WHISTLEBLOWING
Law and Practice

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Note

The next and third edition of this book will be published during 2017. To maintain the utility of this Cumulative Supplement up to the publication date of the Third Edition and given that the new edition will replace both the second edition and this and previous cumulative updaters some of the material contained in the Sixth Cumulative updater has been removed or condensed.

Legislative reform, plans for further reform and further legislative measures

The Enterprise and Regulatory Reform Act 2013 ("ERRA") introduced the first major legislative changes to the whistleblowing provisions first brought in by the Public Interest Disclosure Act 1998:-

- A disclosure no longer qualifies for protection unless the worker reasonably believes it is "made in the public interest". That qualification applies to all disclosures without exception.

- But, secondly, protection no longer depends on the disclosure having been made in good faith. Instead lack of good faith can lead to a reduction in compensation of up to 25%.

- Employers are vicariously liable for whistleblowing victimisation by workers and agents, subject to a defence in relation to workers (but not agents) of taking all reasonable steps to prevent this. Liability is also imposed on the worker or agent.

- There are amendments so as to include certain healthcare professionals who were identified as outside of the scope of whistleblowing protection due to their contractual arrangements.

These changes came into effect on 25th June 2013 as regards any qualifying disclosure made on or after that date. The previous regime continues to apply to any claim or part of a claim arising in respect of a prior qualifying disclosure even if it relates to a dismissal or detrimental act or failure to act which took place on or after 25th June 2013 (s.24(6) ERRA).

Chapter 3

The new public interest test

Section 17 of ERRA amended section 43B (1) of the Employment Rights Act so that it now provides as follows (with the amendments shown underlined):-

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

The new requirement only applies to a disclosure made on or after 25th June 2013 (ERRA section 103).

We now have the first consideration by the EAT of the new requirement: *Chesterton Global Ltd (t/a Chestertons) & Anor v Nurmohamed* [2015] UKEAT 0335_14_0804 [2015] IRLR 614. Mr Nurmohamed was Director of the Mayfair office of the Chestertons, a firm of estate agents and responsible for sales from that office. He contended that he had made three protected disclosures, two to the Area Director for the Central London area and one to the Second Appellant, Chestertons' Director of Human Relations. Mr Nurmohamed stated that he believed Chestertons was deliberately misstating £2-3 million of actual costs and liabilities through the entire office and department network which affected the commission earnings of 100 senior managers, including himself. The ET concluded that the disclosures were made in the reasonable belief of Mr Nurmohamed that the disclosures were in the interest of 100 senior managers, and that that was a sufficient group of the public for the disclosure to be a matter in the public interest. Mr Nurmohamed's claim succeeded.

Chestertons and their Director of HR appealed raising two grounds. The first ground was whether or not Mr Nurmohamed had a reasonable belief that he was making a protected disclosure. The second ground was whether the protected disclosure was made in the public interest. At a preliminary hearing held before Langstaff J (President) on 9 December 2014 ground 1 was dismissed upon withdrawal. The appeal was set down for a full hearing on ground 2 only.

Supperstone J observed that the words "*in the public interest*" inserted into section 43B(1) by ERRA were intended to reverse the effect of *Parkins v Sodexho Ltd* [2002] IRLR 109. He noted that during the passage of ERRA an amendment to clause 14 of the Bill (now section 17) was tabled which would automatically preclude a disclosure relying on a breach of a contract of employment from constituting a qualifying disclosure and that in the Committee debate on the Bill on 3 July 2012 Mr Norman Lamb, the Parliamentary Under-Secretary of State for Business, Innovations and Skills (the promoter of the Bill) stated:

> "*The amendment would, in addition to the inclusion of the public interest test that we propose, disallow Public Interest Disclosure Act claims based on breaches of an individual's employment contract. In a sense, the amendment seeks to add an additional hurdle for claimants to clear on top of what the Government intend.*
>
> *Setting out the issue that the Government seek to address might be helpful. The original aim of the public interest disclosure legislation was to provide protection to individuals who made a disclosure in the public interest – otherwise known as blowing the*

whistle. The clause seeks to make that public interest clear, and the hint is in the title of the original legislation, which was designed to deal with public interest disclosure – that is what we are talking about."

The Minister continued:

> *"To return to my explanation of the purpose of the clause and of why the Government have designed it in such a way, the decision in the case* Parkins v Sodexho Ltd *has resulted in a fundamental change in how the Public Interest Disclosure Act operates and has widened its scope beyond what was originally intended. The ruling in that case stated that there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. The effect is that individuals make a disclosure about a breach of their employment contract, where this is a matter of purely private rather than public interest, and then claim protection, for example, for unfair dismissal…*
>
> *The clause will amend part IVA of the Employment Rights Act 1996 to close the loophole that case law has created… The clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest.*
>
> *…*
>
> *The clause will remove the opportunistic use of the legislation for private purposes. It is in the original spirit of the Public Interest Disclosure Act that those seeking its protection should reasonably believe that their raising an issue is in the public interest. Including a public interest test in the Bill deals with the* Parkins v Sodexho Ltd *case in it entirety. Therefore there is no need to disallow claims based on an individual's contract, as suggested in the amendment. Indeed, although our aim is to prevent the opportunistic use of breaches of an individual's contract that are of a personal nature, there are also likely to be instances where a worker should be able to rely on breaches of his own contract where those engage wider public interest issues. In other words, in a worker's complaint about a breach of their contract, the breach in itself might have wider public interest implications.*
>
> *The blanket restriction of claims involving breaches of an employee's contract, which the Opposition amendment would*

> *introduce, could have unintended adverse consequences for individuals who are legitimately concerned about a breach of their contract that has wider public interest implications. Such a restriction would not reflect the intention or the spirit of the legislation and would unfairly and unduly restrict the number of cases in which an individual could bring a public interest disclosure case.*"

It was submitted on behalf of Chestertons that in construing the words "*in the public interest*" the Tribunal should have examined the subject matter of the disclosures to determine whether or not they were of real interest to the public in general or a sufficient section of the public. It was for the ET to determine objectively whether a disclosure is of real interest to the public. The public interest had to have a quality of real interest to the public (referring to the observations of Baroness Hale in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 at 409 on qualified privilege in defamation law). Mr Nurmohamed's disclosures were not in the public interest. They were made in the context of a dispute between him and Chestertons arising out of the terms of his personal contract of employment. The consequences of the alleged manipulation of the accounts by Chestertons would limit the amount of commission payable to him, and give rise to a personal claim for breach of contract. It was acknowledged that a complaint by an employee about an employer operating a racially discriminatory policy might be in the public interest because public policy was directed against discrimination in society at large on grounds of race. However the subject matter of disclosures in the present case were more analogous to concerns raised by an employee as to his holiday pay. In each case the matters about which complaint was made which led to the disclosures concerned personal contracts of employment between Chestertons and its employees. That being so the public interest test had not been satisfied. Further the Tribunal failed to explain how it reached the conclusion that it did, other than by reference to the number of senior managers potentially affected. The number affected was irrelevant; the dispute remained one of a private nature between Chestertons and its workers.

Supperstone J accepted this last point: the numbers of those affected was not of singular importance in determining whether or not a qualifying disclosure is in the public interest. Supperstone J said that a relatively small group might be sufficient to satisfy the public interest test: what was sufficient was necessarily fact-sensitive. However he rejected Chestertons' attack on the ET's decision.

The question for consideration under section 43B(1) of the 1996 Act was not whether the disclosure per se was in the public interest but whether the

worker making the disclosure had a reasonable belief that the disclosure was made in the public interest. The language of reasonable belief in section 43B(1) pre-dated the introduction of the public interest test. Following the 2013 amendment the worker not only had to establish that he had a reasonable belief that the disclosure tends to show one or more of the matters falling within the statutory categories, but that he also that he had a reasonable belief the disclosure was made in the public interest. The test of reasonable belief in section 43B(1) had, in Supperstone J's view, remained the same. Supperstone J referred to *Babula v Waltham Forest College* (see paragraph 3.35 of the main work) where it was common ground that it is not permissible, as a matter of construction, to adopt a different interpretation of what is meant by "reasonable belief" when applying that phrase to any of the situations in section 43B(1)(a) to (f). The test, as it applied to the old section 43B, was set out by Wall LJ in his judgment:

> "*81. ... An employment tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the paragraphs in section 43B(1)(a) to (f) of ERA 1996. The second is to decide, objectively, whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith.*
>
> *82. In this context, in my judgment, the word 'belief' in section 43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test."*

Wall LJ observed (at paragraph 75) in *Babula:*

> *"Provided* [the worker's] *belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute".*

That reasoning had followed from the purpose of the statute which, as Wall LJ had noted is "*to encourage responsible whistleblowing*". Supperstone J referred to Wall LJ's observation (at paragraph 80 in *Babula*):

> *"To expect employees on the factory floor or in shops and offices*

> *to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute".*

The same reasoning applied, in Supperstone J's view, in relation to sub-paragraph (b) of section 43B(1) which was in play in *Chestertons*. Supperstone J said that applying the *Babula* approach to section 43B(1) following its amendment, the public interest test could be satisfied where the basis of the public interest disclosure was wrong and/or there was (in fact) no public interest in the disclosure being made "provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable." The Tribunal had properly asked itself the question whether Mr Nurmohamed made the disclosures in the reasonable belief that they were in the public interest. The Tribunal proceeded to answer that question and concluded that the disclosures were made in the belief of Mr Nurmohamed at the time that it was in the interests of the 100 senior managers and that that belief was reasonable. There was (now) no challenge to the finding that he had a reasonable belief that he was making protected disclosures.

Supperstone J said that the objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see *ALM Medical Services Ltd v Bladon*). It was clear from the parliamentary materials to which reference could be made pursuant to *Pepper (Inspector of Taxes) v Hart* that the sole purpose of the amendment to section 43B(1) of ERA by section 17 of ERRA was to reverse the effect of *Parkins v Sodexho Ltd*. The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment *where the breach is of a personal nature and there were no wider public interest implications*. As the Minister had observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest".

The submission on behalf of Chestertons was that the fact that a group of affected workers, in this case the 100 senior managers, might have a common characteristic of mutuality of obligations was relevant when considering the public interest test under section 43B(1). The words of the section provided no support for this contention. The protected disclosures made by Mr Nurmohamed concerned manipulation of the accounts by Chestertons' management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person Mr Nurmohamed was most concerned about was himself, the tribunal was satisfied on the evidence that he did have the other office managers in mind too. A section of the public

would be affected and the public interest test was satisfied.

It had been accepted on behalf of Chestertons that if it was a publicly listed company then disclosure of manipulation of its accounts would be in the interest of the public. However that this is not so where, as was the case here, the employer was a private company. Supperstone J said that whether or not the disclosures which potentially affected the bonuses and commissions to be paid to the 100 senior managers were made in the public interest did not turn on Chestertons being a private, rather than a public, company.

In conclusion Supperstone J noted the researches that counsel had conducted, at the suggestion of the President at the preliminary hearing, into other areas of law for the purposes of considering whether they provide any assistance in construing the words "in the public interest" in section 43B(1) of ERA but said that in his view the products of that research did not assist.

Supperstone J's approach therefore accords with that taken in the earlier editions of this supplement: the law on the pre-existing reasonable belief test (see in particular *Darnton v University of Surrey* [2003] IRLR 133 (EAT) and *Babula v Waltham Forest College* [2007] ICR 1045 (CA), discussed in paragraphs 3.26 to 3.41 of the main work) applies to the new requirement. The worker must genuinely believe that the disclosure is made in the public interest and it must be objectively reasonable, judged from the worker's perspective, to hold that belief.

An appeal in *Chesterton* is due to be heard in 2017.

Two other EAT judgments on the public interest test should be noted: *Underwood v Wincanton plc* (UKEAT/0163/15/RN, 27 August 2015) and *Morgan v Royal MENCAP Society* [2016] IRLR 428 (EAT).

Guidance to Tribunal's as to the proper approach to protected disclosure cases

See *Blackbay Ventures Limited T/A Chemistree v Ghahir* Appeal Nos. UKEAT/0449/12/JOJUKEAT/0450/12/JOJ noted below under Chapter 7.

3.01 A disclosure does not have to be made during the worker's employment. See the discussion of *Onyango v Berkeley (t/a Berkeley Solicitors)* under Chapter 7 below.

3.05 **The requirement that the disclosure contain "information"**

Recent decisions clarify and limit the impact of the *Cavendish* and *Goode* decisions.

In *Millbank Financial Services Ltd v Crawford* [2013] UKEAT 0290_13_2009 [2014] IRLR 18 C was a chartered accountant employed by MFS as financial director designate. Her employment was expressed to be subject to a probationary period of six months. During this probationary period she was entitled to one month's notice; after the probationary period she was entitled to three months' notice during the following year. Thereafter, she was entitled to six months' notice. During her probation and at a probation review meeting C was told that her probationary period was being extended and that MFS had concerns about some aspect of her performance. There was no suggestion at that meeting that she would be dismissed. On 15 October, in preparation for a further meeting to be held the following day, C sent a letter by to senior management of MFS. The letter expressed C's deep disappointment at the way in which the probation review was carried out. It set out some of the background history and a critique of the way that C said she had been treated during her period of employment. In her claim form C argued that the contents of the letter contained protected disclosures. In its response, MFS accepted that it dismissed her because on receiving her letter dated 15 October it became concerned about what it described as her '*combative attitude and inability to accept constructive criticism'*. It argued, however, that the letter contained no 'information' for the purposes of s.43B; her allegations, therefore, did not amount to a protected disclosure; and the claim should be struck out. A pre-hearing review was listed to determine this question. C argued that her letter contained information which, in her reasonable belief, tended to show failure by MFS to comply with legal obligations in the following respects: breach of the implied term of trust and confidence; breach of director's statutory duties under the Companies Act 2006; and breach of director's duties under the FSA Code of Conduct. The ET rejected the application and MFS appealed the ET's refusal to strike out the claim. In dismissing the appeal the EAT distinguished *Cavendish*. The distinction drawn in *Cavendish* was between mere allegation or assertion or statement of position on the one hand and the conveying of facts on the other. It is, however, clear from *Cavendish* that the facts conveyed might relate to an omission ('the wards have not been cleaned for the last two weeks') just as they may relate to a positive action ('sharps were left lying around'). C's letter had stated that there had been no feedback during the probationary period; no consultation with the person recruited to carry out the HR function; no consultation with the director, just a single meeting at the end of the probation period with no plan of action and no idea how long

the probation period would last. The letter backed up the lack of communication with facts about a failure to ask her to prepare a preliminary report on a matter within her remit and by giving details of the only email which was ever sent to her about changes to her role. It went far beyond simply making an allegation or stating a position. It set out the factual basis of C's complaint in considerable detail. Although the letter asserted omissions, taking for granted the known fact that MFS has extended her probationary period when it had no contractual right to do so it conveyed facts for the purposes of the whistleblowing provisions in the sense that it conveyed facts about what had not been done.

Norbrook Laboratories (GB) Limited v Shaw [2014] UKEAT 0150 132401 was an appeal from a decision of the ET on a PHR that two emails sent by S on 30 November and 6 December 2010, taken together, were capable of amounting to qualifying disclosures. S was Norbrook's Sales and Business Communications Manager. His duties included managing a team of Territory Managers who operated throughout the United Kingdom. The Territory Managers drove to customers and potential customers to obtain sales. The winter of 2010 was particularly severe and the roads were covered with snow. The Territory Managers were having difficulty getting to their appointments and they raised this with S, as their Manager, that they were concerned that inability to get to appointments might affect their pay. S in turn sent three relevant emails to Norbrook. In the first he asked for "some advice on what my Territory Managers should do in terms of driving in the snow. Is there a company policy and has a risk assessment been done." The ET was clear that this could *not* be a disclosure of information, it was simply an enquiry. The reply was rather vague so in a second email S said he

> *"was hoping for some formal guidance from the company. The team are under a lot of pressure to keep out on the roads at the moment and it is dangerous. Do I log this as the formal guidance?"*

In a third email S said he was:

> *"…only after a simply [sic] policy statement to increase transparency and help build morale and goodwill within the team. As their manager I also have a duty to care for their health and safety. Having spent most of Monday and Friday driving through snow I know how dangerous it can be. In addition the time spent battling through the snow is unproductive; they can gain more sales by phoning customers. If they are not going to be paid then I have to put in contingencies for diverting calls to those team members*

still on the road. In the absence of any formal guidance I take full responsibility for the directions given to my team."

The EJ gave a self-direction that for there to be a qualifying protected disclosure there had to be a disclosure of information. Having considered *Cavendish* the EJ held that, looking at the email correspondence as a whole, a number of statements were being made by S as well as queries raised by him. S was informing his employer that the road conditions were so dangerous that the health and safety of his team was being placed at risk. Even though such facts may have been obvious in any event to the employer that did not prevent S in providing that information in the course of the e-mails making a disclosure which was capable of amounting to a qualifying disclosure within Section 43B(1)(d).

On appeal to the EAT, Norbrook contended that this was perverse and/or erroneous and that no underlying wrong or failure had been identified. Reliance was placed on *Goode* in support of a submission that S's state of mind about weather conditions was not the foundation for a reasonable belief that there was any relevant failure as regards the health and safety of any specific member of the team. As in *Goode* the communications were "…only 'information' in the sense of being a statement of his state of mind…" and as in *Cavendish* simply voicing a concern, raising an issue or setting out an objection was not the same as disclosing information." Yet further there was nothing in the language of ERA section 43B which permitted a "qualifying disclosure" to consist of several separate disclosures over different days and communicated to different individuals.

The EAT dismissed the appeal. The disclosure must be of information not an allegation (*Cavendish* paragraph 24). Nor can it be an expression of opinion or a state of mind (*Goode* paragraph 36) – though as to this see *Western Union* (below). Further, the information had to be of facts which in the reasonable belief of the worker making the disclosure tended to show (in this case) that the health and safety of any individual had been, was being or was likely to be endangered. An earlier communication could be read together with a later one as "embedded" in it rendering the later communication a protected disclosure even if taken separately they would not fall within section 43B(1)(d) (*Goode* paragraph 37). Accordingly two communications could, when taken together, amount to a protected disclosure. Whether they did was a question of fact. The EJ did not err in concluding that in the emails taken together S was communicating information. He was drawing attention to the danger posed to Territory Managers of driving in snowy conditions. This was not just as an expression of an opinion or making an allegation. Information was being provided.

Two communications can be aggregated in order to support a finding that a qualifying disclosure was made if they relate to the same subject. However it does not follow that two separate disclosures can be aggregated to form a single protected disclosure. In *Barton v Royal Borough of Greenwich* [2015] UKEAT 0041_14_0105 B was employed by Greenwich and had formerly been an elected shop steward and health and safety representative. B received a concern from a work colleague that the colleague's line manager had emailed "hundreds" of documents to her home which he believed contained confidential or personal data about himself and her personal email was not part of a secure system nor encrypted. B considered that this was a significant breach of the Data Protection Act 1998. B did not report the matter to his line managers but instead reported his concerns to the Information Commissioner's Office ("ICO"), and only thereafter to his line managers. Having consulted the ICO website, he telephoned the advice line to clarify his understanding of the Data Protection Act. The information B provided to the ICO was wrong. In fact the manager had emailed only 11 documents to her home email and that email was password protected so it was not inappropriate for her to have sent them to the home email address. The Council told B that he should have referred the matter to his line managers before raising concerns with the ICO, and was specifically instructed not to contact the ICO or other external bodies in relation to the matter without the prior authority of his line manager. He was told that the Council would investigate the concerns promptly, and in fact the Council then did so.

B then telephoned the ICO to seek advice as to what he should do about the instruction not to communicate with the ICO. The Council took the view that B's second contact with the ICO in breach of the instruction given to him was a serious breach of duty and he was summarily dismissed. B was already subject to a final written warning in relation to an unrelated matter and also found to have committed gross misconduct by writing an inappropriate letter in the course of his duties, as a tenancy relations officer, to a member of the public.

B claimed that he had been unfairly dismissed for whistleblowing and relied on his original communication with the ICO and the subsequent telephone call to the ICO as protected communications. The ET found that the original referral was not a protected disclosure because the Employment Tribunal did not consider that the Claimant held the requisite reasonable belief that the information he disclosed tended to show that the Council had failed, or was failing, to comply with its obligations under the Data Protection Act. The subsequent telephone call to the ICO was not a qualifying disclosure because there was no disclosure of information

contained within it which related to a supposed relevant failure. The ET considered that the two disclosures had to be considered separately.

B sought to persuade the EAT that the two disclosures could and should be aggregated so that together they constituted a protected disclosure. The Employment Appeal Tribunal referred to *Bolton School v Evans* [2007] ICR 641 and held that second supposed disclosure to the ICO- the telephone call- could not be treated as part of the original referral and could not on its own constitute a qualifying disclosure in the absence of disclosure of "information".

In *Greenly v Future Network Solutions Limited* [2013] UKEAT 0359_13_1912 the EAT held that it was not appropriate to strike out a case at a PHR because, although the pleaded case tended to suggest that no "information" had been disclosed, it was possible, when evidence was heard by an ET, that it would emerge that information had been disclosed or was apparent from the context in which they had been made. In that case the EAT also confirmed that two communications taken together could amount to a protected disclosure where neither, standing on their own, would have satisfied the requirements of the section.

In *Western Union* (see above) the EAT also considered a submission on behalf of the employer that all that Mr Anastasiou had done was disclose his opinion that the projections as to branch openings should not have been given to the stockmarket by the employer. The EAT rejected this argument. They said that they would follow and apply the approach adopted by the EAT in *Cavendish, Goode* and *Smith*: that s.43B ERA requires the disclosure to be one "*of information*", not merely the making of an allegation or statement of position but that:

> *"the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive."*

The EAT observed that Mr Anastasiou was providing responses to an investigation. That investigation was concerned with whether the information given to the stockmarket was correct or whether it had been misleading. To some extent, Mr Anastasiou was being asked to provide his opinion, but not simply as to whether he considered the statements in the conference calls should have been made, but as to the actual sales position as he understood it. Having made its findings as to what Mr Anastasiou had said in the investigation, the ET concluded that he had provided

information – obviously derived from his experience and knowledge of what was happening - as to the likelihood of meeting the sales target and as to the appropriateness of including particulars in the accounts. The EAT would uphold that finding.

The approach in *Western Union* provides strong support for the approach suggested in the Main Work (at paras 3.06 to 3.11). There is no bright line divide between statements of opinion and statements of fact, such that only the latter be sufficient for a qualifying disclosure. A statement of opinion will at least disclose the fact that a person holds that opinion. It is a separate question whether that is information which could reasonably be believed to tend to show a relevant failure. It is important to keep those two questions distinct (as emphasised in *Easwaran*). Context is all important. In *Goode* the mere expression of a state of mind (the statement that the worker was "disgusted") could not reasonably have been believed to tend to show a relevant failure. That will not necessarily always be the case. At the very early stage when a person raises the alarm, there may be the minimum of detail provided because the worker reasonably expects to be given the opportunity to expand on the basis for the concerns. In context the simple communication by a worker that, for example, s/he has discovered a suspected fraud, whilst only disclosing a state of mind or opinion, might in context tend to show a relevant failure. The argument would be stronger if that person was in a position where their opinion was expected by its nature to carry weight e.g. if the warning is given by an employee entrusted with an internal auditing responsibility. It would be unsatisfactory if, before the employee has been offered the chance to expand on the concerns, it was open to the employer to dismiss in response to the warning, and then to say that no protected disclosure has yet been made. Conversely if at a stage when the employee has had the opportunity to expand on concerns there is nothing added to substantiate a mere state of mind or expression of opinion, it may well be that the mere fact that the worker holds a particular opinion would be wholly insufficient to support any contention that the worker reasonably believed that it tended to show a relevant failure.

Finally in *Kilraine v Wandsworth LBC* [2016] IRLR 422 (EAT), Langstaff J (at para 30) cautioned as to the need for some care in the application of the principle in *Geduld.*

> The dichotomy between 'information' and 'allegation' is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. … The question is simply whether it is a

disclosure of information. If it is also an allegation, that is nothing to the point.

Extent to which the disclosure must spell out the relevant failure and why it is shown by the information disclosed.

Paragraphs 3.16 – 3.24

The judgment of the EAT in *Fincham v HM Prison Service* (EAT/0925/01 and EAT/0991/01, 19 December 2002) may be thought to indicate that the worker has to actually identify, albeit "not in strict legal language", the breach of legal obligation which he or she has in mind when disclosing information. As suggested in the main text this was not easy to reconcile with later authority, in particular what Elias P himself said in *Bolton* [2006] IRLR 500 at para 41. In *Western Union Payment Services UK Limited v Anastasiou* UKEAT/0135/13/LA the EAT accepted that what mattered was the context. Given all the circumstances would the employer have appreciated at least the general nature of the relevant failure? If that was the case then there was no need for the worker to spell it out. *Western Union* was concerned with information given by the employee when he was being asked questions on behalf of the employer as part of an investigation as to whether statements made by the employer to the stockmarket, as to the likely number of branches to be opened within the next year, should have been made. Mr Anastasiou expressed the view that they should not have been made. In dismissing Western Union's argument that it was necessary for Mr Anastasiou to identify the legal obligations that were engaged and had or might have been broken by the making of the statements to the stock market, the EAT accepted the submission for Anastasiou, that the context had to be considered. The information disclosed and circumstances of the disclosure by *Fincham* were not such as to make it reasonably obvious what relevant failure she had in mind (health and safety). That was not the case with Mr Anastasiou or Mr Evans in the *Bolton* case. In both of those cases the context made the relevant legal obligation (sufficiently) apparent.

On reasonable belief see *Dr Y-A-Soh v Imperial College of Science, Technology and Medicine* (UKEAT/0350/14/DM, 3 September 2015), at para 47

Chapter 4

Removal of the good faith requirement

In each of those sections where it appears, that is to say 43C, 43E, 43F, 43G and 43H, the requirement that a disclosure must be made "*in good*

faith" to be protected was deleted by section 18 of ERRA in relation to disclosures made on or after 25th June 2013. As such, subject to the issue canvassed above as to the meaning of the new public interest test, a predominant ulterior motive will generally no longer mean that the claim fails at the liability stage. That is subject to the qualification that motive still remains a relevant consideration for wider disclosures within sections 43G and 43H. These exclude disclosures made "*for the purposes of personal gain*". At least at first instance this has been construed as extending beyond financial gain, so as to include the motive of securing an employment advantage. See the discussion of *Kajencki* at [5.25] of the Main Work.

Further, the Tribunal has been given a new power to reduce the compensation payable in respect of detriment (s.49(6A) ERA) and to reduce a compensatory award for unfair dismissal (s.123(6A) ERA), by up to 25% where the tribunal is satisfied that the disclosure was not made in good faith. There would seem to be no reason why the law as outlined in chapter 4 will not continue to apply for this purpose.

Dr Y-A-Soh v Imperial College of Science, Technology and Medicine (UKEAT/0350/14/DM, 3 September 2015). Although the claimant's disclosure had been made to defend herself, rather than to prevent, remedy, or cause investigation of the wrongdoing, that did not equate to it being made in bad faith. As the EAT explained (at para 58):

> The fact that a disclosure of information was made by a worker seeking to defend herself against an adverse assessment of her performance does not necessarily mean that the disclosure was made other than in good faith. There is no halfway house between 'good faith' and 'bad faith'; the one is the converse of the other. 'Bad faith' connotes some degree of impropriety in the making of the disclosure. On the ET's findings the disclosure was not made out of spite towards Dr McPhail but rather to illustrate why some lecturers might be more popular with students than others, hence rendering the SOLE [system of online evaluation] marks an unfair way of assessing a lecturer's performance. The ET correctly applied the words of the statute; it had regard to the guidance in Street, and we do not think it erred in law.

Chapter 5

See the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014 which makes Members of Parliament prescribed persons with effect from 6th April 2014 and, with effect in relation to a disclosure or after the 1st October 2014.
, The Public Interest Disclosure (Prescribed Persons) Order 2014 SI 2014/2148.

See now the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2015 (SI 2015/1407) which cames into force on 21st July 2015. This Order amended the 2014 Schedule to make the Secretary of State for Education a prescribed person in respect of matters relating to the educational institutions in England specified in article 2 of this Order.

See Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2016 which came into force on 1st November 2016 and makes amendments in relation to the entry for the Bank of England and the Food Standards Agency.

See the Department for Business Innovation and Skills' Prescribed Persons Guidance published March 2015 intended to help listed organisations and individuals understand the role associated with being a prescribed person and how this fits with their statutory functions beyond the whistleblowing legislation.
A list of the prescribed persons and the corresponding description of matters in respect of which they are prescribed, and contact details, is set out in the BIS document "Blowing the Whistle to a Prescribed Person: List of prescribed persons and bodies" (February 2016). There has been one further amendment to the list since that publication, SI 2016/968

The decision in *Barton v Greenwich LBC* (UKEAT/0041/14/DXA, 1 May 2015) illustrates that the requirement for a reasonable belief that the disclosure falls within the description of matters in respect of which the relevant body is prescribed may in some cases provide a trap for the unwary

Chapter 6

6.05 See also *Suhail v Herts Urgent Care* UKEAT/0416/11/RN, 14 November 2012, where the EAT upheld a tribunal's finding that the claimant, who worked as an out of hours GP for the respondent, was not a

"worker". Crucially in that case the GP did not contract directly with the Primary Care Trust (now the NHS Commissioning Board), so the extended meaning of worker in s.43K(ba) (as amended by ERRA) would not assist. Contrast *Hospital Medical Group Limited v Westwood* [2013] ICR 415 (CA), where the doctor was integrated into the employer organisation and properly regarded as a worker, and *Abertawe Bro Morgannwg University Health Board v Ferguson* UKEAT/0044/13/LA, 24 April 2013 where it was accepted that a GP was a worker employed by a Health Board.

6.07 – 6.23

On the general approach to s. 43K see *Day v Lewisham and Greenwich NHS Trust and another* [2016] IRLR 415 (EAT), at para 36 (an appeal against this judgment is to be heard by the Court of Appeal shortly). *Day* and *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742 take differing approaches to the question of whether an individual can be a worker under s.230 for one employer whilst at the same time being a worker under s.43K for a different employer.

Section 20 of ERRA made amendments to section 43K with effect from 25th June 2013 (ERRA section 103 (2));

> (ba) works or worked as a person performing services under a contract entered into by him with a Primary Care Trust under section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to ~~section 84 or 100 of~~ the National Health Service Act 2006 or with a Local Health Board under section 41(2)(b), 42, 50, 57, 64 or 92 of, or Schedule 7 to ~~section 42 or 57~~ of the National Health Service (Wales) Act 2006~~, or with a Primary Care Trust under section 117 of that Act~~
>
> (bb) works or worked as a person providing services under a contract entered into by him with a Health Board under section 17J or 17Q of the National Health Service (Scotland) Act 1978,
>
> (c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services works or worked as a person providing services ~~in accordance with arrangements~~ made—
>
> (i) by a Primary Care Trust under section 126 of the National Health Service Act 2006 or Local Health Board under section 71 or 80 of the National Health Service (Wales) Act 2006, or

(ii) by a Health Board under section 2C, 17AA, 17C, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, ~~or~~

~~(ca) works or worked as a person performing services under a contract entered into by him with a Health Board under section 17Q of the National Health Service (Scotland) Act 1978,~~

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being 'employed' shall be construed accordingly.

(2) For the purposes of this Part 'employer' includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(aa) in relation to a worker falling within paragraph (ba) of that subsection, the Primary Care Trust or Local Health Board referred to in that paragraph.

(ab) in relation to a worker falling within paragraph (bb) of that subsection, the Health Board referred to in that paragraph,

(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and

~~(ba) in relation to a worker falling within paragraph (ca) of that subsection, the Health Board referred to in that paragraph, and~~

(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section 'educational establishment' includes any university, college, school or other educational establishment.

Section 20 also added a new subsection 4 to section 43K which gives the Secretary of State new powers to make amendments to that section as to what individuals count as "*workers*" for the purposes of Part IVA. An order under subsection (4) may not make an amendment that has the effect of removing a category of individual unless the Secretary of State is satisfied that there are no longer any individuals in that category. Any such amendment will be made following the results of the Government's call for evidence referred to above.

Section 49B ERA, inserted by section 149 of the Small Business, Enterprise and Employment Act 2015, empowers the Secretary of State to make regulations prohibiting an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure. An 'applicant', in relation to an NHS employer, means an individual who applies to the NHS employer for—
(a) a contract of employment,
(b) a contract to do work personally, or
(c) appointment to an office or post.

It is provided that an NHS employer discriminates against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office, or post. Regulations made under the section may in particular—
(a) make provision as to circumstances in which discrimination by a worker or agent of an NHS employer is to be treated, for the purposes of the regulations, as discrimination by the NHS employer;
(b) confer jurisdiction (including exclusive jurisdiction) on employment tribunals or the Employment Appeal Tribunal;
(c) make provision for or about the grant or enforcement of specified remedies by a court or tribunal;
(d) make provision for the making of awards of compensation calculated in accordance with the regulations;
(e) make different provision for different cases or circumstances;
(f) make incidental or consequential provision, including incidental or consequential provision amending specified primary and other legislation.

'NHS employer' means an NHS public body prescribed by regulations to be made under the section, and 'NHS public body' means—
(a) the National Health Service Commissioning Board;
(b) a clinical commissioning group;
(c) a Special Health Authority;
(d) an NHS trust;

(e) an NHS foundation trust;
(f) the Care Quality Commission;
(g) Health Education England;
(h) the Health Research Authority;
(i) the Health and Social Care Information Centre;
(j) the National Institute for Health and Care Excellence;
(k) Monitor;
(l) a Local Health Board established under s. 11 of the National Health Service (Wales) Act 2006;
(m) the Common Services Agency for the Scottish Health Service;
(n) Healthcare Improvement Scotland;
(o) a Health Board constituted under s. 2 of the National Health Service (Scotland) Act 1978;
(p) a Special Health Board constituted under that section.

For the purposes of the regulation-making power, 'worker' has the extended meaning given by section 43K ERA, and a person is a worker in relation to an NHS employer if that NHS employer is the worker's employer within the extended meaning given by that section. The definitions contained in section 230(6) of employees and workers are extended accordingly. Section 49B came into force on 26 May 2015. As yet, no regulations have been made in exercise of the powers granted by it.

6.07 See now *Keppel Seghers UK Ltd v Hinds* [2014] UKEAT 0019_14_2006. H was self-described as "a site-based Health and Safety Adviser". He worked within the construction and civil engineering industry engaged on projects as a consultant. His evidence, which was accepted by the Tribunal, was that it is a prerequisite for obtaining work as a Health and Safety consultant within his industry that he provides his services through a company. He was the sole share-holder, director and employee of such a company ("Crown"). He had never employed anyone else and the only purpose of establishing Crown was to meet industry requirements in providing his own consultancy services. Keppel was involved in the construction of energy recovery facilities. At the relevant time it was working on a construction project for a final client, TPS, and approached a recruitment agency ("First") with a specification for a contractor that it required for this project. The ET found that "First" sourced the individual contractor:

> *"according to those specifications and put him forward for interview. [Keppel] conducted the interview themselves … [it] interviewed [H] in person …"*

There was no direct contractual relationship between H and Keppel such as might enable this case to fall within s 230 ERA. The ET found that H was:

> *"... ultimately supplied to the respondent via two corporate entities. The first was his own umbrella company Crown ... . The services of Crown were not directly supplied to* [Keppel] *but instead a further intermediary, a recruitment agency called First ... set up an interview with the respondent which* [H] *had at their site in Runcorn, and subsequently was engaged to provide services to them in connection with a construction project that was being done for a final client called TPS.*"

In considering how H had been introduced to Keppel and how his services were then supplied, the ET found that it was:

> *"...* [H] *himself that was introduced to and supplied to do work ultimately for the respondent and not his company, Crown. In the interview that he had with* [Keppel] *... the interview was with him personally. It was clearly* [H] *himself who was being engaged by* [Keppel] *..."*

The contract between Keppel and First contained a requirement that any individual contractors providing services to Keppel would have to do so through intermediary companies and envisaged that the contractors (rather than the companies via which they were required to supply their services) would be subject to suitability checks. It was found that it was not in the parties' contemplation that any intermediary company could substitute anyone else for the individuals who had thus been assessed. Whilst the terms on which First engaged (Crown) allowed for a substitute, the ET found that the terms of the end user (Keppel) did not envisage that.

The ET expressly rejected Keppel's argument that H was in fact employed by Crown and he was able to determine his own terms through that entity (see paragraph 8). The ET held, instead, that Keppel substantially determined the terms of H's engagement for section 43K(1)(a)(ii) purposes and was the employer for section 43K(2) purposes. The ET found that Keppel set the specification for the work; Keppel authorised changes to H's hours, he could not dictate his hours; H was obliged to report regularly to Keppel's manager and was generally subject to Keppel's control, albeit as a health and safety professional he worked on his own much of the time and was not micro-managed. H's evidence that it was Keppel that decided that he should leave and also determined the terms of his departure (i.e. his period of paid notice) was not challenged.

HHJ Eady said it was notable that section 43K put the focus on the way in which the relationship had arisen and had been governed: the introduction or supply and the "in practice" substantial determination of the terms of the engagement. That reflected the fact that the whole purpose of this statutory extension to the definition of "worker" and "employer" was to go beyond the normal contractual focus of those terms for statutory purposes in the employment field. She referred to the recognition by Cox J in *Sharpe v (1) The Worcester Diocesan Board of Finance Ltd and (2) The Bishop of Worcester* UKEAT/0243/12/DM the phrase "terms on which he is or was engaged to do the work" do not imply the existence of a contract (see paragraph 237) but now see below. Absence of actual day-to-day control would not be determinative. Regard would need to be had to the totality of the contractual provisions and all the circumstances of the relationship, see *White v Troutbeck SA* [2013] IRLR 949, CA.

Section 43K is a provision that takes employment lawyers outside the comfort zone of the contractual approach normally required in determining employment status. The protection extends to relationships where there is no contract in existence between the parties and to cases where there might be no direct contract between the complainant and the user of her services but contracts between each of them and other parties, impacting upon (if not governing) their relationship. This might include a contract between the complainant and an employment agency where the complainant is engaged through her own service company. The focus of s 43K is on what happened in practice rather than on the contractual agreement albeit the contracts provide a useful starting point in this case.

The ET had not lost sight of that or reached conclusions inconsistent with the contractual provisions in question. What happened in practice was that there was a focus was on the suitability of H as an individual (not on Crown): H was "sourced" at an individual meeting and was interviewed as such and not as a representative of Crown. That provided sufficient basis for the ET's conclusion that H was introduced as an individual for section 43K(1)(a)(i) purposes. It was “perhaps unhelpful” that the ET did not expressly separate out its consideration of the issue of “supply” from that of introduction but there might be some degree of overlap in terms of the relevant findings of fact in respect of these terms. In any event the judgment had to be read as a whole and the ET clearly kept in mind the important point in each respect: was it H as an *individual* who had been introduced or supplied? In respect of supply, the ET was again entitled to rely on the same matters as those in relation to the question of introduction. There was force in H’s submission that a contractual right to provide a substitute need not exclude the application of section 43K. The focus of the definition at 43K(1)(a)(i) is on the factual question as to whether or not the

complainant has been supplied; it did not include a requirement that no-one else could be supplied in her place. The existence of a right of substitution might point to the fact that it was not, in truth, the complainant who was being supplied but this might not necessarily be so. However that was not a point that arose for determination.

As to the issues raised on the question of determination of the terms of H's engagement Keppel's submission was that under section 43K(1)(a)(ii), the focus could be broader – the terms might be determined by more than one entity and might include terms on which the complainant was engaged to do the work (i.e. projecting forward) rather than simply being the terms upon which she is engaged (the reality of what has transpired). HHJ Eady said that *both* provisions allow that the terms of the engagement might have been determined by more than one entity. Section 43K (1)(a)(ii) simply distinguished between terms substantially determined by the worker themselves and terms substantially determined by others. Section 43K(2)(a) then takes the assessment further forward to define the employer as being the party (which, by this stage, cannot be the worker) who *substantially* determines or determined those terms.

The context of the phrase "*to do the work*" was is in respect of those terms which "*are or were in practice substantially determined*…". There might be a distinction to be drawn as between this provision and the wording of section 43K(2)(a) but the subtlety of it seemed likely to limit its usefulness. In any event HHJ Eady was unable to understand how it was a distinction with practical application in the present case. Keppel had contended in the ET that looking at who had substantially determined the terms on which H was to do the work inevitably led to the answer that Crown did and that, as the sole Director of Crown, that really meant that H had done so. The ET rejected that contention. It held that Crown was simply a vehicle through which H's services were supplied (as an industry requirement). The ET was entitled to focus on the specific terms of the engagement in question and found that Keppel was in the position of determining both H's initial terms of engagement ("the terms on which he was engaged to do the work") *and* during the course of the agreement's operation. Given that the ET had found that it was Keppel which had laid down the specification for the engagement and had interviewed H personally to see if he was suitable, it was entirely consistent for the ET to conclude that Keppel had also determined the initial terms of the engagement. The ET was entitled to look at the various contracts relevant to the relationship and to see how these worked in practice. Although the ET referred to "control", control was not irrelevant to the question as to who determined the terms on which work is to be done. The ET was plainly influenced by the fact that the requirements of the work were laid down by Keppel and that was obliged

to report to its manager. Those findings of fact plainly supported its conclusion as to both the initial determination of the terms on which H was "to do the work" and as to the continuing determination of those terms (i.e. that it was the Respondent which was the employer for section 43K(2)(a) purposes). The ET had regard to Keppel's ability to determine (or control) the terms of the Claimant's engagement through the question of hours and shift arrangements as examples of how this worked in practice. That disclosed no error of law. Other examples were also set out in the evidence.

The appeal was dismissed.

The decisions of the EAT on worker status now need to be read against the background of the Court of Appeal's judgment in *Sharpe v The Bishop of Worcester* [2015] EWCA Civ 399 (30 April 2015) the claimant was until his resignation on 7 September 2009 the Rector of the parish of Teme Valley South in the diocese of Worcester. He claimed that he was unfairly dismissed and that he suffered detrimental treatment as a result of making what are in law called "protected disclosures". The appeal was concerned with whether, on the facts as found, he could meet a threshold test of employment or as a "worker" (as respects his whistleblowing claims) in relation to the sole respondent, the Bishop of Worcester. The Court of Appeal held that □□□the facts as found by the employment judge, there was no employment contract between Reverend Sharpe and the Bishop and that the EAT had fallen into error in making criticisms of the employment judge's conclusions to the contrary. On the alternative claim by Reverend Sharpe that he was a "worker" the Court of Appeal held that that there was no contract meant that there was also no contract for the purposes of section 43K(1)(b). The only question is was whether there also needed to be a contract for the purpose of section 43K(1)(a). The EAT had held that on the true interpretation of this provision there was no requirement for a contract. It was argued for Reverend Sharpe that where Parliament refers to contract, it uses the word "contract" and so when it refers to "terms" there need be no contract. The Court of Appeal rejected this contention. It must inevitably follow from the statutory reference to "term on which he is or was engaged to do work" that there must be a contract.

6.22 See also *P v Commissioner of Police for the Metropolis* [2016] EWCA Civ 2, [2016] IRLR 301.

6.33 Whilst NEDs are not employees, we suggest that they can fall within the definition of a worker. This was the conclusion of an employment tribunal in *Osipov v International Petroleum Ltd and others* Case No.2200944/2015, 23 March 2016 (EJ Lewzey). The issue arose in the

context of concluding that two NEDs were liable for protected disclosure detriment claims under the individual liability provision in s.47B(1A) ERA. The tribunal expressly proceeded on the basis of applying the same test of a worker as would apply for a claimant.

6.37 See now *Clyde & Co LLP and another (Respondents) v Bates van Winkelhof (Appellant)* [2014] UKSC 32 [2014] 1 WLR 2047, [2014] IRLR 641 reversing *Bates van Winklehof v Clyde & Co* LLP [2012] EWCA Civ 1207 [2012] IRLR 992. BvW was a member of the respondent LLP. The Court of Appeal held that under s.4(4) of the Limited Liability Partnerships Act 2000 if Clyde & Co had not been registered as an LLP then Winklehof would have been a partner in an 1890 Act partnership. She was therefore not a "worker" within the meaning of s.230(b) of ERA and therefore could not pursue a whistleblowing claim. The Supreme Court allowed BvW's appeal. Lady Hale (with whom Lord Neuberger and Lord Wilson agreed) said that the 2000 Act was a UK-wide statute, that there was doubt about whether partners in a Scottish partnership can also be employed by the partnership. It was that feature which explained why section 4 (4) had been included in the 2000 Act. There was no need to give "a strained construction" to section 4(4). All that it was saying was that, whatever the position would be were the LLP members to be partners in a traditional partnership, then that position is the same in an LLP. That was how section 4(4) was to be construed. Once the section 4 (4) point was cleared out of the way the result in favour of worker status became, if not a matter of foregone conclusion, at least one to which a fairly clear pathway lay. Lady Hale opened her discussion of the point by remarking that it was striking 'how much hard work has to be done in order to find that a member of an LLP is *not* a worker within the meaning of section 230(3)(b) of the 1996 Act." It was common ground before the Supreme Court that BvW worked "under a contract personally to perform any work or services", that she provided those services "for" the LLP and that the LLP was not her "client or customer". The EAT's approach had been correct.

6.42 See the references to *Day* and *McTigue* above.

Holders of Judicial Office

In *Gilham v Ministry of Justice* (UKEAT 0087/16/LA, 31 October 2016) the EAT held that the a holder of judicial office was not a worker.

6.44 – 6.48 See now *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] IRLR 315 *Rogers v Deputy Commander (as trustee of the Garrison Amenities Fund) and another* UKEAT/0455/12/ZT, 1 February 2013, and *Dhunna v Creditsights Ltd* UKEAT/0246/12/LA, 18

December 2012 *Lodge v Dignity & Choice in Dying & Anor* [2014] UKEAT 0252_14_0212 and *Olsen v Gearbulk Services Ltd and another* (2015) UKEAT/0345/14

In *Fuller v United Healthcare Services Inc & Anor* [2014] UKEAT 0464_13_0409 the claimant's claims included a claim under s.103A that he had been dismissed for making protected disclosures. The respondents argued that the Employment Tribunal did not have territorial jurisdiction, as the claimant's employment did not have sufficient connection to the UK. The claimant was a US citizen, employed by a US company and paid in US dollars. He travelled extensively for his work but undertook an international assignment which involved his working in London for about half of his time and living in accommodation rented for him by the respondent. The ET held that it did not have jurisdiction and the EAT upheld this decision. It was contended before the ET that the test should be different when construing 103A because of the public interest in the encouragement of the disclosure of wrongdoing. The EJ accepted that the case of *BP v Elstone* required a purposive construction of the provisions on **protected disclosure** but there was no basis on which she could conclude that Parliament had intended that the claimant should fall within the legislative grasp of section 103A of **ERA**. This contention was repeated in the EAT but (succinctly) rejected: did not seem to be anything in the legislation or case law to indicate such a difference in the reach of 103A.

See also *Smania v Standard Chartered Bank* [2014] UKEAT 0181_14_0512 [2015] ICR 436: S who was employed by the respondent bank made allegations of financial malpractice. He was subsequently dismissed. S was Italian, he lived and worked in Singapore. The contract under which he worked was subject to Singaporean law. The only connection with the United Kingdom was that that was the location of the head office of the Bank. S accepted that if his claim had been one of "ordinary" unfair dismissal he could not meet the *Serco* test. He unsuccessfully contended that a more generous test should apply in the case of a whistleblower.

S's appeal to the EAT was dismissed. The EAT rejected the contention that the ET should have applied the principle in *Bleuse* to protect the right to freedom of expression guaranteed by Art.10 ECHR as part of UK Law and through the EU Charter (Art. 11 of which adopted Art. 10 ECHR). The EAT held that *Bleuse* did not apply, since neither the ECHR nor EU Law applied in Singapore; nor did the claim involve a directly effective right. No sufficient reason to treat the ERA as extending extra-territorially in cases involving protected disclosures beyond its scope in non-whistleblowing cases had been established.

See also *Olsen v Gearbulk Services Ltd and another* [2015] IRLR 818 Langstaff J

Chapter 7

New section: detriment and dismissal

Romanowska v Aspirations Care Ltd [2014] UKEAT 0015_14_2506 is noted below on the issue of striking out of whistleblowing claims. It also raised the question whether a claimant who but for making a protected disclosure would not have been dismissed for misconduct, but merely warned, could assert a claim under section 103 ERA **(**where it would have to be shown that the "principal" reason for dismissal was protected disclosure) or whether she would be restricted to making a section 47B (detriment) claim. Langstaff P said it seemed to him to be a difficult issue whether, if a protected disclosure made the difference between a final written warning and dismissal from the point of view of the employer whether that disclosure should be regarded as the principal reason for the dismissal. He continued:-

> If it were not, then (depending on the width given to the words "[dismissal] within the meaning of Part X" in section 47B) there might be a lacuna, in that a real wrong would be done to an employee without any opportunity of redress, despite the statute appearing to single out dismissal for particularly effective remedy. I note that this the decision of the Court of Appeal in *Melia v Magna Kansei* could be argued to be decisive, but this also arguably remains an issue of law which may still need to be determined, if it arises, upon consideration of all of the facts and more detailed submissions than I have had here.

Langstaff P raised the point for future reference.

7.12- 7.13 See also *Deer v University of Oxford* [2015] IRLR 481 on the concept of 'detriment'.

7.18 As noted in the Main Work *Woodward v Abbey National* established that a detriment was actionable even if it was imposed after the employment came to an end. *Onyango v Berkeley (t/a Berkeley Solicitors)* [2013] IRLR 338, [2013] UKEAT 0407_12_2501, [2013] ICR D17 dealt with the issue of whether the protected act, that is the protected disclosure, might occur after termination of the relevant employment. The EAT noted that Ward LJ did not exclude that possibility in *Woodward* see paragraph

67, but it did not arise for determination in that case. It did arise in *Onyango*. Giving the judgment of the EAT Judge Clark said that "worker" and "employer" are defined in section 230 ERA as those who are or have ceased to be in a contractual relationship of service or core services (paraphrased) and the parties were in that relationship. Since the detriment had to occur and be causatively linked to the protected disclosure, it followed that it must come later in time and since the detriment might arise post termination there could be no warrant for limiting the disclosure temporarily to the duration of the employment. Nor was there any force in the submission as to the use of the present tense in section 43 A to C. Those provisions were concerned only with the quality of the disclosures when they were made, not with the temporal point which was now raised. As a matter of pure construction of the statute post-termination disclosures may be relied on if they lead to detrimental treatment that was also in line with the legislative purpose of protection for whistleblowers and is entirely consistent with the recent authority.

It should be noted that in *Ali v Washwood Heath Technology College & Ors* [2014] EWCA Civ 97 the Court of Appeal did not take the opportunity to comment upon the correctness or otherwise of the EAT's decision in *Onyango.*

7.41

As to the references to *Orr v Milton Keynes Council* and the state of knowledge of the dismissing officer, see the updating notes to paragraphs 7.51 and 8.11 below.

7.27A

In *Engel v The Joint Committee for Parking & Traffic Regulation Outside London (P.A.T.R.O.L)* UKEAT 0520/12/LA, 17 May 2013 [2013] ICR 1086, [2013] IRLR 787, the EAT held that a decision by the Chief Adjudicator of the Traffic Parking Tribunal not to allocate cases to a fee paid Parking Adjudicator could not amount to a detriment for the purpose s47B of the Employment Rights Act 1996. Engel was a parking adjudicator authorised to hear appeals against decisions of local enforcement authorities to uphold the imposition of penalty charges in respect of certain road traffic contraventions. His appointment was originally made by the Joint Committee for Parking and Traffic Regulation outside London (a consortium of local authorities responsible for traffic enforcement in their area) under Regulations made under s.73 of the Road Traffic Act 1991 and later renewed under s.81 of the Traffic Management Act 2004. Regulation 17(5) of the Civil Enforcement of Parking Contraventions (England)

General Regulations 2007 SI 2007/3483, made under s.81 of the 2004 Act, provides that adjudicators who were appointed under s.73 of the 1991 Act and held office immediately before the coming into force of reg. 17 shall be treated as having been appointed on the same terms on which they then held office. Engel's terms and conditions of appointment provided that he could be removed from office only for misconduct or on the ground that he was unfit to discharge his functions; h could be called upon to sit and undertake other prescribed duties 'as the need arises'; he would be paid a fee of 1/220 of 90% of the salary payable to an office holder in Judicial Appointments Group 7 per day.

His terms and conditions of appointment also contained provision for non-renewal on five grounds. Subject to reg. 17(5) it was for the 'relevant enforcement authorities' to decide the terms upon which an adjudicator was to be appointed: reg. 17(1). Under reg. 17(3) any decision by those authorities not to reappoint or to remove an adjudicator from office could not have effect without the consent of the Lord Chancellor and of the Lord Chief Justice (or a judicial office holder nominated by him).

A contention that Engel was not a "worker" was abandoned. It was settled law that a fee-paid judicial office holder was a 'worker': *O'Brien v Ministry of Justice* [2013] UKSC 6, [2013] IRLR 315 paragraph 42. In an area of law in which it was now accepted that EU and domestic law could not readily be disentangled, the proposition that the same words mean different things depending upon whether or not they can be disentangled, is unlikely to be correct. For those reasons, even had the concession not been made, the EAT would have gone further than the employment tribunal judge and held that Engel was a 'worker' for the purpose of Part IVA of the 1996 Act (the protected disclosures provisions).

It was common ground that the Chief Adjudicator is a judicial office holder and that, in the discharge of her judicial functions, she was entitled to judicial immunity; and that, in respect of her discharge of those functions, the Joint Committee could not have vicarious responsibility. It was also common ground that the Chief Adjudicator, in addition to being a judicial office holder discharging judicial functions, was an employee of the Joint Committee and did perform administrative or 'ministerial' functions. The Employment Judge had however concluded that the decision not to allocate personal or postal cases to Engel was made in the performance of her duties as a judicial office holder.

It was common ground that in appointing and reappointing an adjudicator, the Chief Adjudicator would not be exercising a judicial function. It was also common ground that a decision by the Joint Committee not to

reappoint a person as an adjudicator or to remove him from office under reg. 17(3) of the 2007 General Regulations would not be made in the exercise of judicial functions, by whomsoever it was made. The EAT said that the concession that the taking of disciplinary steps against an adjudicator, other than a decision not to allocate personal or postal cases or both, by the Chief Adjudicator would not be in the exercise of her judicial functions was correctly made. Disciplinary proceedings had nothing to do with the resolution of disputes between parties to an appeal by an adjudicator. They concerned only the position of the adjudicator.

Long established conventional wisdom was that listing decisions made in courts in which judges appointed by the Crown sit was an exercise of judicial functions. The Ministry of Justice and its predecessors had always maintained that s.2(5) of the Crown Proceedings Act 1947 provides a water-tight defence to a claim brought by an aggrieved litigant as a result of listing errors: 'no proceedings shall lie against the Crown … in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibility of a judicial nature vested in him'. The EAT said that this proposition has never been successfully challenged in litigation and observations by Sir Robert Carswell LCJ in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, approved by Lord Walker, delivering the judgment of the Supreme Court in *O'Brien v Ministry of Justice* [2010] UKSC 34, [2010] IRLR 883 at paragraph 26 that judges "… are not free agents to work as and when they choose, as are self-employed persons…. Their office accordingly partakes some of the characteristics of employment" did not change the position. However it was submitted on behalf of Mr Engel that the decision not to allocate him any personal or postal cases was not a listing or allocation decision, but a decision to suspend him from work. The EAT accepted that the decision had that effect: if Engel was not allocated any cases to determine, he could not work and so could earn no fees.

The EAT rejected the proposition that it was necessary to look at the purpose of the decision not to allocate. Even if the decision was taken as a free-standing disciplinary measure and even if it was taken for the improper purpose alleged by Engel of subjecting him to a detriment because of his protected disclosure, the decision would still be covered by judicial immunity. The principle of immunity for the exercise of judicial functions was ultimately, a policy decision, which must be upheld even in extreme circumstances, as Lord Denning MR had explained in *Sirros v Moore* [1974] 3 All ER 776 at 781J–782D. The Employment Judge was entitled and right to find that the Chief Adjudicator's decision not to allocate further personal or postal cases to Engel was a decision taken in the exercise of judicial functions in her capacity as a judicial office holder.

It would not be open to an employment tribunal to determine that, in consequence, the Joint Committee subjected Engel to a detriment contrary to s.47B of the 1996 Act.

7.50 "On the ground that"

See *Northumberland Tyne & Wear NHS Foundation Trust v Geoghegan* [2014] UKEAT 0048_13_2901 which was an appeal against findings that the respondent subjected the claimant to detriment for making protected disclosures. The appeal was allowed. The detriments had been identified but the ET's reasoning did not sufficiently explain how those detriments were related to the protected disclosures.

See also on this point *Western Union Payment Services UK Limited v Anastasiou* [2014] UKEAT/0135/13/LA where the EAT remitted the case to the ET.

See also *The Co-Operative Group Ltd v Baddeley* referred to in the notes under paragraph 8.11 below.

In *Blackbay Ventures Limited T/A Chemistree v Ghahir* Appeal Nos. UKEAT/0449/12/JOJUKEAT/0450/12/JOJ the EAT issued guidance as to how ETs should approach a claim of victimisation for making protected disclosures. The guidance is, for the most part, equally applicable to dismissal claims.

- Each disclosure[1] should be separately identified by reference to date and content.

- Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.
-
- The basis upon which each disclosure is said to be protected and qualifying should be addressed.

- If a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.

[1] Applying *Greenly v Future Network Solutions Limited* [2013] UKEAT 0359_13_1912 a disclosure may be made from more than one communication.

- It is not sufficient …to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations.

- It is …proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

- The ET should then determine
    - whether or not the Claimant had the reasonable belief
    - whether each disclosure was made in good faith/whether it was made in the public interest[2]

- Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant.

- This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

7.51-7.66 Knowledge of the protected disclosure: an important caveat

The focus on the mental processes of the employer discussed in these paragraphs needs to be understood with one important qualification. It may *not* always necessary to establish that the person who actually inflicted the detriment was aware of the protected disclosure. Although this question now needs to be considered in the light of the Court of Appeal's decision in *CLFIS (UK) Ltd v Reynolds* [2015] IRLR 562 we start with a discussion of those cases decided before *CLFIS.* In *Western Union Payment Services UK Limited v Anastasiou* [2014] UKEAT/0135/13/LA there was no evidence that those employees who had actually subjected the worker to detriment

[2] This ought, we suggest, to have been a reference to the need to be satisfied that the worker reasonably believed that it was in the public interest that the disclosure be made.

had been aware of the making of the protected disclosure. The worker's case was that those employees had been instructed to subject him to detriment(s). The EAT said (at paragraph 74) that they could see that – hypothetically - there might be cases where there was an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced the treatment of the complainant worker. However in such cases it would still be necessary for the ET to explain how it had arrived at the conclusion that this is what had happened and the EAT concluded that that explanation had not been given in that case: accordingly the case was remitted. (For the disposal hearing judgment which expands the EAT's reasoning on this point see [2014] UKEAT 0135_13_1205).

See also the discussion of *The Co-Operative Group Ltd v Baddeley* under Chapter 8 where the Court of Appeal refers to the possibility that the dismissing officer is manipulated by some other person involved in the disciplinary process who has an inadmissible motivation- what it described as an "Iago situation".

Another case which makes the same point is *Ahmed v City Of Bradford Metropolitan District Council & Ors* [2014] UKEAT 0145_14_2710. Mr Ahmed was employed by Bradford. During a redundancy exercise he was offered an alternative post subject to a CRB check and an internal reference, both of which were regarded as formalities. Ahmed had previously made what were held to be protected disclosures of information tending to show a serious breach of contract by Bradford in relation to a scheme funded by the European Development Fund. Ahmed had raised a grievance during which he had made the protected disclosures. Mrs Baker, the second respondent had taken against Mr Ahmed as a result of the making of the disclosures and put herself forward to write the reference, even though she had no knowledge of Ahmed's work. Mrs Baker wrote a reference she knew to be negative and in a sense misleading and that would affect Mr Ahmed's ability to secure the new post. She did so to ensure that he was forced out of Bradford's employment. The employee who was considering the appointment of Mr Ahmed to the new post, Mr Rashid, formed the (incorrect) view that Mr Ahmed had misled him about sickness absence. Mrs Baker did not disabuse Mr Rashid who withdrew the offer of the new post to Ahmed and in doing so relied to a substantial degree on the reference given by Mrs Baker. That led to Mr Ahmed being made redundant. The Employment Tribunal put it this way (paragraph 144):

> "… *The decision to reject the Claimant for the SCDO post was taken by the Fourth Respondent, Mr Rashid. We were satisfied that*

Mr Rashid took his decision because he unreasonably but honestly believed the Claimant to be lying about sickness absence and <u>*because of the reference*</u> [emphasis added]. *We do not consider Mr Rashid's acting on the reference to deny the Claimant the job renders Mr Rashid's action on the ground of protected disclosure although the underlying reference was written and delivered to him on that ground. The Second Respondent's motivation in writing the reference and the Fourth Respondent's motivation in acting on the reference as received were different and the latter was not caused, in a sufficient sense, by the Claimant's protected disclosure. It was not Mr Rashid's real reason for rejecting the Claimant….*"

In the EAT it was argued on behalf of Mr Ahmed that the ET had impermissibly, severed the relationship between Mrs Baker's motives and those of Mr Rashid. They had incorrectly ignored the fact that the detriment that was suffered by Mr Ahmed - that is, the withdrawal of the offer of the SCDO post - was as a result of something done that the Employment Tribunal accepted was a detriment that had been caused, or was as a result of, protected disclosures made by Mr Ahmed. On the findings of the ET Mrs Baker had deliberately set out to secure Mr Ahmed's employment with the council coming to an end by scuppering his chances of redeployment not only for the SCDO post but for any post. HH Judge Clark said that in those circumstances that it is almost impossible to argue that, from the findings of the Employment Tribunal, by reason of the protected disclosure her act in particular in relation to the reference could not be regarded as having had a "material influence, being more than a trivial influence", as per *Fecitt*, on the treatment meted out to Mr Ahmed. The Employment Tribunal applied the wrong test for causation and applied too strict a test; they should have applied the test formulated in *Fecitt.* The findings in relation to the non-appointment to the SCDO post strongly suggested that the reference, tainted as it was, had more than a trivial influence and that Mrs Baker's reference was a means of manipulating the redeployment process. The Employment Tribunal should not have separated the motivation for writing the reference by Mrs Baker, which she wrote with the intent that he should cease to be employed and not be re-employed, from the reliance by Mr Rashid upon it. The fact that Mr Rashid did not realise he was being misled by the reference did not sanitise the effect of the reference and did not exonerate Bradford as the employer from a decision that ultimately was significantly, influenced by an infected reference that came into existence as a result of a protected disclosure . Where an employee X does an act which amounts to a detriment to employee Y by reason of a protected disclosure , such as by giving an unfair and negative reference, with the intention that it should lead to the

Claimant suffering a further detriment at the hands of employee Z, or might reasonably be found to have been so intended, the employer will be liable for the second detriment if it can be shown to have been infected by the first discriminatory act and had materially influenced the imposition of the second detriment imposed by Z upon Y.

The age discrimination case *CLFIS (UK) Ltd v Reynolds* [2015] IRLR 562 CA reversing UKEAT/0484/13, [2014] Eq LR 356, [2014] UKEAT 0484_13_2105, [2014] ICR 907 21.5.14 is now a very important point of reference in this discussion. Dr Reynolds was employed by Canada Life FS and was in her seventies. Her contract was terminated by Mr Gilmour on behalf of Canada Life after rumblings of discontent with her performance within management. Her 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. However- as Singh J put it in the EAT - , that was not necessarily the end of the matter.

On Dr Reynolds' behalf it was argued that even if the sole decision-maker was Mr Gilmour, his decision was shaped and informed by others within Canada Life. If the actual decision to terminate an employee's contract was taken by a senior manager that person might have no personal knowledge of the employee and might have to rely entirely on reports which have been prepared by others, for example about an employee's performance or conduct. Dr Reynolds' contention was that if the mental processes of those who prepared such reports were based on discriminatory grounds, then in principle the Tribunal had to examine those mental processes and could not confine itself to the mental processes of the eventual decision-maker alone. Singh J agreed: he said that the precise point of law that arises had not been the subject of direct authority in the past but drew support for his conclusion from *Nagarajan* and *Igen***.** To discharge a reversed burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

The Employment Tribunal found as a matter of fact that the views of others did play that part, in particular a presentation by a Mr McMullan and a Mr Newcombe to Mr Gilmour. But it failed to examine the mental processes of those persons to see if they were based on the prohibited ground of age.

Upholding the appeal Singh J said it will always be a question of fact for the tribunal. It may well be that, having examined the mental processes of those people who are known to have been involved in a significant way in the process leading up to a decision to terminate a person's employment,

the tribunal will conclude that the respondent has discharged the burden of proof. In Dr Reynolds' case, even though it was known that other identified people were involved in a significant way in the process which led up to Mr Gilmour's decision to terminate her contract, *their* mental processes had not been addressed by the Tribunal. That was an error of law.

The Court of Appeal reversed the decision of *CLFIS (UK) Ltd v Reynolds* [2015] IRLR 562, and Underhill LJ gave the substantive judgment of the Court. Underhill LJ reasoned that the ET had focussed solely upon Mr Gilmour and his reasons for acting as he did, because it had not been suggested on behalf of Dr Reynolds that anyone else discriminated, but that Mr Gilmour was the sole discriminator. The burden of proof provisions in the Equality Act did not place a blanket obligation on Canada Life 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.

Rather the starting-point was that the Dr 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 which she had advanced. Since the case she advanced only referred to Mr Gilmore, the ET had not erred in only considering Mr Gilmour's motivation.

Underhill LJ said that in a case such as this, an ET should treat the conduct of the person supplying the information – which we will call 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 seeks to bring together the influencee's act with the influencer's motivation was unacceptable in principle. Under the Equality Act 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. That meant that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. On the facts as found in Reynolds there was no basis on which the influencee's act could be said to be discriminatory because they were unaware of the basis of the influencer's motivation.

In other words it would be quite unjust for the person influenced to be liable to a claimant where he personally was innocent of any discriminatory motivation.

The solution in such cases was to ensure that the claim specifically raised the conduct of or act of the influencer – citing that influence either as the detriment or as contributing to the risk of a dismissal or detriment and this would ensure that the Tribunal would then evaluate this 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 – i.e. to what extent the influencer's influence contributed to the risk to the claimant of their dismissal or a detriment.

Given the fact that evidence would need to be produced and facts determined, such an allegation needed to be put clearly and notice of it given so that the respondent could call the necessary evidence. Underhill LJ recognised the practical difficulties – namely that 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, but considered that these practical difficulties could be surmounted and if need be by an amendment being sought at that time.

Underhill LJ noted that reference had been made to his remarks (see above) in *Baddeley* but that it had been agreed that the difference in the statutory provisions as between the discrimination legislation and the unfair dismissal legislation meant that it was unsafe to read across from one type of case to the other. (It would also be right to say that detriment provisions differ (as Underhill LJ had mentioned earlier in his judgment).

See now *Royal Mail Group Ltd v Jhuti* [2016] ICR 1043 where the EAT, Mitting J, considered the *CLFIS* and *Baddeley* judgments in the context of a whistleblowing claim. *Jhuti* is being appealed.

Section E. Subjection by the employer

The meaning of "*subjecting*" in this context was considered by the EAT in *Abertawe Bro Morgannwg University Health Board v Ferguson* [2013] UKEAT/0044/13/LA, 24 April 2013, in the context of a GP's claim against a Health Board. Various allegations were made of deliberate failures to act by investigating the claimant's concerns, treating his identity with due confidentiality and protecting him from reprisals from the colleagues in the GP's practice. It was also alleged that the Health Board had subjected the GP to detriments by reason of protected disclosures in forcing her to take voluntary leave as an alternative to suspension and forcing her to be subjected to an investigation. The EAT upheld the tribunal's refusal to strike out the claim. It rejected the Health Board's contention that the phrase "subjected to" entails an element of wilfulness. That concept was unnecessary given the needs for the act or failure to act to be by reason of a

protected disclosure. Instead the phrase "subjected to" merely connotes an element of causation. The phrase is used instead of the phrase "caused by" so as to encompass deliberate failures to act. So far as concerns deliberate failures to act, there is no necessary requirement that there must be a duty to act. It is sufficient if there is a discretion to do so. It is then sufficient if it is established that the respondent deliberately decided not to act by reason of the protected disclosure.

Vicarious and co-worker liability

ERRA made sweeping changes to section 47B in relation to a claim based on qualifying disclosures made on or after 25th June 2013[3]. It introduced "co-worker" and agent liability for any detriment done to a worker by another worker of the worker's employer and, reversing the effect of the Court of Appeal's decision in *Fecitt* (referred to in paragraph 7.37 of the main work), made that employer liable for co-worker detriment, subject to a reasonable steps defence. As amended s.47B provides by new subsections 1A to 1E that a worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

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

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

on the ground that W has made a protected disclosure.

Where a worker is subjected to such detriment then that is treated as also done by the worker's employer. For the purpose of the subsection it is immaterial whether the thing is done with the knowledge or approval of the worker's employer, however in proceedings against the claimant worker's employer based on victimisation by a co-worker (but not an agent), it is a defence for the employer to show that the employer took all reasonable steps to prevent the co-worker from doing the thing complained of or from doing anything of that description. A worker or agent of the employer is not liable for doing something that subjects the claimant to detriment if the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene the Act, and it is reasonable for the worker or agent to rely on the statement. However that defence does not prevent the employer from being liable to the claimant worker.

The forms of liability and defences follow the model used in the Equality Act 2010 and its predecessor statutes and the case law in relation to those provisions will fall to be considered and applied.

[3] see Enterprise and Regulatory Reform Act 2013 (Commencement No 1, Transitional Provisions and Savings) Order 2013, SI 2013/14550.

"course of that other worker's employment…"

As to "*course of that other worker's employment*" see *Jones v Tower Boot Co Ltd* [1997] IRLR 168, [1997] ICR 254, CA taking a purposive approach: tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words 'in the course of employment' in the sense in which every lay-man would understand them. The test was wider than the doctrine of vicarious liability as applied by the common law of tort at that time, but the common law has itself developed since. The test now adopted at common law is whether the tort of the employee is so closely connected with his employment that it would be fair and just to hold the employer vicariously liable (*Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366).

For recent case law on the meaning of "course of employment" in that context see *Weddall v. Barchester Healthcare; Wallbank v. Wallbank Fox Designs* [2012] EWCA Civ 25 (CA) [2012] IRLR 307.

For the approach to be taken in relation to any behaviour that takes place outside the work environment see *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, [1999] ICR 547, EAT and *Sidhu v Aerospace Composite Technology Ltd* [2000] IRLR 602, [2001] ICR 167, CA.

"....an agent of W's employer with the employer's authority.."

The leading case is *Lana v Positive Action Training in Housing (London) Limited* [2001] IRLR 501 considering the parallel provision in s.41(2) of the Sex Discrimination Act 1975: the authority referred to must be the authority to do an act which is capable of being done in a discriminatory manner just as it is capable of being done in a lawful manner. See also *Bungay v Saini* UKEAT/0331/10, 27 September 2011, applying the common law rules of agency principles explained in *Bowstead and Reynolds on Agency* (18th edition-1-001) and approved in *Yearwood v Commissioner of Police of the Metropolis* [2004] ICR 1660, 36. The test of authority is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal and not whether the principal had in fact authorised the putative agent to discriminate.

"…took all reasonable steps to prevent…"

On the face of the statute the reasonable steps defence is available only in relation to co-workers and not agents (but see *Victor-Davis v London Borough of Hackney* UKEAT/1269/01 for a discussion of an alternative approach). The reasonable steps may be taken generally or with specific reference to the act complained of. The burden will be on the employer to

show that reasonable steps were taken. The proper approach is to focus on what steps were actually taken prior to the act complained of and whether it would it have been reasonable to take further steps: see *Canniffe v East Riding of Yorkshire Council* [2000] IRLR 555): and *Al-Azzawi* v *Haringey London Borough Council (Haringey Design Partnership Directorate of Technical and Environmental Services)* UKEAT/158/00, 3 December 2001. By way of examples see *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045, [2003] ICR 1425 and *Caspersz v Ministry of Defence* UKEAT/0599/05/LA, 3 February 2006. The question is one of fact: *Enterprise Glass Co Ltd v Miles* [1990] ICR 787, EAT, *Balgobin v Tower Hamlets London Borough Coun*cil [1987] ICR 829, EAT.

The imposition of vicarious liability accentuates the desirability of an effective and effectively monitored whistleblowing policy which will assist the employer in showing that reasonable steps were taken to prevent victimisation of a whistleblower by co-workers.

7.79

See also *Mr A Blitz v Vectone Group Holdings Ltd* UKEAT/0253/10/DM, 29 November 2011, where the EAT upheld the distinction drawn by the Employment Tribunal between the disclosure and the manner in which it was conveyed.

7.84

See also *Ibekwe v Sussex Partnership NHS Foundation Trust* [2014] UKEAT 0072_14_2011 where the claimant contended that her employer's failure to deal with a complaint by her was causatively linked to the fact of a previous protected disclosure by her. The ET had held that there was no evidence to find that "causational link". On appeal the employee submitted that the Employment Tribunal failed to apply the burden of proof laid down in section 48(2) ERA. Judge Clark rejected this contention. He held that the ET had carefully directed themselves as to the burden of proof, setting out s 48 (2) and then referring to what had been said about it in *Fecitt*. Judge Clark said he did not accept that a failure by the Respondent to show positively why no action was taken on the employee's letter meant that the section 47B complaint succeeded by default. Ultimately it was a question of fact for the Employment Tribunal as to whether or not the 'managerial failure' to deal with the Claimant's letter of 5 April was on the ground that she there made a protected disclosure. Their clear and unequivocal conclusion was that it was not, having considered the whole of the evidence. That was a finding of fact with which the EAT would not interfere.

7.87 to 7.90

The decision in *Martin v Devonshires* was considered by the EAT in *Woodhouse v West North West Homes Leeds Ltd* UKEAT/0007/12/SM, 5 June 2013, which was another discrimination case. The EAT emphasised the exceptional circumstances in *Martin v Devonshires.* As the EAT noted in *Woodhouse* at [102]:

> "*Martin* cannot be regarded as some sort of template into which the facts of cases of alleged victimisation can be fitted. There are no doubt exceptional cases where protected acts have not caused the dismissal or whatever other detriment is at issue. *Martin* is an example of such an exceptional case. But we emphasise the word exceptional; very few cases will have grievances based on paranoid delusions about events that never happened. It seems to us the process of measuring cases against such a yardstick is a dangerous one. One person's conviction that they have been discriminated against is very likely to generate the polar opposite, i.e. that the complainant is irrational, in the person or organisation complained about. Experience of this type of litigation teaches that grievances multiply and so the fact that here are a series of them is not unusual. It is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievances can lead, as a matter of routine, to the case being placed outside the scope of section 27 of the Equality Act. …"

However the pendulum swung – emphatically- back the other way in *Panayiotou v Kernaghan* [2014] IRLR 500 (EAT) a whistleblowing case. P was a policeman who was found to have been subjected to a series of detriments and was ultimately dismissed from the force. The ET found that P made a number of protected disclosures. He contended that the fact that he had made those protected disclosures influenced the employer in acting as it did and was the reason, or the principal reason, for his dismissal. The tribunal concluded that the employer acted as it did because of P's long term absence on sickness grounds together with the manner in which P had pursued his complaints. He would not accept any answer save that which he sought and, if he was not satisfied with the action taken following a complaint, he would pursue the matter to ensure that his view prevailed. As a result, the force was having to devote a great deal of management time to responding to P's correspondence and complaints and he had become "completely unmanageable".

On P's behalf it was argued before the EAT that it was not possible to separate out the fact of making a protected disclosure from the frustration

of the employer at having to deal with the disclosures or the campaign to right the wrongs that Mr Panayiotou perceived had not been corrected. The EAT disagreed. Section 47B ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. That accorded with *Bolton School v Evans* [2007] ICR 641. Whilst it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, the employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did. That was the case here. The EAT disagreed with the suggestion in *Woodhouse* that there was an additional requirement that the case be exceptional for the principle of separability to apply. On the findings of the ET the reason why the force acted as it did was not in any sense whatsoever for an unlawful reason: rather it was the combination of his long term absence and the way in which he pursued his views.

The ET's decision as to separability was also upheld in *Shinwari v Vue Entertainment Ltd* [2015] UKEAT 0394_14_1203 paragraphs 56 to 60.

7.107

See *Ibekwe v Sussex Partnership NHS Foundation Trust* [2014] UKEAT 0072_14_2011 noted above. See also *Dahou v Serco Limited* [2016] EWCA Civ 832 (a case on s.148 TULR(C)A)

7.122

See *Flynn v Warrior Square Recoveries Ltd* [2014] EWCA Civ 68, [2014] All ER (D) 48 (Feb) - the threat of a defamation action had disappeared by 30 November 2009. It followed that, once the EAT had correctly identified the legal error on the part of the tribunal in focusing on detriment rather than on act or deliberate failure to act in relation to the issues of time, it had been inevitable that it would be driven to the conclusion that the relevant acts or failures to act in the form of the threats and the failure to withdraw them had ceased to exist long before June 2010.

In *McKinney v London Borough of Newham* [2014] UKEAT 0501_13_0412. Mr McKinney was employed by Newham in their Finance Department from 29 July 1985 until termination of the employment on 31 July 2012. He brought two complaints before the Employment Tribunal. The first, lodged on 11 January 2011, alleged detrimental treatment short of dismissal on the grounds that he had made protected disclosures**.** The second, following termination of the employment of

constructive unfair dismissal. At a Pre-Hearing Review the whistle-blowing claim was struck out as being time-barred and the constructive unfair dismissal claim as having no reasonable prospect of success. The principal question before the Employment Tribunal was when the three month primary limitation period began to run for the purposes of the whistle-blowing complaint? Was it (a) when the Respondent reached the decision to reject the Claimant's third stage grievance on 8 October 2010, following a hearing on 6 October or was it (b) when the Claimant learned of that decision on 14 October, on receipt of the Respondent's outcome letter dated 8 October. The 8th October rendered the form ET1 lodged on 11 January 2011 out of time; the 14 October in time. The EAT upheld the EJ's ruling that the earlier date was the correct one. HHJ Clark referred to the Supreme Court Decision in *Gisda Cyf v Barratt* [2010] IRLR 1073 to the effect that where a contract of employment is terminated without notice the dismissal took effect not when the letter was sent but when the employee read the letter or had a reasonable opportunity to do so. It was submitted that since Mr McKinney did not receive his grievance outcome letter until 14 October, time for his whistle-blowing claim began on that day, by analogy with the Supreme Court construction of the effective date of termination, However a line of EAT authority was to the effect that a detriment was suffered for the purposes of the anti-discrimination legislation when the detrimental act is done, not when the complainant has knowledge of it: *Mensah v Royal College of Midwives* (EAT/124/94 unreported, Mummery P) and *Virdi v Commissioner of Police of the Metropolis* [2007] IRLR 24 (Elias P). In *Virdi,* Elias P had declined to follow the contrary view expressed by Morison P in *Aniagwu v London Borough of Hackney and Owens* [1999] IRLR 303, that time did not begin to run until the claimant was aware of the detrimental treatment. HHJ Clark agreed. There is no material difference between the detrimental treatment provisions under the ERA and the EqA as far as limitation is concerned. In *Warrior Square* the Court of Appeal upheld the approach of Langstaff P in the EAT in holding that, for the purposes of section 48(3) ERA time begins to run from the date of the employer's act or failure to act rather than from the date when the detriment is first suffered (per Maurice Kay LJ, paragraph 6). The concept of effective date of termination, considered by the Supreme Court in *Barratt*, under section 97(1)(b) differed from the detriment provisions in the ERA and EqA. Whilst the current state of the authorities was less than satisfactory, a clear thread was now emerging (see *Mensah; Virdi; Garry; Warrior Square*) which pointed towards the counter-intuitive position that time begins to run against the claimant relying on a detriment, both under the ERA and the EqA whether or not he is aware that a detriment has been suffered. The Employment Judge was right to treat time as running from the date of the Respondent's grievance decision, 8 October.

7.125
In relation to footnote 54 see *Dolby v Sheffield City Council* [2012] EWCA Civ 1474 (15 November 2012).

Chapter 8

8.11
See now *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658 and also the notes under 7.51-7.66. The Tribunal's Reasons for Judgment attracted some attention (the EAT describing the case as being "not the Tribunal's finest hour") because of their somewhat unusual style- what Underhill LJ referred to as:

> "…frequently rhetorical, not to say tabloid. The tone can be illustrated by reference to the use of such terms as "stitch-up", "the strong stench of conspiracy", "Machiavellian intrigue" and "a brutal act of managerial homicide".

Language aside, the case is significant in being one of a number of examples of the appellate courts being dissatisfied, in the context of a whistleblowing claim, with the exposition of the tribunal's findings of fact and reasoning (see the notes to paragraph 7.50 above). The ET's decision survived scrutiny at EAT level but not by the Court of Appeal: see Underhill LJ at paragraphs 58 to 60.

However it is also of importance- and these notes concentrate on this aspect- for remarks made by Underhill LJ (who gave the only reasoned judgment) on the subject of "the reason or principal" reason for dismissal, whose "reason" is in issue. We have referred to what might be seen as a parallel development in relation to detriment (and discrimination) in the notes to the preceding chapter.

B was employed by the Co-Op from November 2007 until his dismissal for misconduct on 20 December 2010. In the later part of his employment by the Co-Op he was Quality Assurance Manager. The ET held that the reason for B's dismissal was that he had made protected disclosures and that the dismissal was thus "automatically" unfair under section 103A ERA. It also held that it would, if section 103A had not applied, have found his dismissal to be unfair under the ordinary provisions of section 98 of the Act. The EAT upheld this decision.

As summarized by Underhill LJ the ET's reasoning was that, following B's protected disclosures in connection with sales of date expired

pharmaceutical drugs, his line manager, Mr Berne, who resented those disclosures, decided that B "had to go". Mr Berne used the events surrounding a sale of expired date drugs (with which B had been associated) and a report from a Trading Standards Officer as an opportunity to get rid of B and "orchestrated" his dismissal on that basis. A Mr Atkinson and a Mr Logue took (at least in formal terms) the decisions to dismiss and then to refuse B's appeal, but they were found to have done so in pursuit of Mr Berne's agenda. The Tribunal found, at para. 15.1.3, that "[B's] dismissal was in consequence of his making disclosures qualifying for protection" although in a summary of its conclusions at the end of the Reasons (section 19) the Tribunal also stated that "the reason or principal reason for his dismissal [was] that [B] made a protected disclosure".

In discussing the "reason or principal reason" requirement Underhill LJ's judgment traverses the ground covered in paragraph 8.11 of the Main Text, referring to the classic explanation by Cairns LJ in *Abernethy* and the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee". Underhill LJ comments that Cairns LJ's exact language "may not be wholly apt in every case" but the essential point is that the "reason" for a dismissal connotes the factors operating on the mind of the person or minds of the persons who made the decision to dismiss: he notes that the same approach applies to the "ground" for a putative detriment contrary to section 47B. Underhill LJ remarked that it had been accepted in the Court of Appeal in the instant case (and appeared to have been accepted by the ET) that the relevant decision-makers – that is, the persons whose motivation was in issue– were Mr Atkinson and Mr Logue (the dismissing and appeal officers). In principle it was immaterial what Mr Berne might have thought or wanted *except* to the extent that that operated on the minds of Atkinson and Logue.

Underhill LJ added however that there might be circumstances where the actual decision-maker acted for an admissible reason but the decision was unfair because the facts known to him or beliefs held by him had been manipulated by some other person involved in the disciplinary process who had an inadmissible motivation – "an Iago situation". But that did not appear to be the way that the ET had viewed the case because Mr Atkinson and Mr Logue were found, not to be innocent dupes but knowing participants, who consciously followed Mr Berne's agenda. Underhill LJ's remarks (which were obviously not relevant to B's case) can be set alongside those of the EAT in *Anastasiou* referred to in the notes to paragraph 7.51 -7.66 and his own later remarks in the *CLFS* case discussed above.

Underhill LJ went on to point out that it would not be enough for the Tribunal to find that Mr Atkinson and Mr Logue welcomed the opportunity to

dismiss B for misconduct because he was a whistleblower – or because they knew that that was Mr Berne's view. That was not the same as a finding that that was *their reason* for either Mr Atkinson in dismissing him or, in the case of Mr Logue, rejecting his appeal. Underhill LJ referred to and expressed agreement with the explanation given by the EAT, Elias J presiding, in *ASLEF v Brady* [2006] IRLR 576, at paras. 78-79 (p. 584):

> *78. We would agree that in principle there is indeed a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. ([Counsel for the employer] in fact drew a distinction between reason and motive, but we do not think that the analysis in this case is assisted by referring to the elusive concept of motive.) An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords. For example, it may be that someone perceived by management to be a difficult union official is perfectly properly dismissed for drunkenness. The fact that the employers are glad to see the back of him does not render the dismissal unfair. What causes the dismissal is still the misconduct; but for that, the employee would not have been dismissed.*
>
> *79. It does not follow, however, that whenever there is misconduct which could justify the dismissal a tribunal is bound to find that this is indeed the operative reason. The Thomson case [Times Corporation v Thomson [1981] IRLR 522] shows that even a potentially fair reason may be the pretext for a dismissal for other reasons. To take an obvious example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then in our view the reason for dismissal – the operative cause – will not be the misconduct at all. On this analysis, that is not what has brought about the dismissal. The reason why the employer then dismisses is not the misconduct itself. Even if that in fact merited dismissal, if the employee is treated differently to the way others would have been treated, being dismissed when they would not have been, then in our judgment a tribunal would be fully entitled to conclude that the misconduct is not the true reason or cause of the dismissal. The true reason is then the antipathy which the employer displays towards the employee."*

Underhill LJ referred to the similar exposition in *Governing Body of John Loughborough School v Alexis* UKEAT/0583/10, at paras. 32-34). He accepted that distinguishing between cases falling on either side of the line might not be straightforward and would often require careful consideration of the decision-makers' mental processes.

See also the *Jhuti* case referred to above in the notes to Chapter 7.

D. Constructive Dismissal
8.16- 8.17

An illustration of the points discussed in these paragraphs is the discrimination case of *Clements v Lloyds Banking Plc & Ors* [2014] UKEAT 0474_13_3004. C, who was in his 50s, occupied a senior role in Lloyds. His manager had performance concerns, and thought it time for C to move on from his role. The ET found that the manager did not tell C of this view in a proper manner (and thereby committed what was part of a cumulative breach of the implied term of trust and confidence). At one stage of their first conversation the manager said (twice) to C "You're not 25 anymore". The ET found that this was discriminatory on the ground of age, even though not intended in that way. After further events at work, C resigned. The ET held that he was entitled to treat himself as constructively dismissed by reason of Lloyds' breach of the trust and confidence term by seeking to move him on from one role to another without adopting any proper process to do so. Although it had held the specific words found to have been used by the manager to be discriminatory in themselves, it also considered that the use of those words was not a material part of the conduct which amounted to the breach in response to which the claimant resigned. It was careful not to say that the discriminatory words of 5th. January were actually part of the breach it held repudiatory. Rather, what it said about 5th. January 2012 was that Mr. Shawcross's approach was not a proper way to go about telling the Claimant that there were concerns about his performance serious enough to call into question whether he should remain in his Business Continuity role. The Tribunal did not separately identify the discriminatory act as part of that breach. Rather, the Tribunal found the employer to be in repudiatory breach by adopting a course of conduct which it found to be an approach seeking to move the Claimant out of his current role, and to appoint someone else.

As Langstaff P put it (at paragraph 28) the Tribunal had found a repudiatory breach but the issue was whether discrimination, as such, was a cause of the dismissal. The real question for determination was whether the resignation was because of the discrimination in any real causative

sense. The conclusion that it was not was one of fact: a robust approach has to be taken by courts and tribunals to determining whether or not a particular act has been caused or materially contributed to a given effect, for the purposes of determining which of two parties should suffer a given loss – here, the damage caused to the claimant by the discrimination for which he could claim compensation. The Tribunal had considered whether the discrimination involved in telling the claimant he was "no longer 25" had played any material part in the breach in response to which the claimant resigned. It did so by asking (appropriately) whether it had "tainted" the dismissal. Its conclusion that it did not was one of fact which would not be upset absent an error of approach/perversity.

The following guidance as to constructive dismissal claims where the reason for dismissal is said to be an automatically unfair reason was given by HHJ Eady in her judgment in *Salisbury NHS Foundation Trust v Wyeth* ([2015] UKEAT 0061/15/1206 at paragraph 31:

> In such a case, the ET will have identified the fundamental breaches of contract that caused the employee to resign in circumstances in which she was entitled to claim to have been constructively dismissed. Where no reason capable of being fair for section 98 purposes has been established by the employer, that constructive dismissal will be unfair. Where, however, the reason remains in issue because there is a dispute as to whether it was such as to render the dismissal automatically unfair, the ET then has to ask what was the reason why the Respondent behaved in the way that gave rise to the fundamental breaches of contract? The Claimant's perception, although relevant to the issue why she left her employment (her acceptance of the repudiatory breach), does not answer that question.

8.20 On the proper approach to the burden of proof in these cases see *University of Bolton v Corrigan* (UKEAT 0408/14/RN, 21 December 2015 and *Croydon Health Services NHS Trust v Beatt* UKEAT 0136/15/JOJ, 19 January 2016.

8.24

See also *Ross v Eddie Stobart Ltd* UKEAT 0068/13/RN, 28 June 2013, citing paragraph 8.24 and following the authorities there mentioned, upholding the principle that an employee with insufficient qualifying service bears the burden of establishing the alleged automatically unfair reason for dismissal.

Chapter 9

In relation to detriment claims, ERRA inserts a new s.49(6A) ERA as follows:

(6A) Where—

(a) the complaint is made under section 48(1A), and

(b) it appears to the tribunal that the protected disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%.

Similarly in relation to unfair dismissal, ERRA amends section 123 of the Employment Rights Act to add a new provision in relation to the compensatory award as follows:-

(6A) Where—

(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b) it appears to the tribunal that the disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

9.23 – 9.27

Now see *Kaltz Ltd v Mrs B Hamer* UKEAT/0198/11/RN, 24 February 2012, where it appears to have been agreed that a deduction could be made for contributory fault where a claim for automatically unfair dismissal having made a protected disclosure had been made out.

See also *Audere Medical Services Ltd v Sanderson* UKEAT 0409/12/RN, 29 May 2013 which also addresses this point and where the EAT noted that it could see no reason in principle where there could not be a reduction for

contributory fault in a case of automatically unfair dismissal by reason of a protected disclosure.

The point was revisited in detail in *Arriva London South Limited v Graves*, Appeal No. UKEAT/0067/15/DA by HHJ Clark on 2 July 2015. Mr Graves was employed by Arriva as a bus driver until his dismissal by Mr Gary Smith, Operating Manager for the Norwood garage at which was then based, on 26 September 2013. Graves was a member of the RMT although Arriva recognised Unite and not RMT. In 2011 Graves and an RMT colleague, Mr Farr, brought proceedings in the London (South) Tribunal complaining of trade union detrimental treatment contrary to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). Those complaints were upheld by the ET (EJ Zuke presiding) in the finding that Graves had been disciplined by Mr Gary Smith for wearing an unauthorised "*hi vis*" vest. The evidence showed that another employee, Mr Diplock, had in the past worn unauthorised vests, i.e. those not showing the Arriva logo, without being disciplined. The difference, the Tribunal found, was that Graves' vest had the legend "RMT" on the back. The Tribunal found that a Mr Hall also subjected Graves to detrimental treatment for the prohibited purpose under section 146. Mr Hall was the Operations Manager at the South Croydon garage at which Graves then worked.

No action was taken against Messrs Hall and Smith following the Tribunal's decision and no training provided consequent upon that Tribunal's Judgment. On Arriva's case Graves was dismissed for going off route and then seeking to cover up that fact by putting in a false Occurrence Report ("OR"). As a result, and following a complaint by a member of the public, he was interviewed by Mr Hudgell (Deputy Operations Manager). Mr Hudgell suspended the Claimant. The interview by Mr Hudgell which formed the basis of the detriment (short of dismissal) claim was found by the Tribunal to have been held for a proper motive. That part of the claim failed.

In 2013 Mr Gary Smith held a disciplinary hearing and then dismissed Graves for breach of trust amounting to gross misconduct. Mr Graves' appeal was heard by Mr Halligan and Mr Hall (who featured in the earlier claim) and dismissed by them.

As Judge Clark said, applying *Kuzel*, and given that Graves qualified for "ordinary" unfair protection dismissal it was for Arriva to disprove (on the balance of probabilities) the impermissible reason trade union activities reason alleged by Graves. The ET had been referred to the approach of Elias P in *Aslef v Brady* [2006] IRLR 576 and the helpful analysis by Elias

P at paragraphs 79 to 80. Judge Clark noted, in passing, that at paragraph 80 Elias P referred to the onus on the employer to show the statutory (permissible) reason and: "… *If the tribunal is left in doubt, he will not have done so.* …" but observed that he was confident that Elias P was not here applying the criminal standard of proof. The complaint by Mr Graves raised three potential statutory prohibited reasons for dismissal:

(1) membership of the RMT Union and/or;

(2) taking part in the activities of that Union at an appropriate time contrary to section 152 TULRCA 1992;

(3) victimisation contrary to section 104(1) and 4(c) Employment Rights Act 1996 ("ERA"), by reference to his previous proceedings under section 146 TULRCA which were determined by the Zuke Tribunal.

That said, an employer's reason (or principal reason) for dismissal was the set of facts or beliefs which caused him to dismiss the employee.

The ET had taken into account the history of dealings between Mr Graves and Messrs Mr Smith and Mr Hall, his less than perfect disciplinary record, his falsifying a company document (the log card) and treatment of other disciplined employees and concluded that Arriva had failed to disprove the prohibited reason/s notwithstanding Mr Graves' admitted misconduct: the complaint under section 152 TULRCA and section 104 ERA was made out. The Tribunal said that they found "*that as the real reason for dismissal was a prohibited reason ... no reduction for contributory fault is appropriate*."

On appeal it was argued that there could not three separate reasons: trade union membership (section 152(1)(a) TULRCA); trade union activities (section 152(1)(b)) and victimisation contrary to section 104 ERA for dismissal. Judge Clark said that that "superficially attractive argument" overlooked the real issue in this case. Had Arriva established the conduct reason for dismissal; had it negated the "*trade union*" reason? Ultimately, whilst recognising Graves' misconduct, as in *Brady*, the ET had concluded that it was not the misconduct which really caused Graves' dismissal, it was his membership of the RMT, his taking part in the activities of that union and his previous section 146 complaint, determined by the Zuke Tribunal in 2011. It was sufficient that the trade union membership and/or victimisation complaints were made out for the purposes of the Employment Tribunal's finding that dismissal was for an inadmissible reason. Whilst the Tribunal strayed into the language of section 146 (purpose) applicable to action short of dismissal their finding as to the principal reason for dismissal plainly answered the statutory question: what was the reason or principal reason for dismissal?

Having dismissed a complaint that the Tribunal did not pay close attention to the motivation of the relevant decision makers Judge Clark moved to the question of contribution. It was, he said, plain that the Employment Tribunal considered that as they had found inadmissible reasons for dismissal contrary to section 152 TULRCA and section 104 ERA no reduction for contributory fault was appropriate. It was quite clear that a Tribunal's power to reduce a claimant's compensatory award by reason of contributory conduct was directed to the effect of that conduct on the dismissal, not the employer's reason for dismissal; *Steen v ASP Packaging Ltd* [2014] ICR 56, paragraphs 11 to 15.

In Mr Graves' case the ET had appeared to conclude that no contribution enquiry was necessary because it had found that dismissal was for the prohibited reasons. That was not correct. Given that Graves was, on his own admission, guilty of blameworthy conduct, the question was whether that conduct caused or contributed to the dismissal to any extent and, if so, to what extent (applying the slightly different tests under sections 123(6) and 122(2) ERA)? That question was remitted for determination.

In the light of the reforms introduced by ERRA, an issue is liable to arise as to the relationship between a reduction for contributory fault and the ability to reduce the compensatory award where an employee is found not to have acted in good faith in making the disclosure. In particular, can a tribunal circumvent the limit of 25% on the reduction for good faith by making a further reduction in relation to lack of good faith under the heading of contributory fault? The argument against is that it would be contrary to the statutory scheme. By placing a limit on the extent of the reduction for not acting in good faith, a balance is struck between (a) not overcompensating those who act for an ulterior motives and (b) seeking not to deter workers from raising the alarm for fear that their motives will be attacked. The counter-argument is that there is no inconsistency in allowing a further reduction for contributory fault. A reduction can be made under the heading of contributory fault only if the ulterior motive was causatively relevant to the dismissal, whereas there is no such requirement to make the reduction of up to 25% under the specific good faith provision.

In any event, in most cases this issue can be evaded by drawing a distinction between the ulterior motive, and the acts or failure to act from which good faith might be inferred. Thus, commonly a lack of good faith is inferred from acts or failures to act of the employee, e.g. in seeking to gain an employment advantage (*Bachnak v Emerging Markets Partnership (Europe) Limited* EAT/0288/05, 27 January 2006) or from refusal to cooperate with an internal investigation (*Street v Derbyshire Unemployed*

Workers' Centre [2005] ICR 97 (CA)) or to set out sufficient information to enable the allegation to be investigation (*Phipps v Bradford Hospitals NHS Trust* EAT/531/02, 30 April 2003) or generally acting inconsistently with what would be expected of someone acting in good faith (*Muchesa v Central and Cecil Housing Care Support* EAT/0443/07, 22 August 2008). In each case there would be acts or failures to act, distinct from the ulterior motive, which if causatively relevant to the dismissal might be taken into account when assessing contributory fault, albeit whilst taking care to avoid double-counting.

For a discussion (though not in a whistleblowing context) of the role of contributory fault in constructive dismissal cases see *Firth Accountants Ltd v Law* UKEAT/0460/13/SM,

9.31 On interim relief see also *Parsons v Airplus International Limited* (UKEAT/0023/16/JOJ, 4 March 2016) (refusing interim relief despite there being a 'good arguable case').

9.40 The test of whether the loss is 'attributable to' the act or failure to act was considered by the EAT in *Roberts v Wilsons Solicitors LLP* [2016] ICR. The claimant had been a member of the respondent LLP. He had purported to accept a repudiatory breach of contract by virtue of treatment alleged to be a detriment under section 47B ERA. Notwithstanding that he then refused to provide any service, the respondent insisted that he remained a member of the LLP until, by letter of 30 April 2015, the respondent gave him notice expelling him from the LLP with immediate effect. The ET struck out a constructive dismissal claim on the basis of authority that the doctrine of repudiatory breach does not apply to LLPs. It also struck out the claim to losses flowing from termination. That aspect of the decision was successfully appealed. The EAT rejected an argument that the fact of a lawful termination had the effect of excluding any claim in relation to post-termination losses. Addressing the test of attribution of loss, the EAT concluded that this raises a question of fact in each case. It neither sets a 'but for' test, nor does it require that the infringement or unlawful act must be the proximate cause of loss. As the EAT explained (at para 24):

> Depending on the circumstances, a loss may be attributable to a particular act whether that act is closest in time to the loss or not, and two or more consecutive (or concurrent) acts may combine to bring about a particular consequence or loss. Proximity by itself is not the determining factor, though it is obviously relevant, and the further away in time a loss is from the infringement to which it is said to be attributable, the harder in practice it is likely to be to

> prove that case. Rather, it is a question of fact and judgment in every case for the tribunal whether a particular consequence or loss is attributable to a particular unlawful act or infringement or to something else or both and if so, to what extent. The mere fact that an infringement is less close in time to the loss or consequence than something else to which it is also said to be attributable, does not inevitably or necessarily negate the infringement as also having relevant contributing attribution.

The EAT added that 'attributable' is an ordinary English word and is 'capable of being applied flexibly . . . on a broad common sense basis.' Here the claim should not have been struck out as there was a question of fact to determine. If there was unlawful victimization which led the claimant to withdraw his labour, which in turn led to him being expelled, it would be open to the tribunal to regard losses following termination of employment as the natural and likely consequence of the unlawful detriment, and to regard such losses as attributable to those detriments. The tribunal would need to consider whether he acted reasonably and justifiably in withdrawing his labour or, conversely, whether it was wrongful conduct which amounted to an intervening act. These were issues of fact, not law, for the tribunal.

Chapter 10

See now the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237.

10.46

See also *Abertawe Bro Morgannwg University Health Board v Ferguson* UKEAT/0044/13/LA, 24 April 2013, in which the EAT stressed (at para 33) that the circumstances in which it will be possible to strike out a fact-sensitive protected disclosure claim are likely to be rare and that:

> "In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not."

See also *Romanowska v Aspirations Care Limited* [2014] UKEAT 0015_14_2506. The Claimant's whistleblowing claim should not have been struck out as having no reasonable prospects of success. The EJ had held that the Claimant might well establish that she had made protected

disclosures. It was not appropriate to strike out a claim the result of which would turn on evidence from the employer as to the reasons for dismissal.

Para 15.43

As to the scope of the positive duty of disclosure of an employee who does not owe relevant fiduciary duties, see now *Ranson v Customer Systems Plc* [2012] IRLR 769 (CA) and *Imam-Sadeque v Bluebay Asset Management (Services) Limited* [2013] IRLR 344. The Court of Appeal emphasised that there is no general duty on employees to report a fellow employee's misconduct or a breach of contract. Such a duty must arise of the terms of the employee's contract of employment, the nature of the employee's role and responsibilities. More controversially it was also suggested by Popplewell J in *Imam-Sadeque* that the nature of the threat and the circumstances in which the employee becomes aware of it are also relevant. Popplewell J noted at [133] that a senior manager who becomes aware of a competitive threat to an aspect of the business for which he is responsible will normally come under such a duty, whereas a junior employee with such responsibility would not.

In *QBE Management Services (UK) Limited v Dymoke* [2012] IRLR 458, Haddon-Cave J stated that the working assumption should be that directors and senior employees ought to disclose (a) any action at all, if taken by others, that would lead to competitive activity, and (b) any action of their own, as soon as the irrevocable intention to compete is formed unless they resigned immediately. At least so far as concerns employees who do not owe relevant fiduciary duties, that statement must now be regarded as too broad in the light of the Court of Appeal's decision in *Ranson*. Instead it would be necessary to consider carefully the specific contractual obligations of the employee, including those that can properly be implied in the light of the employee's role and responsibilities, in order to ascertain whether by way of divergence from the general rule, a duty of disclosure arises. Equally however the approach in *Ranson* indicates that the earlier first instance decision of *Lonmar Global Risks Limited v West* [2011] IRLR 138 took too narrow an approach in suggesting that any positive duty of disclosure arose only where there were relevant fiduciary obligations giving rise to the duty.

See also *Thomson Ecology Ltd & Anor v APEM Ltd & Ors* [2013] EWHC 2875 (Ch) (24 September 2013) which considers contractual duties of disclosure in relation to competitive activity during gardening leave.

See now *The Basildon Academies v Amadi* [2015] UKEAT 0343_14_2702 (27 February 2015). Mr Amadi is a citizen of Nigeria. He had been

working in the United Kingdom on a work visa valid until 8 March 2015. He was employed full-time by The Basildon Academies ('the Academies') as a work-based learning tutor from 1 November 2008. Following an adverse Ofsted inspection in March 2011 the Academies were reorganised and a consequence of the reorganisation was that Mr Amadi was offered and accepted part-time employment for two days a week, Thursday and Friday, as a Cover Supervisor. His Terms and Conditions of employment were set out in a letter dated 26 October 2011, which he signed on 8 November 2011. In September 2012 Mr Amadi was offered and accepted a zero hours contract to work between Monday and Wednesday for another employer, Richmond upon Thames College ('RuTC'). He did not inform the Academies of this other work in breach of an express term of his contract of employment (Clause 2.6), for which the Employment Tribunal held that he had contributed to his ultimate dismissal to the extent of 30%. This finding was not appealed.

On 19 December 2012 Mr Amadi was suspended by RuTC when a female pupil alleged that he had sexually assaulted her. The allegation was reported to the police. Mr Amadi was arrested and bailed. There had not been a prosecution of him and he was under no continuing bail obligation in respect of those allegations.
In March 2013 the police contacted the Academies and told them that they were enquiring about Mr Amadi's previous employment with them. The police said that Mr Amadi had been suspended by RuTC for the reasons stated. On 14 March 2013 Mr Amadi was suspended by RuTC. A disciplinary hearing concluded that Mr Amadi had decided deliberately not to inform the Academies about his employment at RuTC and also about the allegation of sexual misconduct. Both were acts of gross misconduct and Mr Amadi was dismissed with effect from 22 July 2013.

As already noted the ET had held that he had been unfairly dismissed but that he had contributed to his dismissal from the Academies by 30%. The Academies appealed. The EAT focussed on Mr Amadi's contract of employment. The opening operative paragraph of the letter to of 26 October 2011 stated that it:

"....outlines your terms and conditions of employment and I enclose a copy of the Basildon Academies terms and conditions document which together with the various policy and procedure documents to which it refers confirms the terms and conditions of your employment."

It further stated:

"This letter, together with the attached Statement of Written Particulars (Terms and Conditions of Service), constitutes your contract of employment. ..."

Mr Amadi was invited to sign the document, which he did. Immediately above the signature of the Chair of Governors, on behalf of the employers, the following was stated:

"The Basildon Academies are committed to safeguarding and promoting the welfare of children and young people and expects all staff and volunteers to share this commitment. All adults are required to adhere to the Academies' safeguarding policies and practices. As part of the Academies' recruitment procedures all staff regularly undergo the enhanced CRB check."

Clause 2.6 of the Pay and Conditions of Service document required Mr Amadi to notify the employers of any other employment taken up by him during the course of his employment. Paragraph 7 set out in bullet point form a summary of the Code of Conduct:

"You are expected to comply with the Academies' Code of Conduct which sets out rules in respect of:

- Standards
- Confidentiality
- Use of Email and Internet
- Relationships
- Political Neutrality
- Use of financial resources
- Sponsorship
- Dress Standards"

Those were headline summaries of paragraphs 1 to 11 of a detailed Code of Conduct. Clause 8 provided:

"Safeguarding Children and Vulnerable Adults

The Basildon Academies' Trust is committed to safeguarding and promoting the welfare of children, young people and vulnerable adults and expects you to share this commitment by complying with national standards and Academies' policy."

The EAT noted that an omission in the evidence deployed before the ET was any statement of national standards. The ET was not shown the Academies' child protection procedures nor any national standards with regard to safeguarding children and vulnerable adults, nor any policy with regard to safeguarding children and vulnerable adults adopted by the employers.

Clause 14.1 of the Terms and Conditions of Service document identified on a non-exclusive basis what would be considered to be gross misconduct which would result in instant dismissal. There was a long list. At the foot of the list were the following:

"Failure to disclose any relevant criminal offences prior to employment and any criminal convictions which occur in employment

Any other act of misconduct of a similar gravity"

Clause 16 dealt with disclosure of criminal convictions during employment:

"Should you be convicted or cautioned for any offence during your employment with the Basildon Academies' Trust you are required to notify the Executive Principal immediately in writing of the offence and the penalty. This includes motoring offences which result in court action and licence penalty points, but not parking offences/fines where no penalty points are incurred. The effect of your conviction or caution will be considered with regard to the particular post you occupy and the nature and severity of the offence and penalty and in accordance with the Academies' policy on the employment of ex-offenders. Any action taken by the Basildon Academies' Trust will be in full accordance with the disciplinary procedure."

The Academies' Code of Conduct fleshed out the bullet points referred in paragraph 7 of the Terms and Conditions of employment. Paragraph 4.1, under the heading "Standards", provided:

"There is an expectation that Academies employees will provide the highest possible standard of service to the public through the performance

of their duties. Employees will be expected through agreed procedures and without fear of recrimination, to bring to the attention of their line manager any deficiency in the provision of service. Employees must report to the appropriate manager/the Governing Body any impropriety or breach of procedure."

Appendix A to the Code of Conduct set out the employer's stance on whistleblowing. The opening paragraph stated:

"... the Academies wishes to promote an open environment that enables staff to raise issues in a constructive way and with confidence that they will be acted upon appropriately without fear of recrimination." Paragraph 4 deals with the following question, "What if I receive a complaint about myself?": "If the complaint or allegation is at all significant or made in a formal way, particularly by a member of the public or other external users, then you should inform your line manager, or Chair of Governors in the case of Executive Principals – even if you believe or know the complaint to be groundless or unjustified."

The Academies' case before the ET was that that paragraph imposed upon Mr Adami an express obligation to report an allegation of impropriety made against him even when the allegation did not concern anything that had occurred at their school though it was accepted that that obligation would, if it existed, be qualified by the provision that the allegation must be capable of having a bearing upon the employer's safeguarding duties in relation to children and/or its reputation.

The EAT thought that the contractual provisions were "perfectly clear". Under paragraph 4.1 of the Code of Conduct, not Appendix A to the Code of Conduct but the Code itself, the Mr Adami was under an obligation to report any impropriety committed either by himself or by another member of staff. But the EAT could not read into the advice given to potential whistleblowers in Appendix A to the Code of Conduct any contractual *obligation* on Mr Adami to report *an allegation* made against him to the employers save for one which he knew or had reason to believe to be true. The obligation was not imported by Clause 4.1 of Appendix A but by Clause 4.1 of the Code of Conduct itself.

National standards might impose on teachers and those such as the claimant who are responsible for the care of children at a school to report allegations made against them of impropriety involving children, not only at the school but elsewhere. If that were so, then Mr Adami might well have been in breach of contract and so liable to be dismissed for failing to report the allegation made against him. But it was a critical omission in the

employer's case that no information about national standards was presented to the Tribunal.

There being no express term requiring Mr Adami to report an allegation which he did not believe to be true and had no reasonable ground to believe to be true, the employers were driven back to reliance upon an implied term. The law as understood from *Bell v Lever Bros* was now less clear, as is demonstrated by *Item Software (UK) Ltd v Fassihi* [2005] ICR 450 and the observations in *Lister v Hesley Hall Ltd* [2001] ICR 665.

The EAT considered it now to be established that there is no rule of law that under no circumstances can an employee owe to his employer a duty to disclose his own misconduct (referring to Arden LJ in the *Item Software case* at paragraphs 55 and 60). But in no case cited to the EAT had the proposition ever been advanced, let alone held to be good law, that an employee must disclose to his employer, in the absence of an express contractual term requiring him to do so, *an allegation* however ill-founded of impropriety against him. The EAT stated that it was "*clearly not the law*" that any employee is under such an implied obligation.

Directors and employees who owe fiduciary obligations

For a useful discussion of the law relating to disclosure duties imposed on fiduciaries see *First Subsea Ltd v Balltec Ltd & Ors* [2014] EWHC 866