismissing officer with the motivation of a third party), do not apply to unfair dismissal complaints. In *Reynolds,* Underhill LJ was concerned that if there could be liability on a composite basis the individual dismissing officer could be liable under the Equality Act despite not having the necessary state of mind. That does not arise in relation to unfair dismissal, where there is no provision for individual liability. Indeed Underhill LJ emphasised that whilst it makes sense to construe language in the whistleblowing provisions consistently with identical language, where it appears, in the Equality Act 2010, it is not always safe to read across from the discrimination legislation because there are some significant differences in terminology. The fact that there is separate provision in the whistleblowing legislation for cases of unfair dismissal of employees, and a boundary with detriment claims, is an instance of one such significant difference from the Equality Act.

Supp.83 As against this, in an ordinary unfair dismissal case, considerable uncertainty might be engendered by going beyond the mental processes of the dismissing officer. As emphasised in *Orr,* the scheme of the unfair dismissal legislation is to encourage reasonable investigation. That points against focussing on the mental processes of the manager who may bring a complaint rather than the decision maker who may be tasked with considering the evidence including that of the complainant manager. That is less of a concern in cases of automatic unfair dismissal where no issue arises as to adequacy of the investigation. But as emphasised by Underhill LJ, it cannot be the case

that there is a different approach to the test of the reason or principal reason in automatic unfair dismissal cases.

Supp.84 In any event, pending any further appeal (permission is currently being sought from the Supreme Court), the decision in *Jhuti* has now settled the position in relation to non-attribution to the employer of the mental processes of those who are outside the disciplinary process (including a line manager who set up an employee to fail) save for the issue which it left open as to where someone at or near the top of the management hierarchy procures the dismissal.

Ms Jhuti's alternative detriment claim: (1) the pleadings issue

Supp.85 The conclusion on the unfair dismissal issue in *Jhuti* necessitates a fresh focus on whether there is an alternative route to recovery under the detriment provisions contained in s.47B ERA. There would be a serious lacunae in protection if there could be no claim in circumstances such as the tribunal found in *Jhuti*.[3] The ET had specifically found (at paragraph 346) that:

> "… given Mr Widmer's actions, including the treatment which he meted out to the claimant as a result of her protected disclosures, the email trail that he prepared in this context, and his other actions as set out in these reasons above, it was inevitable that Ms Vickers would, as she did, dismiss the claimant."

Supp.86 As we describe in the Main Work at **7.175**, Mitting J had expressed the view that the ET's apparent belief that Ms Jhuti should in principle be able to claim "career-long" losses as a consequence of the unlawful detriments was wrong because of the effect of s.47B (2) ERA. He considered that since this expressly excluded the detriment of dismissal, of necessity it also entailed that there could be no claim in detriment for the financial and other consequences of dismissal, whatever the causative link. In the Court of Appeal, Royal Mail did not support that position. Instead it argued that there was indeed a route by which Ms Jhuti might have been entitled to compensation for dismissal consequent on detriment notwithstanding s.47B (2) ERA but that no such case had been advanced on her behalf in the ET and that it was too late for it to be advanced now. The hypothetical route was:-

- A claim that on the ground of Ms Jhuti having made protected disclosures Mr Widmer manipulated Ms Vickers by providing a false and misleading impression of Ms Jhuti's performance, leading to Ms Vickers reaching a negative view of Ms Jhuti so that she dismissed Ms Jhuti.
- Such a claim would have been made against Mr Widmer, pursuant to s47B (1A) and, if proven, would then have attached liability vicariously to Royal Mail under s 47B (1B), subject to any reasonable steps defence under s47B (1D). Underhill LJ said that it was clear that Royal Mail did not intend to say that proceedings *had* to be brought

[3] The remedy has yet to be determined by the ET in *Jhuti*: the ET will need to consider various issues including whether all of the detriment claims were in time and which acts should be taken into account. .

against Mr Widmer personally. He added that in his view if the point was otherwise good, the route to recovery would not depend on Mr Widmer being named as a respondent. All that would matter was that Royal Mail's liability arose, vicariously, under s.47B (1B). It was perfectly open to a claimant to advance a claim against an employer under s.47B(1B) without (also) proceeding against the worker who actually did the deed: indeed that, was, he said, probably the more usual course.

Supp.87 Underhill LJ dismissed Royal Mail's contentions:

- It did not matter whether the claim was advanced under s.47B(1B) ERA (via s.47B(1A) relating to individual co-worker liability) or s.47(1) ERA (primary liability of the employer). What mattered was that the detriment complained of was the act of Mr Widmer and whether this led to the dismissal, rather than a focus only upon the act of dismissal itself. Whether Royal Mail was liable for Mr Widmer's act because it is to be treated as its own act under s.47B(1), or because it is "vicariously" liable for Mr Widmer's act under s.47B(1B), was immaterial. Ms Jhuti had clearly pleaded acts of detriment done by Mr Widmer, which the Tribunal found to be proved.
- Even if it was necessary in law that the claim be made under s.47B(1B) ERA, Underhill LJ did not accept that that route was not open to Ms Jhuti on her pleadings. The particulars of claim alleged that the relevant acts complained of were done by Mr Widmer, who was an employee of Royal Mail, and it was plainly implicit that he was acting in the course of his employment. The particulars went on to aver that Royal Mail was liable under s.47B ERA but did not identify the sub-section(s) relied on; and since nobody appears to have sought particularisation the Agreed List of Issues was similarly unspecific. Therefore Ms Jhuti was entitled to rely on both s.47B(1) and s.47B(1B), which were not mutually exclusive, since she had averred, expressly or by implication, the facts necessary for either. It was up to Royal Mail, if it chose, to seek further particulars with a view to being able to plead either that Mr Widmer's acts were not to be attributed to it for the purpose of s.47B(1) or that it had a "reasonable steps" defence (i.e. under s.47B(1D)) to the claim under s.47B(1B).
- Royal Mail contended that it would have been necessary for Ms Jhuti to complain specifically of Mr Widmer's *communication* of his tainted views to Ms Vickers, whereas the only acts pleaded and found consisted of:

  > "Being bullied, harassed and intimidated by Mike Widmer, who imposed mandatory weekly one-to-on meetings and targets solely on the Claimant"; and
  >
  > "Being served with a document entitled 'Performance Plan Objectives' by Mike Widmer and informed that it was a condition of her passing her probation to complete this and provide all her key contacts from her previous employments in the travel sector".

Underhill LJ agreed that Ms Jhuti could have identified that communication as a specific detriment, but he did not regard the failure to do so as fatal to her case. It was still open to her to argue at the remedy stage that her eventual dismissal was a (not too remote) consequence of the detriments actually found. The consequence is that

someone who is responsible for starting a process may be liable for its conclusion (or for loss of the chance that this would have been avoided), where they play no part in the process thereafter.

- Royal Mail said that Ms Jhuti never pleaded her case as one of "manipulation". That point was dismissed: in a case of this kind the only question (subject to the possible effect of s.47B (2)) was whether the unlawful detriment found had, applying the applicable remoteness principles, caused the losses consequent on the dismissal. If it had, it did not matter whether the label "manipulation" was used or indeed whether it would be apt on the particular facts of the case.

Supp.88 Since no argument was advanced by Royal Mail on the appeal that a detriment claim was barred by s.47B(2) ERA, it followed that there was no obstacle in principle to Ms Jhuti recovering compensation for dismissal consequent on detriment. Underhill LJ went on to say that whether she could do so in practice, or to what extent, was a matter for the ET at the remedy hearing. The view about causation which the ET expressed at para. 346 of the Reasons (see **Supp.85** above) could not be conclusive, since formally it did not fall within the scope of the liability hearing and the tribunal heard no submissions specifically directed to the point. The ET was merely putting down what it hoped would be a useful marker. In so far as it involved any findings of fact, it was based on the evidence which the tribunal had heard and might accordingly prove difficult to shift; but the tribunal would nevertheless have to consider carefully any submissions from Royal Mail about all aspects of the issue.

Ms Jhuti's alternative detriment claim: (2) S.47B(2) ERA

Supp.89 It followed from the approach taken by Royal Mail on the appeal that the broader issue as to the effect of s.47B(2) ERA, and whether it excluded losses consequent on dismissal (as indicated by Mitting J), did not directly arise, and it was left open by the EAT. However whilst declining to decide the issue as to the effect of s.47B(2) ERA, Underhill LJ but made some observations that were broadly supportive of being able to frame a detriment claim for losses consequent on dismissal despite that provision:

- He noted that it was common ground that s.47B(2) bites where the detriment which is the subject of a claim "amounts to a dismissal". But he identified the relevant issue as being whether that language excluded recovery of compensation for dismissal "even if the dismissal is caused by something formulated as a distinct prior detriment".
- He noted that, in principle, losses occasioned by a claimant's dismissal may be recoverable as compensation for an unlawful detriment which caused the dismissal (para. 39 (5) *CLFIS v Reynolds*) and expressed the view that there was no reason in principle for adopting a different approach in a case of whistleblower discrimination.
- He added that s.47B(2) ERA precluded a claim under the operative parts of the section where the detriment which was the subject of the complaint to the tribunal – what in other contexts would be called the cause of action – "amounts to a dismissal"; and it was "clearly arguable that in this kind of case the relevant detriment is the prior treatment complained of, the dismissal being only a consequence of that detriment".

- However he added that "it may be that that distinction is not as straightforward as it seems" and the decision in *Melia v Magna Kansei Ltd* [2006] ICR 410 (CA) might need "careful consideration".

We return to this below (at **Supp.99-105**) in the context of the reasoning in *International Petroleum Ltd and others v Osipov and others* UKEAT/0058/17/DA, 19 July 2017 which raises some similar issues.

A different approach to s.47B(2) ERA: Osipov

Overview

Supp.90 Whilst in *Jhuti,* Underhill LJ posited that a distinction might be drawn between a detriment amounting to dismissal, and a pre-dismissal detriment which caused the dismissal, an alternative approach, albeit driven by similar purposive considerations, was adopted in *International Petroleum Ltd and others v Osipov and others* UKEAT/0058/17/DA, 19 July 2017. The EAT construed s.47B(2) as limited to claims of unfair dismissal brought against an employer, and therefore as having no application to claims of personal liability for a dismissal against a worker or agent, rather than against the employer. That was held to be the case even where the detriment consists of dismissal or giving an instruction to dismiss. The decision is controversial and elements of the reasoning are, we suggest, unsatisfactory. But it is driven by persuasive policy considerations which point strongly towards applying a highly purposive approach to the meaning of s.47B(2) so as to avoid a serious lacunae in the scope of whistleblowing protection. That is reinforced by the conclusions reached by the Court of Appeal in *Jhuti* as to the operation of the unfair dismissal provisions. Viewed in that light there is scope to adopt a purposive approach, building on the focus on the role of s.47B(2) as a demarcation provision requiring that s.47B be disapplied only in relation to those detriments in respect of which an unfair dismissal claim is available.

Supp.91 If correctly decided the decision in *Osipov* also raises further questions including as to whether it is possible to circumvent the requirements for an unfair dismissal claim against the employer by bringing a claim in respect of dismissal under s.47B on the basis of the employer's vicarious liability for the dismissing officer's act of dismissing the whistleblowing worker.

Supp.92 The EAT's decision in *Osipov* is however unlikely to be the final word on the issue. Although in *Jhuti* Royal Mail drew to the Court of Appeal's attention the judgment in *Osipov* (and both sides then lodged submissions with regard to it) the Court of Appeal declined to embark on an analysis of that judgment because (as Underhill LJ put it in paragraph 82 of his judgment) it would add complication without any corresponding advantage and possibly prejudice the appeal in *Osipov* which had been filed. As noted above, the approach taken in the Court of Appeal by Royal Mail (accepting that s.47B(2) did not bar the claim subject to the pleading point) meant that the Court of Appeal did not have to say whether *Osipov* was correctly decided.

The facts in Osipov

Supp.93 Mr Osipov was employed by IPL, an Australian domiciled oil and gas exploration and production company which was listed on the Australian stock exchange (although trading in its shares were suspended). In June 2014 he was appointed as CEO of IPL. He made what were found to be protected disclosures in relation to failure to conduct a competitive tendering process in relation to exploration operations in the Niger. The tribunal found that he suffered detriments (including being removed from a business trip to Niger), and ultimately was dismissed by reason of his protected disclosures. The ET upheld a claim of automatic unfair dismissal under s.103A, and also detriment claims under s.47B ERA against two directors, Mr Timis and Mr Sage. Mr Timis was a non-executive director and the majority shareholder. The tribunal also found that he was a de facto executive director who regarded himself as entitled to exercise executive authority in relation to the day-to-day running of the company because of his significant investment in the business. Mr Sage was also a non-executive director but, despite his denial, was found by the tribunal to have exercised managerial functions including having signed the term sheet for Mr Osipov in the position of CEO. Mr Timis was found to have subjected Mr Osipov to a detriment, inter alia, by giving an instruction that Mr Osipov be dismissed and, prior to that, removing him from his involvement in the Niger. It was Mr Sage who wrote to Mr Osipov implementing Mr Timis' instructions and he was held thereby also to have subjected Mr Osipov to an unlawful detriment. Those conclusions were upheld by the EAT.

ET decision on s.47B detriments

Supp.94 The employment tribunal's reasons proceeded on the basis that the detriments inflicted by Mr Timis and Mr Sage could not consist of the dismissal itself. Indeed the pleaded detriment relating to dismissal was formulated as follows:

> "Any instructions or recommendations given by the [individual] Respondents which culminated in the Claimant's dismissal on 27 October 2014".

Supp.95 In relation to this, the ET expressly acknowledged (at paragraph 132) that:

> "This can only refer to the instruction to dismiss and not the decision to dismiss itself. … The decision to dismiss was that of Mr Timis who instructed Mr Sage to dismiss Mr Osipov."

Supp.96 Consistently with the approach subsequently envisaged by Underhill LJ in *Jhuti*, the ET therefore drew a distinction between dismissal (which could not be a s.47B detriment for an employee) and an instruction or decision to dismiss, which was regarded as distinct from dismissal and could found a detriment claim. Yet despite this, the detriment claim under this head also succeeded against Mr Sage. That was explained by the EAT by reference to the ET's finding that Mr Sage had agreed with the decision to dismiss, and so was not simply the messenger passing on instructions. That did not explain how Mr Sage's actions fell within the pleaded detriment of instructions or recommendations to dismiss. It was instead the implementation of those instructions, or possibly participating in the decision to dismiss, which constituted the detriment notwithstanding the ET's acceptance that the dismissal itself could not be the basis for a detriment claim.

The EAT's reasoning on s.47B(2)

Supp.97 The reasoning of Simler P in the EAT differed from that of the employment tribunal. Instead of proceeding on the basis that the decision to dismiss itself could not be the grounds for a s.47B detriment claim, she concluded that a worker could bring a claim of detriment against a co-worker or agent based on the fact that the co-worker or agent had effected the dismissal of the worker. It was therefore not necessary to distinguish between the dismissal and the procuring of a dismissal.

Supp.98 In summary Simler P reasoned that:

1. It is appropriate to construe s.47B(2) ERA, so far as possible, to provide protection rather than to deny it, given that the mischief at which it is directed is to provide employees and workers with protection from prohibited acts and deliberate omissions of employers and fellow workers or agents of the employer (para 153).

2. The exclusion provided for by s.47B(2) only covers detriments "amounting to dismissal within Part X" of the ERA. Simler P stated (at para 154) that this meant "detriments amounting to unfair dismissal claims" and therefore referred only to claims by an employee against the employer. She added that the submission that it could cover claims against the individual worker ignored the words in brackets cross-referring to Part X ERA. (As note above, we suggest that this step in the reasoning is highly questionable, but taking a policy orientated approach, might be adapted by focussing on the core element in the reasoning that the function of s.47B(2) is to disapply the detriment functions where an unfair dismissal claim is available.)

3. In Simler P's view this construction put employees in the same position as workers, since workers are able to bring detriment claims based on early termination of their contracts against their employers. (But as noted below, at **Supp.101**, this needs to be qualified in the light of s.49(6) ERA).

4. Simler P said that there was no principled reason for making fellow-workers personally liable for losses caused by detriments short of dismissal, but relieving them from individual liability for the most serious detriments, such as an instruction to dismiss. There was no rational reason for a different approach to that in discrimination claims where fellow workers or agents were not protected from liability for the consequences of the most serious detriments to which they could subject others.

5. The approach of permitting detriment claims by an employee against a co-worker/employer's agent based on the detriment of dismissal would avoid unjust consequences that otherwise might arise in a "tainted information case". In such a case the person who dismisses the employee acts for a potentially fair reason and in good faith but does so on information supplied by another employee (X), and X is influenced by the employee's protected disclosure. On Simler P's reasoning, the

approach adopted in discrimination cases in *Reynolds v CLFIS (UK) Limited* [2015] ICR 2010 (CA) would apply so that even though a s.103A claim could not succeed there would be a claim against X for losses consequential on X's victimising conduct. This would avoid the result that the victimising employee (X) escapes liability because the detriment consists of dismissal (or having liability curtailed by excluding the financial consequences of dismissal). Further, if there could not be a claim against X, the potential claimant employee could be left without a remedy if it was found that, although the protected disclosure was a material influence in the dismissal, it was not the reason or at least the principal reason for it.

6. As Simler P acknowledged, her approach differed from that of the EAT in *Jhuti* where, as noted above, Mitting J commented (at paragraph 28) that the employment tribunal had erred in apparently taking the view that, despite s.47B(2), it could treat the manager's acts of victimisation as giving rise to a claim for Ms Jhuti's losses flowing from dismissal (subject only to proof of causation). However Simler P noted that little weight could be placed on this since (a) Mitting J acknowledged that he had heard no argument on this point and (b) (as we commented in the Main Work at paragraph 8.74) Mitting J's reasoning was flawed by reason of having overlooked s.48(5) ERA. S.48(5) makes clear that in the context of a claim against a worker or agent, references to the employer in ss.48 and 49 ERA include references to that worker or agent. That error led Mitting J to the clearly erroneous view (at paragraph 27 in *Jhuti*) that the only remedy available against a worker or agent was a declaration. Simler P added (at paragraph 162) that it seemed unlikely that the EAT in *Jhuti* would have reached the same conclusion had consideration been given to the effect of the construction adopted by it, which was that workers and agents would be relieved of the consequences of their own detrimental treatment.

Analysis of Simler P's reasoning and observations of Underhill LJ in Jhuti

Supp.99 Simler P's reasoning was therefore heavily policy driven. Similar policy considerations may be viewed as underlying Underhill's observations in *Jhuti* on the possibility of raising a detriment claim by distinguishing between a detriment amounting to dismissal and pre-dismissal detriments (even when they cause dismissal). As Underhill LJ noted (at para 27), whistleblowing claims are unique in the dichotomy between detriment and unfair dismissal claims. Whilst there are other categories of detriment claim contained in Part V of the ERA, it is only in relation to whistleblowing claims that there is the distinction between detriment claims as giving rise to individual co-worker or agency liability and vicarious liability, whereas this is not available unfair dismissal claims. That dichotomy results in a series of anomalies. As Underhill LJ noted in *Jhuti* (at para 20), in addition to the anomalous difference in relation to personal and vicarious liability, for detriment claims it is sufficient that the detriment is a significant influence rather than there being a need to show the principal reason. Reference might also have been made to other anomalies that could be avoided by adopting Simler P's approach or the approach mooted in *Jhuti*. Detriment claims can include one for non-pecuniary loss such as injury to feelings, whereas in unfair dismissal claims the only element of non-

pecuniary loss is the basic award (though there are other remedies – interim relief, reinstatement and re-engagement – that only apply to unfair dismissal claims). In addition, the provisions relating to burden of proof are also more generous in a claim under s.47B/s.48. For an employee who lacks the qualifying service to bring a claim for ordinary unfair dismissal under Part X of the ERA, the burden of proof is on the employee to establish the reason for dismissal: see 9.46 to 9.48 in the Main Work. Under s.48(2) ERA it is for the employer to show the reason (but see **Supp.128-Supp.131** below).

Supp.100 However, whilst the policy considerations adopted by Simler P are persuasive, aspects of the reasoning as to statutory construction are problematic (ie step 2 above). Simler P read s.47B(2) as if it provided that s.47B does not apply where "the detriment in question amounts to **unfair** dismissal (within the meaning of Part X)". She regarded this as being required by the reference to Part X. Indeed she commented (at paragraph 154) that the consequence of contending that s.47B(2) could apply to claims against the worker or agent was to ignore the words in brackets (ie "within the meaning of Part X"). But that is not the case. The cross-reference in s47B(2) to the meaning of *dismissal* in Part X is, in our view, a reference to that part of Part X, s.95(1) ERA, which sets out the circumstances in which an employee is taken as being dismissed by the employer for the purposes of Part X ie (a) termination by the employer, (b) non-renewal of a limited-term contract or (c) constructive dismissal. Whether the dismissal is *fair or unfair* is dealt with separately in other provisions within Part X.

Supp.101 Further, Simler P made no reference to s.49(6) ERA. This provides that on a complaint under s.47B ERA of a detriment consisting of the termination of a worker's contract which is *not* a contract of employment, the compensation must not exceed that which would have been payable on a claim of unfair dismissal if the worker had been an employee and the dismissal was (at least) principally by reason of a protected disclosure and therefore contrary to s.103A. As explained in the Main Work at paragraphs **10.104 to 10.107**, the effect in relation to dismissal claims by workers other than employees is to limit any award for non-pecuniary loss (eg injury to feelings) so that it cannot exceed the amount of the basic award. The reference to compensation payable under s.103A appears to contemplate that the remedy for a dismissal claim brought by an employee would lie under the unfair dismissal provisions rather than in a claim for dismissal as detriment. If it was contemplated that there could be a "dismissal as detriment" claim brought by an employee, then either there would be no need for s.49(6) or, if such a provision was considered necessary, it would equally have extended to "dismissal as detriment" claims by employees against co-workers or agents. Instead, if *Osipov* is correct and claims against a co-worker by an employee can be made in respect of a detriment consisting of dismissal, then there would seem nothing similarly to limit the compensation available in those claims to the total of a putative unfair dismissal award as applies to claims by a worker who is not an employee. Even in a dismissal case an employee, but not other workers, could then claim compensation for injury to feelings or personal injury without his being confined to the amount of the basic award. Indeed in *Osipov* an award of some £16,500 was made in relation to injury to feelings which took into account the dismissal (as well as pre-dismissal detriment): see **Supp.162**. This

asymmetry is a powerful indication that Parliament must be taken to have assumed that in the case of an employee no claim could be made where the detriment consists of dismissal.

Supp.102 If those considerations are viewed it is suggested that it may be going too far to say that even where the alleged detrimental treatment consists of the very act of carrying out a dismissal, that there can be a claim against a worker/agent under s.47B, the question would then arise as to whether the approach mooted by Underhill LJ in ***Jhuti*** is to preferred. As noted above, Underhill LJ identified the key question as being whether s.47B(2) stood in the way of a claim for losses resulting from dismissal but ultimately flowing from a pre-dismissal detriment (which in turn causes the dismissal). Both that approach, and the approach of Simler J in *Osipov*, may be said to elide the distinct concepts of (a) the act or deliberate failure to act and (b) detriment. That is a significant distinction, as has been emphasised in the context of time limits, which run from the date of the act or deliberate failure to act rather than date on which the detriment is suffered: see *Vivian v Bournemouth BC* (UKEAT/ 0254/ 10, 6 May 2011); *Flynn v Warrior Square Recoveries Ltd* [2014] EWCA Civ 68, and 7.210 to 7.215 in the Main Work. Whilst a dismissal can only be carried out by the employer, it may be caused by the act or failure to act of another person, as instanced by the scenario in *Jhuti* where it was said that Mr Widner set up "a paper trail which set her to fail" (though there was no finding that Mr Widmer caused the dismissal, an issue for the remedy hearing). S.47B(2) is framed so as to apply where the detriment consists of dismissal. The detriment which results in an employee being unemployed in this scenario is dismissal, and accordingly so far as concerns those losses, the key detriment is surely the dismissal.

Supp.103 Whereas procuring a dismissal is a distinct act from the dismissal, it remains the case therefore that insofar as the detriment which flows from the procuring is the dismissal this would seem to be covered by s.47B(2). Even if it is possible to identify some other detriment (eg that the steps consisting of procuring the dismissal are themselves detrimental), the losses consequential on dismissal would only flow from the detriment of dismissal and not the preceding procuring or instruction. The scheme of the legislation is to exclude from the detriment provisions such losses which are consequential on the dismissal: see *Melia v Magna Kansei* [2005] EWCA Civ 1547, [2006] IRLR 117. It is apparent that Underhill LJ recognised the difficulties that *Melia* poses although he did not specifically deal with it.

Supp.104 Notwithstanding these substantial difficulties, the policy considerations advanced by Simler P point strongly in favour of a purposive construction of s.47B(2) in favour of a narrow construction of that provision which does not lead to such a large lacuna in protection. Those considerations are further reinforced by the approach to unfair dismissal claims in *Jhuti*. It cannot have been the legislative intention for serious acts of whistleblowing victimisation to go unpunished or without an adequate remedy, merely because they culminate in dismissal. Whilst aspects of the reasoning adopted by Simler P in relation to the approach to construction can be questioned, viewed in the context of the policy considerations, we suggest there was force in the observation that s.47B(2) is best viewed as a demarcation provision which is intended only to bite where a

claim is in respect of a detriment that can be framed as an unfair dismissal claim. Indeed aspects of the Court of Appeal's decision in *Melia* may be regarded as supporting that approach. Giving the leading judgment, Chadwick LJ reasoned (at para 34) that s.47B(2) only excludes detriments that can be compensated under the unfair dismissal regime. It was on that basis that it was construed only to exclude losses consequent on dismissal (being, in a constructive dismissal claim such as was considered in *Melia*, the acceptance of a repudiatory breach). Adopting a purposive construction applying that approach, it may be said that in a case where it is found that the dismissal has been caused or influenced by someone whose acts or motivation cannot be attributed to the employer for the purposes of the unfair dismissal provisions, since the detriment is not capable of being compensated under the unfair dismissal it falls outside the scope of s.47B(2).

Supp.105 Different considerations arise in relation to the approach in *Osipov*. There was no difficulty in that case in attributing to the employer the relevant acts or motivation of the directors, Mr Timis and Mr Sage, for the purposes of the unfair dismissal legislation. Indeed the claim under s.103A succeeded. The issue was therefore not that the loss consequential on dismissal was incapable of being compensated under the unfair dismissal regime, but instead that it was not capable of being recovered from the individual respondents under the unfair dismissal regime. It might be said then that even though the exclusion of a detriment claim for losses that could be claimed against the employer under s.103A ERA has anomalous consequences, it reflects the legislative choice not to provide for individual liability in cases amounting to unfair dismissal. But despite the need to strain the legislative language to do so, there remain compelling reasons for adopting a (highly) purposive approach to construction so as not to exclude a detriment claim. Why should it be that a co-worker who victimises an employee on grounds of a protected disclosure should escape personal liability if, despite their abuse of authority, their acts/motivation can be attributed to the employer? Again, as noted by Simler J there is the anomaly that less serious detriments can lead to individual liability, but the most serious detriments, which cause dismissal, lead to exclusion of personal liability. There is the further anomaly that there would be no difficulty with individual liability if the claim concerned termination of the contract of a non-employee worker. If s.47B(2) can be construed so as not to cover a situation where the loss is not capable of being compensated under s.103A, then it may be seen as a short step for it also to be construed purposively so as not to exclude detriment claims which, being brought against a co-worker or agent, could not be framed against that respondent under s.103A ERA.

Vicarious liability for dismissal? Implications for identification of parties

Supp.106 The reasoning in *Osipov* and the Court of Appeal's observations in *Jhuti* also raise the question of whether a detriment claim based on dismissal can only be brought against the co-worker/agent, or can also be pursued against the employer on the basis of vicarious liability for the co-worker/agent who dismissed (or instructed or procured the dismissal) whether or not the co-worker/agent is also herself or himself made a party to the proceedings. The employment tribunal in *Osipov* proceeded (at paragraph 133) on the basis that there could be vicarious liability for the detriment claims which it upheld, since it concluded that the employer was responsible for all of the detriments found. The issue was not specifically addressed in the EAT's reasoning;

nothing turned on this on the facts of that case given that the claim of unfair dismissal also succeeded.

Supp.107 Since the scheme of the legislation is to impose vicarious liability (subject to the statutory defence) where a detriment claim is available against a co-worker or agent, it might be thought to follow that the employer could equally be liable for the detriment of dismissal, if *Osipov* is correctly decided. Support for that view may be derived from Underhill LJ's reasoning in *Jhuti* in that he appeared to exclude the possibility that a different approach to recoverability of compensation for dismissal via the detriment route would apply in relation to a claim against the employer under 47B(1) ERA or through the vicarious liability route offered by ss.47B(1A) and (1B) ERA. However there was no specific consideration as to the interaction between s.47B(2) ERA and the vicarious liability provisions, and there are some arguments available to the effect that s.47B(2) does lead to a different result when applied to the employer's liability. In particular:

1. As noted above, the reasoning in *Osipov* proceeds on the basis that s.47B(2) only covers conduct which is capable of giving rise to an unfair dismissal claim and for that reason only covers claims against employers. But the vicarious liability provisions proceed by attributing the acts of the worker or agent to the employer: s.47B(2). Where that act consists of the very act of dismissal, it can be said that this is precisely the conduct which on any view must be caught by s.47B(2). A claim for dismissal, at least if brought against the employer, can only be brought under s.103A. Put another way, if s.47B(2) is to be purposively construed only as meaning that claims that can be brought as unfair dismissal claims can only be brought in that way, this would suggest that it should apply in such a case.

2. A more difficult question arises if the detrimental act is said to be something which is distinct from the dismissal itself, such as instructing someone to dismiss or procuring the dismissal. Again, the effect of s.47B(1B) is that this conduct (and no doubt the co-worker's reason for it) is attributed to the employer. But as noted above (**Supp.102-103**), s.47B(2) focuses on whether the detriment in question (rather than the detrimental act or deliberate failure to act) amounts to dismissal. The same issue therefore arises as to how it can be said that a claim against the employer concerning the detriment of dismissal should fall outside s.47B(2).

3. There is a close parallel here with the position in a constructive dismissal claim. The pre-dismissal conduct which amounts to a repudiatory breach may give rise to separate detriments which could give rise to claims under s.47B. But claims for compensation which are consequential on acceptance of the repudiatory breach (ie the constructive dismissal) would have to be brought under s.103A: *Melia v Magna Kansei* [2005] EWCA Civ 1547, [2006] IRLR 117. Equally, just as the acts of supplying tainted information (as in *Jhuti*) which are attributed to the employee under s.47B(1B) may give rise to separate detriments for which a claim can be made if they do not involve loss consequential on dismissal, to the extent that loss is consequential on dismissal the claim must be brought under s.103A. Whilst on

the authority of *Osipov* (if that case is correctly decided) that does not apply to the claim against the worker, it may be argued that it does not seem to follow that the same applies to the claim against the employer where, pursuant to s.47B(1B) ERA, that conduct is attributed to the employer.

Supp.108 These considerations also have some practical implications in relation to how protected disclosure claims are framed and who should be parties to them. Simler P suggested (at para 156) that it is likely to be an unusual case where an employee will wish to pursue a claim and seek a remedy against a fellow worker for a whistleblowing detriment amounting to dismissal rather than pursuing a claim against the employer. We respectfully disagree. There is ample incentive to include a claim against the individual(s) behind the decision to dismiss, on the basis of (a) the lower threshold for causation ("significant influence"), (b) any concern as to solvency of the employer, (c) for workers with less than two years' service, the different burden of proof, (d) the availability of compensation for non-pecuniary loss and (e) in some cases the wish to hold those responsible for acts of victimisation personally liable and (f) it may be that the employer can satisfy the statutory defence, in which case the claim would fail if it had only been brought against the employer. If there may be no vicarious liability for the co-worker who dismisses (or instructs or procures the dismissal) there is a further strong incentive to ensure that the individual workers or agents behind the decision to dismiss are included as parties to the litigation.

Supp.109 These factors, taken together with the short time limit for bringing claims, could lead to a proliferation of parties, as the worker seeks to include all those who it is believed had or may have had a role in the decision to dismiss. That may be regarded as an unfortunate consequence which may itself provide a positive spur for a construction which, notwithstanding the above analysis, does allow for vicarious liability. But in practice, until the position is clarified by further authority, the prudent course may be to include the individual worker/agent as a respondent as well as the employer. Equally that feature highlights the need to keep in mind the potentially different time limits that apply to detriment claims, where time begins to run from the date of the act or deliberate failure to act, rather than the date of detriment taking effect.

Supp.110 Taking a step back, many of these difficulties arise from the unfortunate consequence of the different regimes applicable to unfair dismissal and the detriment provisions, with its associated similarities to the discrimination regime including vicarious and personal liability. Added into the mix there is yet a further level of complexity that now arises in introducing a further different regime in relation to NHS applicants for employment where the discrimination regime applies (see **Supp.174-186** below). In *NHS Manchester v Fecitt and others* [2012] ICR 372 the Court of Appeal recognised the anomalies that were liable to arise from the differing regimes for detriment and unfair dismissal but considered that it was a matter for the legislature to address. The further anomalies highlighted by the decisions in *Osipov* and *Jhuti* perhaps further highlight the need for legislative reform to remove the artificial detriment/dismissal distinction.

Applying *CLFS v Reynolds*: *The Commissioner of Police of the Metropolis v Denby* UKEAT/0314/16/RN, 24 October 2017

Supp.111 Whether applying the approach of the Court of Appeal in *Jhuti*, or the approach in *Osipov*, in practice the effect is to permit detriment claims to be advanced notwithstanding that in substance the losses flow from dismissal (albeit the *Jhuti* approach requires identification of some separate prior detriment which is found to cause the dismissal). As expressly recognised in *Osipov* (at paras 158 and 165), the effect in detriment cases is likely to be similar to that applied in the discrimination context in *Reynolds v CLFIS (UK) Limited* [2015] ICR 2010 (CA) which emphasises the need to found liability on the basis that the person who carries out the detrimental act or deliberate failure to act also has the relevant state of mind to give rise to a discrimination claim. *Denby* is the first appellate level case to consider the difficulties that may arise when an employment tribunal applies the principles laid down by the Court of Appeal in *Reynolds*.

Tainted information/ the CLFIS v Reynolds principle

Supp.112 To recap, in *CLFIS,* Ms Reynolds was employed by CLFIS. She was in her seventies. Her contract was terminated after rumblings of discontent with her performance within management. Mr Gilmour was the dismissing officer. Ms Reynolds' claim that she had been discriminated against on the ground of her age was dismissed by the ET. The ET had said that the decision-maker was Mr Gilmour and no one else, and it acquitted Mr Gilmour of being influenced by Ms Reynolds's age. The EAT remitted the case to the ET, accepting the argument advanced on Ms Reynolds' behalf that, even if the sole decision-maker was Mr Gilmour, his decision might have been shaped and informed by others within CLFS and the ET should have considered that possibility. The Court of Appeal allowed CLFIS' appeal. The ET had focused solely upon Mr Gilmour and *his* reasons for acting as he did, because it had not been suggested on behalf of Ms Reynolds that anyone else discriminated against her. The burden of proof provisions in the Equality Act did not place a blanket obligation on CLFS, as the employer, to prove the absence of discrimination in respect of every act of every employee that had formed part of the chain of events leading to the dismissal. Ms Reynolds had to establish a prima facie case that the dismissal had been because of her age. Whether that case was made out had to be decided by reference to the case that Ms Reynolds had advanced. Since the case she advanced only referred to Mr Gilmour, the ET had not erred in only considering Mr Gilmour's motivation.

Supp.113 As explained by the Court of Appeal in *CLIFIS v Reynolds*, where it is contended that one employee of the respondent had been influenced by another employee into acting in a way detrimental to the claimant, an ET should treat the conduct of the person supplying the information—the 'influencer'— as a separate act from that of the person who acted on the information supplied—the 'influencee'. The alternative—namely a 'composite approach' which sought to bring together the influencee's act with the influencer's motivation—was unacceptable in principle because liability could only attach to an employer where an individual employee, or agent for whose act the employer

was responsible, had done an act which satisfied the definition of discrimination. The individual employee who did the act complained of must him or herself have been motivated by the protected characteristic. It would be quite unjust for the person allegedly influenced—Mr Gilmour in this case—to be liable to a claimant where he personally was innocent of any discriminatory motivation.

Supp.114 Underhill LJ said that the solution in such cases was to ensure that the claim specifically raised the conduct of or act of the influencer and cited that influence either as the detriment or as contributing to the risk of a dismissal or detriment. This would ensure that the tribunal would then evaluate that specific claim and the extent to which the influencer caused or contributed to the risk of dismissal or detriment on a loss of a chance basis—that is to say to what extent the influencer's influence contributed to the risk to the claimant of dismissal or a detriment.

Supp.115 Underhill LJ acknowledged some practical difficulties arising from this approach. Such an allegation needed to be put clearly and notice of it to be given so that the respondent could call the necessary evidence. However, the fact that the apparent decision-maker had been influenced by another might not become clear to the claimant until well into the proceedings, or even at trial. Underhill LJ did, however, consider that these practical difficulties could be surmounted, if need be by an amendment being sought at the appropriate time.

Application of CLFIS to whistleblowing cases

Supp.116 As set out above, the Court of Appeal has now decided in *Jhuti* that the *CLFIS v Reynolds* approach does *not* apply to a claim of unfair dismissal contrary to s.103A ERA. Conversely as recognised in *Osipov*, the approach to be applied in detriment cases *does* involve essentially the same exercise as in *CLFIS v Reynolds* of attaching liability to the co-worker (acting in the course of employment) or agent (acting with the employer's authority) who both did the detrimental act or deliberate failure to act and did so on grounds of the protected disclosure. That is reinforced by the observations of Underhill LJ in *Jhuti* as to the scope to read across from the discrimination legislation in relation to those parts of the whistleblowing legislation which use similar terminology. A similar underlying principle applies: it would be unjust for an innocent influencee to be liable for whistleblowing detriment; instead the claim should lie against the influencer and, of course, his or her employer subject to acting in the course of employment and subject to the reasonable steps defences.

Applying CLFIS where the evidence of manipulation or influence only emerges during the hearing

Supp.117 The implications of and practical difficulties that can arise from an application of the principles laid down in *CLFIS* were explored by the EAT in the sex discrimination case of *Denby.* Chief Inspector Denby was in charge of one of the five arms of the Territorial Support Group, "TSG1", based at Paddington. His female comparator, Chief Inspector (CI) Edwards, was in charge of TSG3, in Ilford. Both

reported up the same chain of command and had identical roles. Similar complaints were made against both CI Denby and CI Edwards, that overtime had been booked irregularly by officers at their respective TSGs. CI Denby's complaint compared the more rigorous action taken against himself with that taken against CI Edwards. The ET upheld his complaint. During the hearing and against the opposition of the respondent, the MPS, the ET allowed CI Denby to add claims (which went on to succeed) that an officer in his chain of command had made or been party to two decisions adverse to him: CI Denby's pleaded case had not alleged that that officer was responsible for those decisions. The ET noted that the added claims had arisen from the oral evidence of the officer concerned owning up that the two decisions had been his. It decided that it would be "wholly inequitable not to allow an amendment to reflect the case which the respondents were themselves putting forward".

Supp.118 In the EAT the MPS contended that the ET had misapplied *CLFIS* because the amended case that succeeded had not been put (or adequately put) in the cross examination of the relevant witnesses. In considering MPS' appeal the EAT referred to *Browne v Dunn* [1893] 6 R 67 HL which forms the principal source for the proposition stated in the 18th edition of *Phipson on Evidence*, at 12-12, that

> "[i]n general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point".

However, as the EAT noted, Phipson comments that "the rule is not an inflexible one" and that failure to put a point to the witness "may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him". *Browne* had been the subject of an exegesis in *North Cumbria University Hospitals NHS Trust v Dr S M Saiger*, UKEAT/0276/15/LA, 17 July 2017, (at paragraph 80ff) where HHJ Hand QC was "inclined to treat the rule as one of evidence and practice rather than law". In *Williams v Solicitors Regulation Authority* [2017] EWHC 1478 (not an employment case) Carr J had noted that in modern litigation the parties have more advance written material than was formerly the case and the likelihood of the springing of an unfair surprise at trial is much reduced by the expansion of pleadings, written witness statements and lists of issues.

Supp.119 The EAT commented that the MPS and the ET had more materials stating the nature of CI Denby's case than the defence and the jury would have had in the era in which *Browne* was decided. Finally the EAT referred to *Chen v Ng (British Virgin Islands)* [2017] UKPC 27 (again, not an employment case) in which Lords Neuberger and Mance said at paragraphs 54-55:

> "54. … It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.

55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

Supp.120 Summarising the case law, the EAT in *Denby* said that the issue was whether the outcome of the trial was fair in the light of

- the parties' pleaded cases
- the written evidence
- the list of issues (as agreed and then amended) and
- the conduct and course of the trial including the questioning of witnesses, and
- the matters set out in paragraph 55 in *Chen v Ng*.

In the hearing of a case such as that brought by CI Denby the context also included s 136(2) and (3) of the Equality Act (the burden of proof provisions), pursuant to which it was for the MPS to advance a positive explanation of its conduct unless it was willing to risk not doing so and therefore leave CI Denby with the option of relying on s.136(2) to the extent that the conduct remained unexplained.

Supp.121 The EAT gave detailed consideration to the way the case had originally been pleaded, the MPS's response, the matters raised in CI Denby's detailed witness statement, the witness statements served on behalf of the MPS and the cross examination of MPS' witnesses. The EAT stressed the context of the expectation that the MPS would be likely to proffer a full and frank explanation of CI Denby's treatment and the ET's conclusion that the MPS had not in fact proffered that explanation. That lack of transparency was "consistent with a desire to disguise the influence of senior decision makers …" All in all CI Denby's case had been adequately put.

Supp.122 The EAT said that the *CLFIS* principle needed "careful handling". It agreed with the observation of CI Denby's counsel that

> "the *CLFIS* decision should not become a means of escaping liability by deliberately opaque decision making which masks the identity of the true discriminator. Where a claimant is for good reason unable readily to identify which individual is responsible internally within the employing organisation for an act of discrimination, the claimant may, as this case demonstrates, sometimes be permitted to amend during the hearing once the correct person is, or persons are, identified from the evidence."

A tribunal should not allow an employer to hide behind its more junior officers taking responsibility for decisions dictated to them by invisible senior officers.

Conclusions

Supp.123 The burden of proof provisions in the Equality Act, which played an important part of the context for the EAT's approach to *MPS v Denby*, are not reproduced in the relevant provisions of the ERA relating to detriment inflicted on the grounds of the making of protected disclosures. But s.48 (2) ERA provides that on a complaint that such a detriment has been inflected it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In practical terms that will involve showing which employee or employees of the employer did the act complained of. The context in which the *CLFIS* "problem" will be approached by ETs in detriment claims is therefore very similar to that of discrimination claims.

Supp.124 More generally, and as noted above, in *Reynolds* itself Underhill LJ had recognised the practical difficulties that the conclusions of the Court of Appeal might cause. Whilst employment tribunals will be reluctant to allow claimants to conduct such litigation on a scattergun basis and will expect a positive case to be advanced where possible as to which individual or individuals were party to the acts of which complained is made, they will also expect respondents to be forthcoming by way of pleading, disclosure and witness statements as to:

- how and when the relevant decisions which are complained of were reached and
- which individuals or individuals took those decisions/contributed to them.

Supp.125 If the situation remains opaque at trial, then arguments that the case was not properly put to the employer's witnesses at a stage before the position was made clear, are likely to fall on stony ground. However those acting for claimants will be expected to formulate and articulate a case – however late in the day the material for that case emerges – so that there is clarity as to what the ET is being asked to decide.

(4) Failure in the investigation of the discloser's concerns
Paragraph 7.160

Supp.126 *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN, 22 March 2017 is not a whistleblowing case but it contains an interesting and useful analysis of the extent to which it is permissible to shift the burden of proof in a discrimination case because of findings that the respondent had failed properly to investigate the claimant's grievance. That provides a parallel to a case where the whistleblower complains that his or her disclosure has not been investigated properly. The provision for the statutory reversal of the burden of proof under the s.136 of the Equality Act 2010 of course has no similarly worded equivalent in a claim under the ERA: the operation of the burden of proof provisions and the role of inference drawing is considered in the Main Work at paragraphs 7.191 to 7.209. In the context of a claim under the Equality Act it is an error of law for a tribunal to find less favourable treatment because of a protected characteristic where there is no evidence or material from which it can properly draw such an inference: *Effa v Alexandra Health Care NHS Trust* (unreported CA, 5 Nov 1999 Mummery LJ at page 7 citing *North West Thames RHA v Noone* [1988] ICR 813 at 824.):

Supp.127 It was contended on behalf of the claimant in *Chief Constable of Kent Constabulary v Bowler* that the totality of the failings by the officer who conducted the investigation and the sheer extent of the incompetency shown in the grievance investigation by that officer justified the shifting of the burden of proof. That contention had succeeded in the ET. But Simler P disagreed with it. There was no obvious link between having a lackadaisical approach and having a stereotypical view about race discrimination complainants. The tribunal provided no explanation for why a lackadaisical approach indicated the holding of a stereotypical view. Whilst there was no doubt that unlawful direct discrimination can occur when assumptions are made that an individual has characteristics associated with a group to which he belongs, tribunals were not entitled to rely on unproven assertions of stereotyping. There had to be evidence from which a tribunal can properly infer that a stereotypical assumption was made and that the assumption operated on the mind of the putative discriminator consciously or subconsciously when treating a complainant in the way alleged. The tribunal had not rejected the officer's explanations for failings in the grievance process, such as his failure to correct details, as dishonestly given, but had regarded them, in general, as unreasonable. It had found that the officer was out of his depth and ill-equipped to deal with the claimant's grievance which were both possible explanations for his incompetent handling of the grievance. The tribunal made a leap from a finding that the officer handled the grievance process incompetently and had a lackadaisical attitude (both unreasonable but not in themselves less favourable treatment) to a conclusion that this by itself (without any other apparent basis for it) indicated a stereotypical view of race complainants, and did so based on unproven and unsupported assumption. In the absence of adequate material from which this inference could be drawn the tribunal was not entitled to conclude that a prima facie case of less favourable treatment on race grounds had been established by the claimant.

(7) The burden of proof in relation to the 'reason why' question (paragraphs 7.191 to 201 of the Main Work)

Supp.128 See now *International Petroleum Ltd v Osipov* [2017] UKEAT/0229/16/DA, 19 July 2017 considered at **Supp.90-Supp.116** above. Simler P said this (at paragraph 115):

> "Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:
>
> (a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
>
> (b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see *London Borough of Harrow v. Knight* at paragraph 20.
>
> (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

Supp.129 The proposition in sub-paragraph (a) is controversial. S.48(2) states that 'on [a complaint of victimisation to a tribunal by a worker] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.' The view expressed by the Court of Appeal in *Dahou v Serco Limited* [2017] IRLR 81 (CA) indicated that,

rather than the burden of proof being on the claimant, there was only an initial evidential burden to adduce some evidence to show a prima facie case or at least issues requiring explanation. There would then be a need for the employer to show the detriment was not on the ground of a protected disclosure. On that view, the effect would be closely similar to that applied under the approach in *Kuzel v Roche Products Ltd* [2008] ICR 799 (CA) in dismissal cases.

Supp.130 The approach in *Osipov*, by contrast, was that the burden throughout rests on the worker to establish the reason for the detriment. On this view s.48(2) ERA is explained on the basis that it applies only an evidential burden. That approach explains the view, originally expressed in *Harrow v Knight*, that the effect of failure by the employer (or a respondent worker/agent) to show the reason for the treatment, is that an adverse inference may be drawn, but it does not necessarily follow that the claim would succeed. The thrust of the line of recent cases referred to at paragraphs 7.192 to 7.201 of the Main Work (*Ibekwe, Phoenix House Limited* and *Dahou*) is to emphasise that a tribunal must not abstain from grappling with the evidence and reaching positive findings of fact in relation to the "reason why" the worker has been subjected to a detriment. But significantly and controversially, on the view expressed by Simler P, s.48(2) ERA would not act as a tie breaker of last resort in favour of the claimant.

Supp.131 As against this, it can be said that this approach creates a further and regrettable difference in approach when compared to that applicable to unfair dismissal claims. Indeed Simler P expressly referred to an analogy with the approach set out in *Kuzel* in relation unfair dismissal cases where the employee has sufficient qualifying service for an ordinary unfair dismissal claim. But in those cases the burden of proof is indeed firmly on the employer. The employer bears the burden of showing that the dismissal was not because of the protected disclosure, subject only to the claimant employee producing some evidence to support a case that the protected disclosure was the reason: *Marshall v Game Retail Ltd* UKEAT/0276/13/DA, February 13, 2015. In that case (albeit applying the *Kuzel* approach in the context of TUPE dismissals), the EAT acknowledged that it would be rare for cases to be determined on the basis of the burden of proof. But it noted that the employment judge had done so here and had wrongly imposed a burden on the claimant employee to produce evidence establishing on a balance of probabilities that dismissal was by reason of the transfer or a reason connected to the transfer. On this basis the burden of proof could ultimately be a tie-break factor in an unfair dismissal case. Viewing s.48(2) ERA in that light, we suggest that it is not appropriate to apply a different approach in detriment cases by placing the burden of proof on the claimant employee or worker.

(8) Drawing inferences
Paragraph 7.208
Supp.132 In relation to the extent to which unreasonable behaviour might give rise to adverse inferences see *Chief Constable of Kent Constabulary v Bowler* above (in the context of the statutory reversal of the burden of proof under the Equality Act).

Chapter 8

Paragraphs 8.48 to 8.50: Agency relationship

Supp.133 The decision *Ministry of Defence v Kemeh* [2014] ICR 625 was considered and applied in *International Petroleum Ltd v Osipov* [2017] UKEAT/0229/16/DA, 19 July 2017. As summarised above (**Supp.93-96**), the claim was upheld against the employer (IPL) and two non-executive directors, Mr Timis (who was also the majority shareholder and also found to be a de facto executive director) and Mr Sage (who was also found in fact to have carried out executive activities). However at first instance the claim against two other individual respondents, Dr Lake and Mr Matveev, was dismissed. Mr Matveev provided consultancy and advisory services in West Africa to companies owned by Mr Timis pursuant to a consultancy agreement to do so in relation to IPL. Dr Lake, a geologist with experience in the oil and gas sector, was the CEO of another company, APCL. Prior to 31 July 2014 he had assisted IPL as a favour to Mr Timis and because IPL owed money to APCL. After 31 July 2014 APCL provided services to IPL under an Advisory Agreement.

Supp.134 In the EAT (at paragraph 179) Simler P summarised the effect of the decision in *Kemeh* in the following terms:

> "(a) whatever the precise scope of the legal concept of agency, and whatever difficulties there might be of applying it in marginal cases "…it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents." (paragraph 40).
>
> (b) It would be unusual for a person who was the employee of one company to be an agent of another company. There would "need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed" (paragraph 43).
>
> (c) Whatever concept of agency was adopted, the putative agent needed to be acting on behalf of the putative principal with the authority of the putative principal in relation to independent third parties (paragraphs 39 to 44)."

Supp.135 Simler P also noted that although the Court of Appeal in *Kemeh* considered the EAT's approach to the concept of agency in *Yearwood*, it had not decided whether it was correctly decided (and nor did she consider it was necessary to do so). Simler P did not spell out which aspect of the decision in *Yearwood* had been left open. In fact to the extent that the decision in *Kemeh* left open any issues as to the correctness of the decision in *Yearwood*, these were very narrow.

Supp.136 The leading judgment in *Kemeh* was given by Elias LJ. Lewison LJ agreed with that judgment and added some further comments. Kitchin LJ agreed with both judgments. As noted in *Kemeh* (at paragraph 178) the decision in *Yearwood* was to the effect that the references to agency in the discrimination legislation referred to the common law concept of agency rather than having any different statutory meaning. Elias LJ concluded (at paragraph 46) that whatever the precise scope of the concept of agency used in s.32 of the Equality Act 2010 "it must at least reflect the essence of the legal

concept". He noted (at paragraph 37) that s.32(2) (like s.47B ERA) uses terms which the law employs when defining the scope of common law agency and that there was no consistently understood broader meaning which Parliament can reasonably be taken to have intended. Lewison LJ's judgment was to like effect. He expressly rejected the argument that developments in the common law of vicarious liability could bear on the correction interpretation of s.32 EqA 2010. He stated that in referring to established legal concepts, Parliament must be taken to have intended that those legal concepts would be interpreted in accordance with ordinary legal parlance (paras 69 to 70). He did note that the EAT in *Yearwood* was not correct in saying that it was a feature of common law agency that when an agent acts on behalf of a disclosed principal the agent is not liable to a third party and nor could the third party sue the agent on it. That could, he said, only be correct if referring to liability in contract rather than tort. But in Lewison LJ's view this only strengthened the argument that s.32(2) EqA 2010 used terminology in the same way as it would be understood in the common law of agency.

Supp.137 As noted in the Main Work (at paragraph 8.49) Elias LJ identified one respect in which the decision in *Yearwood* misstated the common law test. He noted that the EAT appeared to consider that it was an essential part of the test that the agent must have power to affect the principal's legal relations with a third party (ie to enter into a contract on their behalf), whereas there could be an agency relationship if that feature was missing. Elias LJ noted that in *Yearwood* the alternative formulation put forward was that agency should have an "everyday meaning" of "a person who acts on behalf of another person with their authority" (see *Kemeh* at para 31). However he added that once it was recognised that authority to affect relations with a third party was not a necessary feature of an agency relationship, he doubted whether there was any material difference between the two alternative formulations argued in *Yearwood*.

Supp.138 Applying the guidance in *Kemeh*, the EAT in *Osipov* concluded that there had been no error of law in the conclusion reached by the tribunal that Mr Lake was not an agent, and nor was he a worker. As to worker status there was no express or implied direct contractual relationship between Dr Lake and IPL. The work he undertook was explained by his position as CEO of APCL. His desire for APCL to recover the money owed to it by IPL provided a clear basis for the work he undertook going beyond the scope of the Advisory Agreement. For the same reasons there was no basis for finding that he acted as an agent for IPL. In effect this applied the approach in *Kemeh* that cogent evidence would be needed to show that duties carried out as an employee of one employer were also being performed as agent of another. Far from there being such cogent evidence here, Dr Lake's actions were explicable without need to find an agency relationship with IPL.

Supp.139 So far as concerned Mr Matveev the EAT concluded that there was no basis for finding that he was in an agency relationship with IPL. Simler P noted (at paragraph 186) that the employment tribunal found expressly that he was not authorised to execute agreements or transactions with third parties in the absence of a specific power of attorney authorising him to do so. As to the latter element, as noted above, in *Kemeh* Elias LJ noted that the requirement to enter into contracts on behalf of the employer was

not a necessary element of an agency relationship (as subsequently reiterated in *Unite the Union v Nailard* [2017] ICR 121 at para 46). However here not only was there no authority to bind IPL contractually but more generally, as Simler P also noted (paragraph 186), there was no finding or evidence that he was authorised to act on its behalf in relation to its dealings with third parties. Nor had any case been advanced at first instance that Mr Matveev was an agent of IPL. However the issue of whether he was a worker was remitted to the tribunal as its conclusion on that issue was not adequately reasoned and did not address the considerations relied upon by Mr Osipov as pointing to worker status.

Chapter 9
Paragraph 9.11
Supp.140 *Kuznetsov v The Royal Bank of Scotland Plc* [2017] EWCA Civ 43 (31 January 2017) is now reported at [2017] IRLR 350.

Paragraphs 9.09 to 9.11 (amendment)
Supp.141 In *Gillett v Bridge 86 Limited* UKEAT/005/17/DM, 6 June 2017, an appeal was allowed against refusal to allow amendment to add an (in-time) whistleblowing unfair dismissal claim to a claim of unfair dismissal by reason of disability and disability discrimination. Although the claim was not mere re-labelling, given that the claim was in time the balance of prejudice was clearly in favour of permitting the amendment given that the employer would have been in the same position if there had instead been a new claim presented. It was difficult to conceive of a case where a pessimistic view of the merits falling short of no reasonable prospect of success could provide support for refusal of an amendment application made in time.

Paragraphs 7.86 to 7.156 and 9.19
Supp.142 In paragraphs 7.86 to 7.156 of the text, we considered issues that may arise where an employer seeks to contend that detrimental action was taken by reason of something which is related to a disclosure but is said to be separable from it. As we noted (at para 7.156), conceptually the greatest difficulty arises where the distinction which is sought to be drawn is based on something to do with the disclosure itself, such as the manner of the disclosure or that it is alleged to involve a breach of confidentiality. A closely related argument was addressed in *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401 [2017] IRLR 748 (23 May 2017), where the Court rejected an argument that a dismissal could be said to be not due to protected disclosures but instead due to a genuine (but incorrect) belief that the dismissals were not made in good faith.[4]

Supp.143 Dr Beatt, a consultant cardiologist, had been employed by Croydon University Hospital working in the 'Cath Lab'. On 9 June 2011 Sister Jones, a senior nurse in the cardiology department, was called to a meeting regarding allegations she had been rude and abusive towards colleagues. Dr Beatt attended with Sister Jones, but during a break was called to take over a medical procedure. When the meeting resumed in Dr

[4] Permission to appeal has now been refused by the Supreme Court.

Beatt's absence, Sister Jones was suspended. Complications developed in the procedure being conducted by Dr Beatt and the patient, "GS", died. Dr Beatt's strongly-held view (which he expressed both internally and, latterly, externally) was that it was irresponsible of the Trust to have suspended Sister Jones in the middle of a working day when she might be expected to have had clinical responsibilities. The Coroner expressed the view that the absence of Sister Jones might have contributed to GS's death. Dr Beatt was subsequently dismissed by the Trust (the charges are referred to below but they strongly referenced Dr Beatt's view as to the circumstances surrounding GS's death).

Supp.144 Dr Beatt's claim for automatically unfair dismissal contrary to s.103A ERA was upheld by the ET, but the Trust successfully appealed to the EAT. HHJ Peter Clark held (paragraph 9.45) that the ET's decision was not properly reasoned because there was no analysis leading to the conclusion that the evidence of the dismissing officer (Mr Parker) and the chair of the appeal panel (Mr Goulston), was false and a deliberate attempt to mislead the Employment Tribunal as to the true reason for dismissal. Judge Clark said that "*separately*" he could:

> "…discern no clear reasoning leading to the expressed conclusion that Mr Goulston and his panel members determined the appeal on the basis of the protected disclosures found by the Employment Tribunal, as opposed to the conduct grounds put forward."

Supp.145 The EAT appears to have concluded that the ET had in effect misapplied *Kuzel*: it had concluded the dismissal was unfair, if it was for conduct related to the disclosure as opposed to the disclosure being the reason for the conduct. The EAT remitted the claim to a fresh tribunal. Dr Beatt appealed to the Court of Appeal. His appeal was successful and the decision of the ET was restored.

Supp.146 In the Court of Appeal Underhill LJ (with whom King LJ and Sir Terence Etherton agreed) noted (paragraph 48) that the ET had declined to make any distinction of the kind discussed in *Panayiotou* between the fact of the disclosures and the manner in which they were made. There was no challenge to that aspect of their decision, nor was there any challenge to the ET's conclusions that:

- the disclosures on which Dr Beatt relied were qualifying disclosures;
- they were made in good faith and (as regards the last, to which the post June 30 2013 law applied) in the public interest;
- they were accordingly protected disclosures.

Supp.147 Underhill LJ observed that therefore the only question was whether the ET was right, or in any event entitled, to find that the protected disclosures was the principal reason why Dr Beatt was dismissed.

Supp.148 Having rehearsed the provisions of the ERA which protect whistleblowers , Underhill LJ referred to the statement by Cairns LJ in *Abernethy v Mott Hay & Anderson* [1974] ICR 323, at p. 330 B-C but noted that, as he himself had observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H) (a case on the reasons for dismissal in the context of a TUPE transfer):

> "….the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so (see also *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658, at para. 41)."

Supp.149 For Dr Beatt it was submitted that that question as to the reason for dismissal was answered unequivocally by the terms of the dismissal letter itself. Of the six charges which were found proved[5], four consisted explicitly of the making of the disclosures which the ET had held to be protected.

- that Dr Beatt made "various unsubstantiated and unproven allegations of an unsafe service within the interventional cardiology service at Croydon Health Services NHS Trust".

- that he "made unsubstantiated and unproven allegations of an unsafe service and unsafe staffing levels within the interventional cardiology service" in his initial report to the Coroner.

- that he made the same "unsubstantiated and unproven allegations" to Dr Fernandes (a GP from a local commissioning group).

- that he made "persistent claims that the Cath Lab is unsafe due to [Ms Riddle's] (Service Manager for Cardiology) presence/management".

Supp.150 It was therefore submitted on behalf of Dr Beatt that the Trust, through the letter of dismissal, was straightforwardly saying "we are dismissing you because you made these disclosures". Underhill LJ said that that submission was entirely consonant with the reasoning of the ET. Stating that Dr Beatt was being dismissed for making the disclosures did not mean that the Trust was automatically rendering itself liable for unfair dismissal. But the substance of the letter was that the disclosures were not protected (principally, though not only, because they were made in pursuit of personal antagonism against Ms Riddle and others and so not in good faith). The consequence of that was that if the Trust lost on that issue (as it did) it was condemned 'out of its own mouth' on the "reason" issue. For that reason Dr Beatt's case was different from the kind of whistleblowing case where a dismissal is ostensibly for a legitimate reason but it is said by the whistleblower that that is not the true reason. Accordingly the problem about the burden of proof considered in *Kuzel* and other such cases (application of which had led the EAT to remit the case) did not arise. Whilst the ET appeared not to have fully appreciated this point and had taken a long way round to reach its conclusion, that had not prevented it from eventually asking and answering the right question. Underhill LJ accepted that in the circumstances of Dr Beatt's case it was not very useful to deal sequentially with the issues of whether the Trust had shown that it had dismissed the

[5] There were two others but one was regarded as being inextricably entwined with the making of the disclosures and the other was not at the core of the case as to why Dr Beatt had been dismissed.

Appellant for misconduct and whether it had shown that he was dismissed for making protected disclosures because those issues overlapped to too great an extent. Whilst the ET had wished to follow what it understood to be the course mapped by *Kuzel*, sometimes a straightforward application of the words of the statute was all that is needed. But the ET got to the right question in the end and answered it explicitly.

Supp.151 On behalf of the Trust it was contended that the "*Abernethy* approach" (of finding the reason for the dismissal in the mind of the dismissing officer) applied. They argued that applying this approach the decisive issue was not whether the ET found the disclosures to be protected, but whether the dismissing officer (Mr Parker) believed that they were "or, to put the same thing another way, whether they would have been protected if the facts were as he believed them to be". They relied on the paradigm case of a dismissal for misconduct falling for consideration under s.98. If an employer 'believed' that an employee has stolen from the till, the "reason" for the consequent dismissal was misconduct, even if it was subsequently proved that the theft was carried out by someone else. The only issue at the "reasons" stage of the enquiry was whether the employer's belief is genuine (a belief held that was unreasonable, would fail at the second stage under s.98). The Trust argued that it made no difference that the particular reason in play in Dr Beatt's case was the making of a protected disclosure, arguing that s.103A had been incorporated into Part X of the 1996 Act and therefore must be interpreted in conformity with the general principles of unfair dismissal law. It had been the Trust's case throughout, and his own evidence, that Mr Parker genuinely believed that Dr Beatt made the disclosures in question in pursuit of his personal antagonism against (primarily) Ms Riddle and with a view to securing the reinstatement of Sister Jones; in which case the disclosures would plainly have been made in bad faith and would not be protected. It was argued that the question before the Tribunal was whether that was indeed Mr Parker's belief. The Tribunal had made no finding about that, or in any event none that was sustainable.

Supp.152 Underhill LJ said that the approach contended for by Dr Beatt was "plainly right" and that advanced on behalf of the Trust "plainly wrong". In the context of s.103A it was necessary 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. The first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. However, the second question was of a different character and the beliefs of the decision-taker were irrelevant to it. Parliament had enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. 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. If the Trust's contention was correct, the only question that could ever arise (at

least in a dismissal case) would be whether the employer *believed* that they were satisfied. In the view of Underhill LJ (at para 80):

> "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 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."

Supp.153 That approach did not involve any inconsistency with the general approach to establishing the reason for a dismissal adopted in cases under s.98. Whilst a "subjective" approach was necessary to decide whether the reason for dismissal related to capability or conduct under heads (a) and (b) of s.98(2), that did not mean that the same approach was required to any question that might arise in the context of other potential reasons for dismissal. Underhill LJ pointed out that in the context of s.98 itself, s.98(2)(d) covered the case where the employee's continued employment would be in breach of a statutory requirement. Case law (*Bouchaala v Trust House Forte Hotels Ltd* [1980] ICR 721, per Waterhouse J at p. 725 B-H) established that in such a case the question is not whether the employer believed that that would be the case, but whether it was in fact so.

Supp.154 As to the EAT's decision, Underhill LJ accepted that Dr Beatt had accused Mr Parker and Mr Goulston of consciously participating in a sham which would indeed necessarily mean that their evidence had been dishonest and the ET had made a finding to this effect. However the Trust's liability did not depend on that being established. On the contrary the Trust's dismissing and appeal officers might perfectly honestly (or indeed reasonably) have believed that Dr Beatt's disclosures had been made in bad faith but none of that mattered if the ET, as it did, disagreed with the assessment of the Trust's decision-makers and found that the disclosures were in fact made in good faith and were protected.

Supp.155 *Beatt* makes clear that the employer's subjective belief that a disclosure is not protected is immaterial. Rather it is the Tribunal's conclusion as to whether those circumstances were present that is conclusive. In all the effect of the decision, we suggest, is to limit the type of distinction that can permissibly be drawn between the disclosure itself and something that may permissibly be regarded as distinct. It is not possible for an employer to assert that a dismissal was not by reason of the protected disclosure itself but instead by reason of the belief that in some respect the disclosure was not protected; whether that be that the worker did not hold the requisite reasonable belief

(either that the disclosure tended to show a relevant failure or was made in the public interest) or that there was no disclosure of information or the absent of any element required for a qualifying disclosure to be protected. Those issues fall to be determined at the stage of determining whether there was a protected disclosure at all. That is not, we suggest, affected by the fact there was no appeal against the decision that a distinction could not on the facts be drawn between the disclosure and the manner of the disclosure. Any such distinction must be based on something more than simply an incorrect belief that some element of a protected disclosure was absent. That approach was firmly underpinned by policy considerations. As Underhill LJ explained (at para 94):

> "… it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the Appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where *Panayiotou* is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made)."

Supp.156 However it remains open to an employer, depending on the facts, to identify some separable factor other than an incorrect belief that some element required for a protected disclosure was missing. Notably there was no suggestion that Dr Beatt had to be dismissed because his disclosures had led to the workplace becoming dysfunctional as in *NHS Manchester v Fecitt and others* [2012] ICR 372 (CA) (see paragraph 7.100 of the text). Nor was it contended that the Trust had had to deal with a relentless campaigner who would never accept any answer save that which he sought and had become unmanageable as in *Panayiotou* (the case which was specifically mentioned by Underhill LJ and is considered in detail at paragraphs 7.148 of the text). In those circumstances it *may* be possible to argue that the employment relationship cannot continue (though see the *Woodhouse* case to which we also refer).

Supp.157 What if the employer genuinely does not appreciate that the worker has made a disclosure of information at all? Two separate issues may need to be distinguished. If the employer is aware of what was said or written by the worker, but does not believe it amounts to a disclosure of information, it is clear on the basis of *Beatt* that this will provide no answer to the claim. A different question may arise as to whether the employer can be said to have been acting by reason of a protected disclosure if not aware of part of what was said or written. We suggest that it may still be possible to argue that, as a result of the limits of what the employer was aware had been said or written, it could not be said to have acted by reason of a protected disclosure.

Paragraph 9.43

Supp.158 As noted above, in *Beatt* the Court of Appeal considered that there had been no need to apply the *Kuzel* approach. However that was in a context where it was clear from the respondent's own reasons for dismissal, that the dismissal was by reason of the disclosure and the real issue was as to whether the disclosures were protected disclosures. The position would be otherwise where the issue is whether the disclosure is the reason or principal reason for dismissal. It would be for the employer to show that the disclosure was not the reason for the dismissal.

Chapter 10: Remedies in Dismissal and Detriment Claims
Paragraph 10.23
Supp.159 See now *Small v The Shrewsbury and Telford NHS Trust* [2017] EWCA Civ 882, where an appeal was allowed and the case was remitted to the employment tribunal to consider the issue of continuing loss after the claimant's employment would have ended with the respondent. The claim was brought by way of a detriment claim under s.47B ERA for termination of the contract of a (non-employee) worker. The claimant's contract terminated on 23 July 2012 and the employment tribunal found that he would in any event not have been retained beyond 14 November 2013. The ET awarded compensation up to that date but not beyond. However the ET had made a finding that in his field of work the claimant was dependent on a reference from his last employer (which it had not supplied) and that the dismissal appeared to have been career ending for the claimant. He had applied for over 600 suitable positions without success, and his evidence was to the effect that interviewers appeared to be uncomfortable when he explained the reason for his dismissal.

Supp.160 The Court of Appeal accepted that given the evidence advanced, and the tribunal's finding that it was career ending, even though no claim based on ongoing damage to employment prospects was argued before the ET (where the claimant was unrepresented), it ought of its own initiative to have dealt with the "*Chagger* point" (referring to the decision in *Chagger v Abbey National plc* [2010] ICR 37). As Underhill LJ explained (at paragraph 9), *Chagger* established that the period which the employee would have worked for the respondent employer but for the dismissal does not represent an automatic cut-off in assessing compensation. A claimant can still recover for the consequences of any disadvantage suffered on the labour market not only by reason of having been dismissed by the previous employer but also of having brought proceedings against that employer. The principle is of particular significance in the context of protected disclosure dismissals, given the potential stigmatising effect of such dismissals.

Paragraph 10.26
Supp.161 See also *Beatt*. For more detail see the updated notes to Chapter 9 above. The ET held that there should be no reduction to Dr Beatt's compensatory award on the basis either of *Polkey* or of any contributory fault on his part. An appeal against these findings failed on the basis that Dr Beatt was found not to have acted culpably and that, on a broad brush assessment, Dr Beatt's conduct could not have led to his fair dismissal. Of more general interest was the submission on behalf of Dr Beatt in the Court of Appeal that the ET would not in any event be entitled as a matter of law to make a finding of contributory fault in a case under s.103A. Dr Beatt's Counsel referred to s.123(6A) as

permitting a tribunal to reduce the award by no more than 25% where there was a finding of bad faith on the part of the successful claimant (see paragraphs 10.141 of the main text). It was submitted that the existence of a right to reduce compensation under s.123 (6) in a whistleblower case would be inconsistent with that provision. Underhill LJ said that he could see no such inconsistency (and we agree), though he declined to express a final view since s.123 (6A) was not in force at the material time. He also noted that the EAT had held that a reduction for contributory fault could be made in *Audere Medical Services Ltd v Sanderson* [2013] UKEAT/0409/12 (as referred to in the main text).

Paragraphs 10.42 to 10.45 and 10.56

Can workers/ agents be liable for an uplift in the award under s.207A Trade Union & Labour Relations (Consolidation) Act 1992 for failure to follow a fair dismissal procedure?

Supp.162 As noted above (**Supp.90-Supp.110**), in *Osipov* the EAT controversially concluded that, on a claim of detriment under s.47B ERA, a worker or agent could be liable for a detriment consisting of dismissal or an instruction to dismiss. At first instance, the employment tribunal determined that there should be an uplift of 12.5% for failure to comply with the ACAS code in relation to the dismissal, taking into account that there was a peremptory dismissal with no procedure followed at all, that the total award was substantial and that the employer had a very small workforce. This uplift was then applied to the total award of £749,664.50 consisting of (a) £563,461.92 for unfair dismissal, (b) £16,500 for injury to feelings and (c) £169,702.58 being a provisional netted down sum for unpaid salary. There was therefore a total award of £843,372.56 which was said to be damages for the claims of detriment and unfair dismissal for making a protected disclosure. At the remedies hearing, it was then decided that there should be joint and several liability for this award, with the individual directors as well as the employer being liable for the full award.

Supp.163 It was argued on behalf of Mr Timis and Mr Sage that it was wrong of the ET to have made them liable for all the elements of the awards referred to because awards for unfair dismissal were payable only by the employer (see s.112(4) ERA 1996); and the same is true in respect of wages claims (see s.24 ERA 1996). Although a s.207A TULCRA uplift can be awarded on a joint and several basis as between different respondents in a discrimination claim (*Catanzano v. Studio London Limited* UKEAT/0487/11), that could only occur where findings were made as to the extent to which a person was responsible for the failure to follow the particular statutory procedure, and then only where the uplift relates to an underlying claim which can be advanced against that individual.

Supp.164 Simler P accepted that the basic award was a sum payable under s.119 ERA and only by the employer, and accordingly a co-worker could not be made liable for the basic award. However she rejected the other points made in relation to remedy. The compensation awarded to Mr Osipov apart from the basic award related to losses which flowed directly from his dismissal and the detriments to which he was subjected by Mr Sage and Mr Timis. It was therefore recoverable from IPL and/or from Messrs Sage

and/or Timis. The tests for determining an award based on detriment under s.49 and an award based on dismissal under s.123 were materially the same: in a detriment case it is compensation which is just and equitable having regard to the loss attributable to the act complained of (s.49(2) ERA) and in a dismissal case, loss sustained in consequence of the dismissal (s.123(1) ERA). Both exercises would, in a case such as that of the claimant, produce the same level of award, this being

> "exactly the sort of case envisaged by the Court of Appeal in *CLFIS v. Reynolds* as being one in which the unlawful discriminatory act causes the dismissal so that the individual respondent is liable for it."

Supp.165 Under s.207A(2) TULCRA the tribunal has power to increase "any award it makes to an employee" subject to the just and equitable principle contained in the same subsection. Schedule A2 includes detriment claims under s.48 ERA 1996 within the scope of claims covered by the uplift provisions. Thus the EAT held that there was no statutory basis for contending that they should not be liable for the ACAS uplift bearing in mind that it was they who were responsible for the peremptory dismissal. The position would be otherwise in a case where they had not been responsible for the failure to follow a fair procedure (*Catanzano*). Therefore in a tainted information case such as *Jhuti*, where the manager had victimised the employee in providing the information which was relied upon by the dismissing officer, but the manager was not responsible for the procedure followed, it would not be appropriate for the victimising manager to be liable for the uplift. But that was not the situation in *Osipov*. On the findings of the ET the decision to dismiss was taken by Mr Timis and implemented by Mr Sage. The respondents did not seek to argue that the ACAS Code had been complied with and the only persons with responsibility for this were Mr Sage and Mr Timis.

Paragraphs 10.77 to 10.: Injury to feelings – the appropriate amount

Supp.166 In *International Petroleum Ltd v Osipov* [2017] UKEAT/0229/16/DA, 19 July 2017 (see above), the EAT rejected a cross-appeal against the award by the tribunal of £16,500 for injury to feelings. This was at the top of the middle *Vento* band (as uplifted by 10% in accordance with *Simmons v Castle* [2012] EWCA Civ 1288). It was argued on the cross-appeal that the award should have been in the top band given that there had been a sustained campaign of victimisation and exclusion of the claimant, Mr Osipov, from early June 2014 until his dismissal in October 2014. The employment tribunal had expressly found that he had been undermined over a long period, being cut out of meetings and his professionalism impugned. The EAT commented (at paragraph 207) that the *Vento* guidance was indeed only guidance. It was not to be read or applied like a statute. Here the tribunal's assessment was open to it, and there was no error of law. Although the tribunal had in its assessment not expressly mentioned the final detriment, namely two directors (Mr Timis and Mr Sage) acting together to bring the job to an end, the EAT (Simler P) was satisfied that this had not been overlooked. (Note the reasoning of the EAT in this respect also illustrates that even where the detriment consisted of causing the dismissal, the EAT considered that it could be taken into account in assessing injury to feelings – which would not have been possible under the guise of an

injury to feelings claims. See further the commentary above, at **Supp.99-Supp.110**, as to the EAT's view that there could be a detriment claim against workers or agents under s.47B even where the detriment consisted of dismissal.)

Supp.167 Note that in *Eurides Pereira De Souza v Vinci Construction (UK) Limited* [2017] EWCA Civ 879 the Court of Appeal confirmed that, for claims under the EqA 2010, injury to feelings awards should be subject to the 10% *Simmons v Castle* uplift. That followed from the terms of s.124(6) EqA 2010 which provides that the amount awarded should correspond to the amount of the County Court. Although there is no equivalent provision under the ERA, the same uplift would no doubt be applied, as the tribunal did in *Osipov*. As noted above, in *Osipov* this was effected by simply uplifting the *Vento* bands by 10%. However, giving the leading judgment in *Pereira De Souza*, Underhill LJ noted (at para 34) that there was the complication that the *Vento* bands themselves also require updating for inflation, as had been done in *Da'Bell* several years ago. Underhill LJ suggested that this could be dealt with by guidance from the President of the Employment Tribunals, but that in the meantime tribunals can make their own adjustments, which need not be mathematically precise.

Supp.168 In the event Presidential Guidance has now been issued: **Presidential Guidance, Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 5th September 2017.** Following consultation with employment tribunal stakeholders and users and subject to what is said in paragraph 12 of the Guidance, in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*, the revised *Vento* bands are to be as follows:

(a) a lower band of £800 to £8,400 (less serious cases);

(b) a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and

(c) an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.

Supp.169 Again subject to what is said in paragraph 12 of the Guidance, in respect of claims presented before 11 September 2017, an employment tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z, where x is the relevant boundary of the relevant band in the original *Vento* decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift).

Supp.170 Paragraph 12 of the Guidance provides that so far as claims determined by an employment tribunal in Scotland are concerned, if an employment tribunal determines that the *Simmons v Castle* 10% uplift does not apply then it should adjust the approach and figures set out above accordingly, but in so doing it should set out its reasons for reaching the conclusion that the uplift does not apply in Scotland**.**

Chapter 11

Paras 11.02 to 11.06: Claim forms

Supp.171 As to whether a claim form is to be regarded as containing a protected disclosure claim, see the guidance set out in *Mechkarov v Citibank NA* UKEAT/0119/17/DM, 15 June 2017 (at paras 26 to 28):

> "26. When deciding whether an ET1 claim form contains a claim of a particular kind, the correct approach is to look at the claim form as a whole, giving it a generous construction to see whether it identifies an act complained of and the nature of the complaint made about that act. If that is the case, there will have been an effective complaint. …
>
> 27. It is of course not necessary that the claim form should identify the complaint with the label that a lawyer would apply. If the act is identified and the nature of the complaint is identified, the fact that there is no label or the label is wrong or only one label is given where two would be applicable will not be determinative against the Claimant.
>
> 28. A complaint of public interest disclosure must to my mind state, so that it can be discerned on a generous reading, that the worker concerned made one or more public interest disclosures and that he was subject to detriment for doing so. An essential element of a complaint of public interest disclosure detriment is that the Claimant should be complaining that he has suffered detriment on the grounds of the public interest disclosure. The claim form, read generously, must therefore identify the detriment complained of, the public interest disclosure alleged and the linkage between the two. If it does this, even in very broad terms, further detail may be given by Particulars; if it does not, amendment will be required."

Supp.172 Applying that approach, the EAT upheld the EJ's finding that a claim form (presented some 15 months after the termination of employment) which contained complaints of post-termination of employment discrimination did not also contain protected disclosure claims, and further upheld a refusal to permit amendment.

Chapter 12

Paragraph 12.32

Supp.173 The model adopted in relation to NHS applicants has been followed in s.32 of the Children and Social Work Act 2017 (not yet in force). This provides for a new s.49C to be inserted in the Employment Rights Act 1996 providing protection to applicants for a children's social care position. A position is a "children's social care position" if the work done in it relates to the children's social care function of a "relevant employer" (s.49C(3)). A "position" is defined as where a person works under a contract of employment, a contract to do work personally or the terms of an appointment to an office or post (s.49C(2) ERA). A relevant employer includes a local authority in England or Wales or a body corporate that, under arrangements made by a local authority in England under s.1 of the Children and Young Persons Act 2008, exercises children's social care functions. As with s.49B ERA a discrimination model is adopted based on whether "it appears to the employer that the applicant has made a protected disclosure" (s.49C(1) ERA).

Paragraphs 12.32 to 12.46 (NHS applicants for employment)

Supp.174 On 20 March 2017 the Department of Health published draft Regulations with a view to providing whistleblowing protection to applicants for NHS employment[6].

[6] See https://www.gov.uk/government/consultations/protecting-whistleblowers-seeking-jobs-in-the-nhs

A consultation was launched, and ran to 12 May 2017. Some two years after the publication of the report by Sir Robert Francis QC into whistleblowing in NHS, *Freedom to Speak Up*, the draft Regulations aim to implement the recommendation that consideration be given to outlawing discrimination against whistleblowers in recruitment by NHS employers. (Legislation giving power to make these regulations - s.49B of the Employment Rights Act 1996 - has been on the statute book since 6 May 2015).

Supp.175 The draft Regulations may be seen, in some important respects, as pointing to how whistleblowing protection may be strengthened not only for NHS applicants but more generally. They beg some important questions as to why protection and remedies provided for NHS applicants is not also appropriate outside the NHS context, or indeed to workers already in employment within the NHS, as opposed to applicants for employment. But, as currently drafted, they also in significant respects too narrow and add unnecessary complexity.

Appearance of a protected disclosure

Supp.176 The draft Regulations provide that an NHS employer must not discriminate against an applicant "because it appears to the NHS employer that the applicant has made a protected disclosure." Applying protection to those who are believed to have made a protected disclosure is a significant departure from the current position, under which establishing that the worker made such a disclosure is central to the scheme of the legislation. The stated intention was to extend the ambit to cover cases where the worker was believed, wrongly, to have made a protected disclosure. But as currently drafted it may also in some cases have a narrower ambit than that applicable to workers (other than applicants for employment). See the text at paras 12-44 to 12-46.

Supp.177 The difference of approach compared to that applicable for other protected disclosures is highlighted by the Court of Appeal's decision in *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401 (23 May 2017). As discussed above, in that case the employer had taken the view that disclosures did not meet the test for being protected disclosures, principally on the basis that they were not made in good faith (and were mostly made when the pre-amendment law applied). The ET concluded that the disclosures were protected disclosures, and there was no appeal against the ET's decision that a distinction was not to be drawn in that case between the disclosure and the manner in which it was made. In that context the Court concluded that where the claimant was dismissed by reason of the disclosures, it was no answer to the claim for the employer to assert that it sincerely believed that the disclosures were not protected. Indeed Underhill LJ commented (at para 80) that it would be "very odd" and "unacceptable in policy terms" if, having established that a protected disclosure was made, the claim could then be defeated on the basis that the employer did not believe that they were satisfied. Yet precisely that argument would seem to be opened up by the proposed test for protecting applicants on the basis of whether it "appears to the NHS employer that the applicant has made a protected disclosure."

Supp.178 There are also further difficulties in basing protection on an apparent protected disclosure. The structure of the protected disclosure legislation is framed

around a careful balance as to when disclosures are protected. The reasonable belief of the worker plays a crucial part in this. At minimum, even for internal disclosures to the employer, this requires a reasonable belief (a) that the information tended to show a relevant failure and (b) that the disclosure was made in the public interest. That need not be an insurmountable barrier to extending protection. In principle protection might also be provided based on the employer's view that the applicant made the disclosures and that those conditions are likely to have been satisfied. It does though beg several questions as to the threshold that is to be applied. The employer may have no actual knowledge of the worker's state of belief, though it may still be possible to form a view as to whether the worker was in a position where s/he ought to have appreciated the true position (see *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT)). But a series of possibilities still arise. Is it an answer if the employer has given no thought to whether the disclosure was a protected disclosure? Is the test one of the employer's genuine belief? Must the employer have given consideration to each of the elements for a protected disclosure? Is it sufficient that the employer believes that there is a change that what was disclosed may amount to a protected disclosure? Does this line of argument allow a worker who fails to meet the criteria for having made a protected disclosure (eg because of lack of a reasonable or genuine belief in the relevant failure) to get round this on the basis that it appeared to the employer (or prospective employer) that s/he had made a relevant failure? That might be said to undermine the structure of the legislation, though to some extent anomalies could be reduced by the approach to remedy.

Supp.179 In any event, if it is accepted that protection for applicants should cover apparent disclosures, it would be anomalous for the same not also to apply in the case of detriments (or dismissals) of workers and employees. Indeed, once it is accepted that protection should apply where the worker did not in fact make the protected disclosure, it becomes all the more difficult to justify the failure to offer protection to those who are associated with a protected disclosure despite not making it themselves. At present, unlike in relation to discrimination protection under the Equality Act 2010, the legislation provides no whistleblowing protection for a worker who is victimised for supporting another worker who made a protected disclosure. It may be for example that two workers (A and B) are known to have together been investigating the concern, and one of them (B) then makes the disclosure. If the employer dismisses A because s/he was associated with or known to have supported B in making the disclosure, there would be no protection unless on the facts it could be found that B had acted in effect as A's agent in making the disclosure.

Injunctive relief

Supp.180 One of the major weaknesses in the protected disclosure legislation identified in *Freedom to Speak Up* (at para 2.2.9) was the absence of any power to restrain employers from imposing a detriment or requiring it to be brought to an end. We discuss this at **12.59 to 12.86** of the text The draft Regulations tackle that concern, again in relation only to NHS applicants, by treating discrimination against NHS applicants as giving rise to a claim of breach of statutory duty actionable in the ordinary courts.

Although generally it is provided in the draft Regulations that there cannot be duplication of claims in the ordinary courts and in the employment tribunal, there is a specific exception to permit an action for an injunction in the ordinary courts to be combined with a claim in the employment tribunal. That is a potentially important addition.

Supp.181 At least at first blush this might seem to run counter to the usual reluctance to grant specific performance of an employment contract, particularly where trust and confidence is lacking. However the Order made need not necessarily go as far as expressly to require the employer to employ the applicant. So as not to usurp the role of the employer as to the choice of recruit, it might be framed merely in terms of restraining the employer from holding against the applicant the fact of making the apparent protected disclosure. There may well then remain a risk that an employer required to reconsider a decision would reach the same decision not to recruit the applicant. But there would then be the significant added risk for the employer in doing so that this would be found to be in contempt of court. Further, interim relief associated with this remedy may also be valuable, for example to require that a vacancy remain open pending a speedy trial of the issue, or to restrain the employer from taking into account an alleged protected disclosure in recruitment decisions pending trial.

Supp.182 However a significant drawback of this remedy lies in the substantial costs risk in pursuing such a claim in the ordinary courts by comparison with the costs regime in the tribunal. One possible means of improving access to the remedy might be to provide that in such cases the costs regime in the employment tribunal applies. An alternative, or additional, approach (albeit a radical departure from the current interim relief regime in the tribunal) might be to afford the tribunals the power to grant such relief (even if enforcement powers, including an application for contempt, remained with the ordinary courts).

Supp.183 In any event, again this begs the question of why injunctive relief should not similarly be available for other whistleblowing claims, for example to challenge an ongoing suspension from work or to challenge a dismissal. To some extent that might be answered on the basis that for workers and employees, similar relief could be obtained on the basis of an implied contractual term limiting the proper exercise of discretion: see by analogy *Lew v Board of Trustees of United Synagogue* [2011] IRLR 664 (where it was noted that it was established that a capability procedure had been trumped up as means of supporting a dismissal, there would be a plain breach of contract). But the scope for such an implied term is limited in relation to dismissal claims (due to the exclusion set out in *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL)), and in any event there would be a benefit of certainty in being able to pursue a breach of statutory duty claim.

Anomalies as a result of adopting a discrimination model

Supp.184 As we argue in the text (at **12.37 to 12.41)**, given the existing protected disclosure legislation, the most straightforward approach would have been to amend the definition of worker so as to cover applicants for employment. That could have been accompanied by any other extensions to protection or remedies considered to be

appropriate. Instead, as foreshadowed in s.49B ERA, the Government is proposing to graft a discrimination model onto the existing protected disclosure provisions. At least as presently drafted, that gives rise to unnecessary complexity and to anomalies as between applicants and workers/employees, added to the discrepancy in the difference in treatment between NHS applicants and applicants for employment in other sectors.

Supp.185 In addition to the new and distinct approach to apparent protected disclosures and to injunctive relief, there are several other aspects of the proposals that would give rise anomalous differences as between applicants for NHS employment and other workers or applicants:

1. The discrimination approach imports a comparison by expressly introducing a test of whether the applicant has been treated "less favourably" (s.49B(3) ERA). That seems unnecessary. There would seem to be no good reason why the same test as in s.47B ERA cannot be applied; whether the worker has been subject to a detriment by any act or deliberate failure to act on the ground that the worker made a protected disclosure. The tests may usually lead to the same result, but then why use different tests at all?

2. Time limits. For workers and employees, if a claim is not brought within the primary three month time limit, it is necessary to show that it was not reasonably practicable to do so (s.48(3) ERA). Yet for applicants (adopting the discrimination model) there is the less stringent test that the tribunal can consider the complaint if it is just and equitable to do so. There may be good arguments for applying that looser test. But there seems no sensible reason for differentiating between the test to be applied for applicants for NHS employment and that for workers/employees.

3. Recommendations: the provisions introduce the power to make recommendations that, within a specified period, the NHS employer should take steps for the purposes of obviating or reducing the adverse effect on the applicant of the discrimination to which the proceedings relate. This a welcome proposed improvement on the range of remedies available. But although it emulates the protection provided in the Employment Relations 1999 (Blacklists) Regs 1999, reg 8, there again seems no good reason for that remedy to be restricted to applicants, let alone NHS applicants for employment. Within the Equality Act 2010 (s.124) the power to make recommendations is not limited to applicants. Equally, given the public policy underlying protection of whistleblowers, there is a strong argument for a wider power (of the type now removed from the Equality Act) to make recommendations.

4. Accessory liability: One aspect of the model for protection under the Equality Act which might usefully be borrowed for the purposes of whistleblower protection is the wider range of accessory liability, which extends beyond the employer to liability for instructing, causing, inducing and aiding contraventions (ss.111,112 EqA). However the draft Regulations contain no provision to extend liability in this way.

5. Individual liability: Far from extending the range of accessory liability, the draft Regulations are narrower in this respect than under the protected disclosure detriment provisions (s.47B(1A) ERA). In the case of a worker or employee, a claim can be brought against the individual worker or agent through which an employer is vicariously liable. No such provision is contained in the draft Regulations.

6. Statutory defence for vicarious liability. The draft Regulations provide, in relation to vicarious liability, that it is a defence for the NHS employer to show that it took all reasonable steps to prevent the worker from doing or failing to do the thing giving rise to the liability or things of that description. This mirrors the statutory defence in protected disclosure detriment claims, but with the modification that it applies not only to vicarious liability for workers but also for agents. That is a sensible extension. But it would make sense for the same to apply to claims by workers and agents, rather than only applicants. As a matter of public policy it would have the positive effect of encouraging employers to make their whistleblowing policy available to agents rather than only to their workers.

Conclusion on the draft Regulations

Supp.186 Although the draft Regulations and consultation paper are intended to apply narrowly to NHS applicants, they should serve to bring into focus broader questions as to the adequacy of whistleblower protection. There is no convincing reason for limiting protection for applicants for employment to the NHS field. The provisions point the way to important respects in which protection may be improved more generally. But by declining to follow a more straightforward model of extending protection against detriment more widely, the draft Regulations introduce avoidable complexity. That is particularly regrettable given that in "Freedom to Speak Up" (see para 2.7.2), one of the criticisms made of the current whistleblowing provisions was their complexity.

Chapter 13
Obligations to blow the whistle
Paragraphs 13.10 to 13.35

Supp.187 See also *Marathon Asset Management LLP & Anor v Seddon & Ors* [2017] ICR 791, [2017] EWHC 300 (Comm), [2017] IRLR 503 where Mr Justice Leggatt held that one of the employee defendants, Mr Seddon, was not under a contractual duty (it was not argued that he was under any fiduciary duty) to report the misconduct of his fellow defendant employee, Mr Bridgman. Leggatt J found that Mr Seddon learnt that Mr Bridgeman had already copied files containing Marathon's confidential information to a USB drive which he intended to take with him when he left Marathon's employment, albeit that Mr Seddon did not learn which files (or how many files) Mr Bridgeman had copied. Marathon contended that, on acquiring this knowledge, Mr Seddon had a contractual duty to report Mr Bridgeman's conduct to Marathon.

Supp.188 There was no express term of Mr Seddon's employment contract which required him to report misconduct of a fellow employee. Leggatt J said that whether a

duty to report misconduct was to be implied as an aspect of the duty of fidelity and good faith depended on the circumstances, including the nature and terms of the employment, the nature of the misconduct, and how the employee has become aware of it. He referred to *Sybron* and to what Fox LJ had said (at p 129):

> "I am not at all saying that an employee has in every case a duty to disclose to his employers any information that he has about breaches of duty by his fellow employees. I can see that ordinary usage is in many respects against such a rule. The matter must depend, I think, upon all the circumstances of the case. The important circumstances in the present case are that [the defendant] was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware."

Supp.189 Leggatt J said that Mr Seddon did not occupy an executive or managerial position at Marathon and did not have any responsibility for supervising Mr Bridgeman (or anyone else at Marathon). The relationship of the two men within the firm was one of professional colleagues, of equal standing. Nor was there any express term of Mr Seddon's employment contract from which any duty to report misconduct could be inferred. Unlike the contract in issue in *Swain* Mr Seddon's contract did not include an obligation to protect or promote the firm's interest. It was possible to conceive of circumstances – for example, discovering that another employee was embezzling large sums of money from Marathon– where it could nevertheless be said that any reasonable employee in Mr Seddon's position would have been bound to report the discovery and could not in good faith have stayed quiet. But Leggatt J did not consider that the facts of the case before him came into this category. It was not suggested that the conduct of which Mr Seddon became aware involved any criminal offence. Nor did Mr Seddon have any evidence that Mr Bridgeman had done anything or was about to do anything which had caused or was about to cause financial loss to Marathon. All he knew was that Mr Bridgeman had, in breach of his employment contract, copied files (with unknown content) to a USB drive with the intention of retaining them after he left Marathon. That by itself was not enough to trigger an implied contractual duty to report.

Specific requests for information from employees

Paras 13.38 to 13.40

Supp.190 See also *MPT Group Ltd v Peel & Ors* [2017] EWHC 1222 (Ch). On an interim relief application Mr Edward Pepperall QC (sitting as a Deputy High Court Judge), inclined to the view that there was no breach of the duty of fidelity where senior employees were alleged to have given false or misleading answers in relation to their plans to enter into competition together after the termination of their employment and expiry of their post-termination covenants. MPT is a leading producer and supplier of mattress machinery, equipment and parts to the mattress manufacturing industry and was, until March 2017, the only company manufacturing such machines in the UK. Until 1 September 2016, the first and second defendants, Shaun Peel and Michael Birtwistle, were employed by MPT in senior positions. Mr Peel was the company's Technical Manager responsible for producing drawings for machinery. He was described by Andrew Trickett, MPT's Managing Director, as the company's most senior and experienced draftsman. Mr Birtwistle was the Technical Sales Manager. He was

responsible for business development and maintaining key relationships with the company's customers and suppliers.

Supp.191 Both men gave notice of their resignations on 4 August 2016 and their respective employments ended on 1 September 2016. Following the expiry of restrictive covenants they, together with business associates, incorporated the third defendant, MattressTek Limited, on 3 March 2017 in direct competition with MPT. Mr Peel was the new company's Technical Director and Mr Birtwistle its Sales Director. Amongst other allegations MPT alleged that the defendants had failed to answer questions truthfully as to their future intentions. MPT sought injunctive relief, an account of the defendants' profits, damages and/or equitable compensation and a springboard injunction to prevent the defendants from unfairly exploiting the competitive advantage said to have been obtained through their alleged wrongful conduct. MPT alleged that untruthful answers were given by Mr Peel on 4 August 2016 when Mr Peel told Mr Trickett that he wished to work from home and spend more time with his child by working as a freelance CAD designer, while Mr Birtwistle said that he had been offered a position doing panel wiring. On further questioning, both defendants allegedly denied any intention of going into partnership together. A few days after that Mr Peel allegedly declined to say where he was going. Subsequently, it was said, Mr Peel told Mr Rodgers, MPT's Technical Director, that he was not planning to work in MPT's industry because he had too much respect for him. He allegedly repeated that he intended to spend more time at home and work on a freelance basis. At some later point during his notice period, Mr Birtwistle allegedly told Mr Rodgers that his new job would be building electrical control panels.

Supp.192 It was submitted on behalf of MPT that one incident of the duty of good faith was to answer questions truthfully. The Deputy High Court Judge noted that this duty was subject to a number of exceptions, one of which related to questions about an employee's private lives, and he was inclined to regard information about future competitive activity as also falling within the sphere of employees' own private information which they are entitled to keep confidential. To that end he said (at paragraph 86) that:

> "I am far from satisfied that these employees were under a duty to disclose their true intentions to MPT. The law will step in to prevent unfair competition or to hold employees to enforceable restrictive covenants or to protect confidential information. Equally, employees must not induce others to breach their own contracts of employment, conspire to cause their employer injury or, in most cases, solicit their colleagues for their new enterprise. Subject to these matters, employees are otherwise free to make their own way in the world. I should therefore be reluctant to hold that an incident of the duty of fidelity is that, when asked a straight question a departing employee is under a contractual obligation to explain his own confidential and nascent plans to set up in lawful competition."

Supp.193 On the facts, the Deputy High Court Judge concluded that even if he was wrong as to this, the alleged breach did not assist MPT since any springboard advantage arose not from a failure to have been candid in answering questions but because the defendants were said to have misused MPT's confidential information in designing and bringing to market their own suite of machines. The dicta in *MPT* need to be treated with

some care. The issue is fact-sensitive. Whilst an employee acting alone may not be under an obligation to reveal future plans where asked, the more surprising feature of *MPT* was that it applied to two senior employees acting together (compare *Kynixa Limited v Hynes* [2008] EWHC 1495). Other relevant factors may be whether the employee obtains some specific advantage in providing the misleading answer beyond protecting future competitive activity, such as securing a loyalty or bonus payment from the current employer.

Chapter 17 Defamation[7]
Paragraphs 17.05 to 17.13, Serious Harm

Supp.194 Contrary to the interpretation of the first instance Judge and some commentators, the Court of Appeal in *Lachaux v Independent Print* ([2017] EWCA Civ 1334) held that s.1 of the Defamation Act 2013 had not affected a number of common law principles and presumptions. In particular, the common law presumption of damage in libel, and the common law principle that the cause of action accrues on the date of publication (rather than when serious harm is caused or becomes probable), remain unchanged. The Court of Appeal held that it will ordinarily be proper to draw an inference of serious harm if the meaning of the words complained of is seriously defamatory. The intention of s.1(1) of the Defamation Act 2013 was to 'build on' the pre-existing case law, and to allow trivial claims to be weeded out.

Supp.195 It was not necessary in *Lachaux* for the Court of Appeal to consider the Defamation Act 2013 test of serious harm for trading corporations, namely "serious financial loss," and as such appeal authority on this is still awaited.

[7] Update for this section provided by Isabel Martorell, Senior Litigation Manager at Macfarlanes and author of Chapter 17 in the Main Work.