

# WHISTLEBLOWING LAW AND PRACTICE

5<sup>th</sup> Cumulative Supplement to the 3<sup>rd</sup> Edition (2017),  
Oxford University Press

JEREMY LEWIS, JOHN BOWERS QC, MARTIN FODDER, JACK MITCHELL

14 May 2020

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## CHAPTER 1: INTRODUCTION

### Territorial extent: Northern Ireland

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

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

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

**Supp.04** When the new provisions were introduced in the rest of the UK, it was expressly provided that they applied only to qualifying disclosures made on or after the day that the new provisions came into force, being 23 June 2013 (s.24(6) ERRA). In summary, as explained further below, we consider that the same approach will apply at least in relation to those provisions affecting whether there is a protected disclosure (i.e. the introduction of the public interest test and the removal of the good faith requirement).

**Supp.05** There is a stronger argument that in relation to the provisions for vicarious and personal liability that the new provisions should apply to detrimental acts/failures to act or dismissals on or after 1 October 2017. Support for an approach which focuses on the date of the act/deliberate failure to act may be derived from the judgments of the Court of Session [2002] IRLR 344 and the Employment Appeal Tribunal [2002] ICR 149 in *Stolt Offshore Ltd v Miklaszewicz*. The disclosure which

Mr Miklaszewicz relied upon in that case as constituting a protected disclosure had been made to the Inland Revenue in 1993. That was long before the coming into force of the amendments to the Employment Rights Act made by the Public Interest Disclosure Act 1998 on 2 July 1999 which introduced the protected disclosure provisions. However his dismissal took place after 2 July 1999, namely on 15 September 2000. The EAT, and then the Court of Session, held that the fact that his disclosures pre-dated the coming into force of PIDA did not matter.

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

“While ... an event which has taken place in the past may be relevant for the purpose of establishing that a dismissal has been unfair, the legislation is not in our opinion truly to be regarded as retrospective. What is affected by the legislation is not the original act of the employee in making the disclosure, but the act of the employer in dismissing the employee. When the matter is looked at in this way, there can be no unfairness to employers. ... Any employer who, since 2 July 1999, is contemplating the dismissal (or victimisation) of an employee for making a qualifying disclosure must be taken to be aware that if he does so the disclosure will be treated as a protected disclosure. It is therefore immaterial whether the disclosure was made before or after 2 July 1999.”

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

**Supp.08** Notwithstanding the approach in *Stolt* we consider that it is the date of the qualifying disclosure that is the crucial date when determining whether the worker made a protected disclosure. It is also the date of the disclosure that should be used for determining whether good faith is a requirement for protection or is relegated to a remedy issue. There is a strong presumption against legislation having retrospective effect: see *Wilson v First County Trust* [2004] 1 AC 816 (HL). If that was not the case, a worker who made a protected disclosure could subsequently lose protection by a retrospective application of the public interest test. The approach in *Stolt* to s.43F does not provide any persuasive support for a different approach. In *Stolt* it was a matter of construing the legislation so as to provide for protection where there would otherwise be none. There was no question of retrospectively removing protection for a disclosure that had already been made.

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

**Supp.10** Would a different test apply to the introduction of vicarious and personal liability for agents/workers? Here there is a direct conflict between the approach under s.24(6) ERA for the rest of the United Kingdom (which restricts vicarious liability to detriments in relation to qualifying disclosures made after the commencement date (2 July 2019)), and the approach taken in *Stolt*. It may be argued that, in the absence of some clear indication otherwise, a consistent approach is to be expected across the new provisions. However we suggest that the reasoning in *Stolt* is persuasive, and it would be unattractive for a co-worker who has engaged in acts of protected disclosure victimisation, after the personal liability provisions came into force, to contend that they should escape liability merely because the victimised worker's protected disclosure was made at an earlier date.

## **Republic of Ireland**

**Supp.11** The Republic of Ireland introduced specific whistleblowing legislation for the first time by the Protected Disclosures Act 2014, which came into force on 15 July 2014. Previous legislation was piecemeal and related to specific sectors. The legislation broadly adopts the structure of the UK legislation. But there are some interesting differences in approach. Notably:

1. A protected disclosure is defined as a disclosure of “relevant information” and is specifically confined to information which came to the attention of the worker in connection with the worker's employment (s.5(2)(b)). We suggest that is unduly restrictive.
2. As with the UK legislation the worker must reasonably believe that the information tends to show one of an exhaustive list of relevant failures, or as they are called “relevant wrongdoings”. However there are some significant differences within the list of relevant wrongdoings:
  - 2.1 There is no separate condition of a reasonable belief that the disclosure is made in the public interest. Instead in relation to past, ongoing or likely future breach of a legal obligation there is a specific exception that this does not cover an obligation arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally work or services (s.5(3)). This is an approach that was specifically rejected when Parliament was considering amending the ERA to introduce the public interest test.

- 2.2 There are two additional categories of “relevant wrongdoing” in the Irish legislation which are not standalone “relevant failures” under the ERA, namely
  - (a) a past, ongoing or likely future an unlawful or otherwise improper use of funds or resources of a public body, or other public money (s.5(3)(f)); and
  - (b) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement (s.5(3)(g)).
- 2.3 There is a specific exclusion that a matter is not “relevant wrongdoing”, and therefore cannot be the subject of a protected disclosure, if it is a matter which it is the function of the worker or the worker’s employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employee (s.5(5)). This removes from protection disclosures by those who may routinely make what, in the United Kingdom, would be protected disclosures in the course of carrying out their ordinary work duties.
- 2.4 Mirroring the removal of the good faith test in the ERA provisions, there is an express provision that the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure (s.5(7)) but there can be a reduction of compensation of up to 25% if investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure (sch 2 para 1(3)).
- 2.5 The maximum compensation for unfair dismissal due to a protected disclosure is capped at 260 weeks’ salary.
- 2.6 Personal liability is not tied to the concept of being an agent or co-worker and nor is protection limited to where a worker himself or herself made the disclosure. Instead liability in tort is imposed if a person causes detriment to another person because that other person, or a third party, made a protected disclosure (s.13).
- 2.7 Specific provision is made for protection of the identity of the maker of a protected disclosure (s.16).

### **All Party Working Group report**

**Supp.12** See ‘Whistleblowing, The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring It’, a report published in June 2019 by the All Party Parliamentary Group available [here](#). There are 10 specific recommendations. Of particular note is the suggestion that protection should be extended to cover disclosures in relation to “any harmful violation of integrity and ethics, even when not criminal or illegal”.

## **J. International Perspective: The EU Whistleblowing Directive (Main Work Paragraph 1.49)**

**Supp.13** On 23 October 2019 the European Parliament and Council passed Directive 2019/1937 on the protection of persons who report breaches of European law (OJ L305/17). Member States are required to bring in Directive into force by 17 December 2021, subject to a later date (17 December 2023) for provisions concerning implementing whistleblowing policies for private companies with at least 50 but not more than 249 workers.

*Scope: subject matter of reporting/ disclosure*

**Supp.14** The Directive makes provision for protection of whistleblowers in relation to breach of EU law. Paragraph 1 provides that the purpose is to enhance the enforcement of EU law and policies by laying down common minimum standards providing for a high level of protection of persons reporting breaches of EU law (Article 1). It applies to reporting breaches in relation specified areas of EU law, including:

- Public procurement;
- Financial services, products and markets, and prevention of money laundering and terrorist funding;
- Product safety and compliance;
- Transport safety;
- Protection of the environment;
- Radiation protection and nuclear safety;
- Food and feed safety, animal health and welfare;
- Public health;
- Consumer protection;
- Protection of privacy and personal data, and security of network and information systems;
- Breaches affecting the financial interests of the EU as referred to in Art 325 TFEU (e.g. counter-fraud measures).
- Breaches relating to the internal market, such as relating to EU and State aid rules.

**Supp.15** In order to qualify for protection, the reporting person must:

1. have “had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of the Directive”; and

2. either have made the report internally (Article 7) or to a “competent authority”<sup>1</sup> (referred to as an external report) (Article 10) or a public disclosure (for which additional requirements apply) (Article 15).

**Supp.16** The first of these therefore serves the equivalent role to the test for a qualifying disclosure. The test of whether there are reasonable grounds to believe that the information was true might be regarded as setting a higher threshold than the qualifying disclosure test under the ERA, with the reference in the latter only to whether there is a reasonable belief that the information “tends to show” a relevant failure. Conversely there is no requirement of a reasonable belief that the disclosure is made in the public interest. Instead that is treated as flowing from the subject matter of the disclosure.

**Supp.17** The second requirement, with the three alternatives of ‘internal report’, ‘external report’ and ‘public disclosure’, adopt the role taken by ss.43C to 43H in the domestic provisions, but (as noted below) the Directive is more prescriptive as to how the report is to be dealt with by the recipient. For a ‘public disclosure’ to be protected under Article 15, one of the following two conditions must be satisfied:

1. That the person making the disclosure had previously made either both an ‘internal report’ and an ‘external report’, or made an ‘external report’ directly (ie without first making an ‘internal report’), and that no appropriate action was taken within the period required for feedback (see below) (Art 15(1)(a)); or
2. The person had reasonable grounds to believe that:
  - 2.1 “the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage” (Art 15(1)(b)(i)); or
  - 2.2 in the case of an ‘external report’, “there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where the authority may be in collusion with the perpetrator of the breach or involved in the breach” (Art 15(1)(b)(ii)).

**Supp.18** The first alternative notably differs from s.43G ERA, where one of the alternative conditions for protection (but subject to other cumulative conditions including the requirement that disclosure is reasonable in all the circumstances), is that the disclosure was made either to the employer or to a prescribed person under s.43F ERA. By contrast, under Art 15(1)(a), there must have been an external disclosure (the

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<sup>1</sup> Defined in Art 5(14) as “any national authority designated to receive reports ... and give feedback to the reporting person, and/or designated to carry out the duties provided for in this Directive, in particular as regards follow-up.”

equivalent of s.43F disclosures) before making a public disclosure, unless one of the conditions in Art 15(1)(b) are satisfied. There is also the further condition that no appropriate action was taken within the timeframe for feedback. In the case of an internal disclosure this has to be stated in the procedure but must be “a reasonable timeframe”, which must not exceed three months from the acknowledgment of receipt of the report or, if no acknowledgement was sent, from 7 days after the report was made (Art 9(1)(f)). In the case of an external disclosure, the feedback has to be “within a reasonable timeframe not exceeding three months, or six months in duly justified cases” (Art 11(1)(d)). Both these provisions appear to leave scope to argue that the overriding requirement for a “reasonable timeframe” may require a quicker response depending on the circumstances of the particular case.

**Supp.19** As to the alternative in Art 15(1)(b)(ii), the risk of retaliation substantially reflects s.43G(2)(a) ERA. Similarly, the first example given of there being a low prospect of the report being effectively addressed, that the “evidence may be concealed or destroyed”, largely mirrors s.43G(2)(b). However there is the notable difference that under the domestic provision this exception is not available in the case where there is a prescribed person under s.43F ERA. It would seem that the UK, unlike the EU as a whole, is content to trust that its prescribed regulators would not conceal or destroy information!

**Supp.20** It is also notable that the Directive uses broader language than the requirement in s.43G(2)(b). It allows scope for arguments as to other reasons for the person making the report to have reasonable grounds to believe that there is a low prospect of the report being effectively addressed. There is also the additional example given of there being a reasonable belief that the authority may be “in collusion” with the perpetrator. The Directive provides no definition of what is meant in this context by “collusion”. See for example *In the Matter of an Application for Judicial Review by Thomas Ronald Hawthorne on his own Behalf and others* [2018] NIQB 94 where in the context of judicial review relating to a report of the Police Ombudsman of Northern Ireland and dealing with allegations of collusion between the Royal Ulster Constabulary and those responsible for the murders being investigated, the Court (at para 44) noted that it had “been notoriously difficult to achieve a universal, accepted definition”, and referred to the following definition that had been used for the purposes of an inquiry into collusion between IRA and Eire Police:

“The issue of collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive or collaborate. In addition I intend to examine whether anybody deliberately ignored a matter or turned a blind eye to it or have pretended ignorance or unawareness of something morally, legally or officially to oppose.”

**Supp.21** Whilst s.43G does not contain any equivalent express exception, it is not easy to see that it could arise without there being scope to rely on one of the gateways

in s.43(2) ERA, whether due to there having been a previous disclosure of substantially the same information to the employer or the prescribed authority, or a reasonable belief that the information would be concealed or destroyed (if there is no s.43F prescribed body).

**Supp.22** The remaining alternative, in Art 15(1)(b)(i), has some parallels with s.43H ERA. However whereas the UK approach is to reserve this provision for the relevant failures of an “exceptionally serious nature”, the Directive instead refers to there being reasonable grounds to believe that there is “an imminent or manifest danger to the public interest”. It is not clear whether these requirements would operate differently in practice. One potential difference is that whereas the Directive focusses on reasonable grounds for the whistleblower’s belief, under s.43H, whilst the worker must have a reasonable belief that the information disclosed and any information contained in it are substantially true, it is for the Court to assess (without there being any express requirement to do so by reference to the worker’s reasonable belief) whether the relevant failure in question is “of an exceptionally serious nature”.<sup>2</sup>

*Who is covered?*

**Supp.23** One significant difference from the domestic protected disclosure provisions relates to the scope of those protected (set out in Article 4). As with the domestic provisions it covers workers (but only if they acquired information on breaches in a work-related context). It also specifically covers:

- Self-employed persons (Art 4(1)(b));
- Shareholders (Art 4(1)(c));
- Volunteers (Taken by itself the wording of Art 4(1)(c) might leave some ambiguity as to whether it includes all volunteers, as the reference to them is as a subcategory of “persons belonging to the administrative, management or supervisory body of an undertaking”, alongside “non-executive members” and “paid or unpaid trustees”. However recital 40 makes clear that a broad meaning is intended. It states that:  
“Effective whistleblower protection implies protecting also categories of persons who, whilst not relying on their work-related activities economically, can nevertheless suffer retaliation for reporting breaches. Retaliation against volunteers and paid or unpaid trainees could take the form of no longer making use of their services, or of giving them a negative employment reference or otherwise damaging their reputation or career prospects.”);
- Paid or unpaid trainees (Art 4(1)(c));
- Persons under the supervision or direction of contractors, subcontractors and suppliers (Art 4(1)(d));

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<sup>2</sup> Article 15(2) provides that the provisions in Article 15 for public disclosures do not apply to “cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information.” However, even if the Directive were to be applied in the UK, it is not apparent that this has any application here, save arguably if the disclosure was protected applying the provisions of s.43G or 43H ERA.

- Persons whose “work-based relationship is yet to begin” where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations (Art 4(3)). Recital 39 makes clear that this covers:
  - “candidates for employment or persons seeking to provide services to an organisation, who acquire information on breaches during the recruitment process or another pre-contractual negotiation stage, and who could suffer retaliation, for instance in the form of negative employment references, blacklisting or business boycotting.”
- “Facilitators”, meaning a natural person who assists a person making a relevant report in a work-related context, and whose assistance should be confidential (Art4(4)(a); Art 5(8)).
- Other people who are “connected with the reporting persons” who could suffer retaliation in a work context, such as their colleagues or relatives (Art 4(4)(b)); and
- “Legal entities that the reporting persons own, worker for or are otherwise connected with in a work-related context” (Art 4(4)(c)).

**Supp.24** The underlying principle is set out in Recital 37 which provides:

“Effective enforcement of Union law requires that protection should be granted to the broadest possible range of categories of persons, who, irrespective of whether they are Union citizens or third-country nationals, by virtue of their work-related activities, irrespective of the nature of those activities and of whether they are paid or not, have privileged access to information on breaches that it would be in the public interest to report and who may suffer retaliation if they report them. Member States should ensure that the need for protection is determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship, so as to cover the whole range of persons connected in a broad sense to the organisation where the breach has occurred.”

It is clear in the light of this provision that the scope of protection is to be read broadly. As we discuss below, this comes at a point at which encouragement has been provided to challenge the boundaries of those covered by the protected disclosure provisions by the Supreme Court’s decision in *Gilham*. That encouragement may be further fuelled by the wide coverage of the Directive.

*Obligation to establish internal reporting channels and procedures for follow up*

**Supp.25** In contrast to the domestic protected disclosure provisions, the Directive takes a more prescriptive approach in setting out requirements for the establishment of whistleblowing procedures and to the provision of feedback. All public sector entities, and all private entities with 50 or more workers, have to establish “channels and procedures for internal reporting and for follow up” (Article 8(1)). By Article 9, this is required to include:

- Channels for receiving the reports, whether orally or in writing or both, which ensure the confidentiality of the reporting person and of any third party mentioned in the report is protected;
- A requirement to acknowledge receipt of the report within 7 days of receipt.
- The designation of an impartial person or department competent for following up on the reports, and diligent follow up.

- A reasonable timeframe to provide feedback, not exceeding three months from the acknowledgment of receipt or, if no acknowledgment was sent to the reporting person, three months from the expiry of the seven day period after the report was made. As noted above, failure to respond within the required timescale is one of the bases for being able to make a public disclosure.
- Provision of clear and easily accessible information regarding the procedures for reporting externally.

In addition Member States are required to designate authorities competent to receive, give feedback and follow up on reports, and are required to provide them with adequate resources (Article 10). Again there are further provision as to the steps to be followed including in relation to giving feedback (articles 11-13).

#### *Duty of confidentiality*

**Supp.26** A further element of differentiation from the domestic provisions is express provision requiring that confidentiality of the person making the report/disclosure is maintained other than with their explicit consent. That is subject to an exception “where this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned.” (Article 16(2)).

**Supp.27** In addition, Article 22 provided that the identity of the person concerned (defined in Art 5 as the natural or legal person referred to in the report as a person to whom the breach is attributed,, or with whom that person is associated) is protected for as long as the investigations triggered by the report or public disclosure are ongoing.

#### *Prohibition of retaliation and measures of support*

**Supp.28** The Directive provides that measures must be taken to prohibit retaliation against any of the protected class of persons (Article 19). Once it is established that there has been an internal or external report or a public disclosure meeting the conditions for protection, and that a detriment was suffered, there is a reversal in the burden of proof in relation to whether this was retaliation (Article 21(6)). A long list but non-exhaustive list of potential forms of retaliation is set out.

**Supp.29** Perhaps amongst the most significant enhancements, compared to domestic legislation, is that the Directive requires (by Article 20) that those within the scope of protection (as set out in Article 4) must be afforded access to support measures including:

- “comprehensive and independent information and advice, which is easily accessible to the public and free of charge, on procedures and remedies available, on protection

against retaliation, and on the rights of the persons concerned”. As to this, Recital 89 provides:

“Member States should ensure that relevant and accurate information ... is provided in a way that is clear and easily accessible to the general public. Individual, impartial and confidential advice, free of charge, should be available on, for example, whether the information in question is covered by the applicable rules on whistleblower protection, which reporting channel might best be used and which alternative procedures are available in the event that the information is not covered by the applicable rules, so-called ‘signposting’.”;

- “effective assistance from competent authorities” before any relevant authority involved in their protection against retaliation including “certification of the fact that they qualify for protection” under the Directive. (This appears to refer to the provision in recital 90, that there should be a documentation provided to show that there has been an external report).
- legal aid in criminal and in cross-border civil proceedings and ... in accordance with national law, legal aid in further proceedings and legal counselling or other legal assistance”.

### *Penalties*

**Supp.30** In addition to a requirement to provide full compensation (Article 21(8)), and interim relief (Article 21(6)), there is also a requirement (in Article 23) for Member States to provide effective, proportionate and dissuasive penalties not only for retaliation but also to those who hinder or attempt to hinder reporting or breach the duty of maintaining confidentiality of the identity of reporting persons. In addition States are required to provide “effective, proportionate and dissuasive penalties” for those established to have knowingly reported or publicly disclosed false information and for compensating any damage which this causes (Article 23(2)).

**Supp.31** Notably, recital 92 indicates that protection extends to the removal of documentation – conduct which would not of itself be protected under the UK legislation, being at most associated with the disclosure. This is to be read together with Art 21(7) which provides:

“In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, persons referred to in Article 4 shall not incur liability of any kind as a result of reports or public disclosures under this Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Directive. Where a person reports or publicly discloses information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3(2) of the Directive (EU) 2016/943.”

Recital 92 provides:

“Where reporting persons lawfully acquire or obtain access to the information on breaches reported or the documents containing that information, they should enjoy immunity from

liability. This should apply both in cases where reporting persons reveal the content of documents to which they have lawful access **as well as in cases where they make copies of such documents or remove them from the premises of the organisation where they are employed, in breach of contractual or other clauses stipulating that the relevant documents are the property of the organisation.** The reporting persons should also enjoy immunity from liability in cases where the acquisition of or access to the relevant information or documents raises an issue of civil, administrative or labour-related liability. **Examples would be cases where the reporting persons acquired the information by accessing the emails of a co-worker or files which they normally do not use within the scope of their work, by taking pictures of the premises of the organisation or by accessing locations they do not usually have access to.** Where the reporting persons acquired or obtained access to the relevant information or documents by committing a criminal offence, such as physical trespassing or hacking, their criminal liability should remain governed by the applicable national law, without prejudice to the protection granted under Article 21(7) of this Directive. Similarly, any other possible liability of the reporting persons arising from acts or omissions which are unrelated to the reporting or are not necessary for revealing a breach pursuant to this Directive should remain governed by the applicable Union or national law. ...” (Emphasis added).

**Supp.32** The scope of this protection appears remarkable from the perspective of the UK law provisions, with the clear distinction drawn between a disclosure and conduct which is merely associated with a disclosure (See *Bolton School v Evans* [2007] ICR 641 (CA)). One important issue will be whether, on the basis that it represents an international consensus, reliance can be placed on it in conjunction with Articles 10 and 14 of the European Convention of Human Rights, to restrict the way in which that distinction can be drawn. Indeed the scope for a restrictive approach to the distinction is illustrated by the decision in *Riley v Belmont Green Finance Ltd t/a Vida Homeloans* UKEAT/0133/19/BA, 13<sup>th</sup> March 2020, considered at Supp.301-303 below.

## CHAPTER 3 PROTECTABLE INFORMATION

### Paragraph 3.04A: Requirement for a “disclosure” by the worker who is the claimant

#### *Perceived or prospective disclosures*

**Supp.33** Subject only to a limited exception for applicants for employment in the NHS and (though not yet in force) for those engaged in children’s social care (see s.49B, 49C ERA)<sup>3</sup>, the legislation does not, on its face, protect a worker who has not in fact made a protected disclosure but who has been subjected to detrimental treatment by an employer who either

- mistakenly believed a disclosure had been made by the worker, or
- believed such a disclosure would be made by the worker.

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<sup>3</sup> S.49B ERA gives a power to make regulations (now made in the form of The Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018) to prohibit an NHS employer from discriminating against an applicant because *it appears* to the NHS employer that the applicant has made a protected disclosure. So it would seem not to matter that the NHS employer was mistaken in this regard.

However, a purposive view was adopted at first instance by the ET in *Bilsbrough v Berry Marketing Services Ltd* Case No. 1401692/2018, 5<sup>th</sup> July 2019, Southampton ET. In that case the employer (BMS) operated a directory of venues around the world and provided software for clients to search for and book those venues for conferences and events. The claimant was employed as a Client Services Executive. He made a protected disclosure to a senior manager about a software flaw which would potentially result in a violation of data protection standards. He was then admonished by his immediate line manager for not having reported the matter to her first. The claimant was angered by this and mentioned to a colleague that he would “take the company down”. He started to research data protection principles and investigated how to go about making a disclosure to the Information Commissioner (i.e. the prescribed regulator under ERA 43F). But he did not actually make any disclosure to the ICO. The colleague reported the claimant’s comments and actions to the employer. The claimant was suspended and, following a disciplinary hearing, dismissed.

**Supp.34** The ET found that the claimant’s suspension was influenced by his employer’s belief that the claimant had been researching ways to make, and he had been considering making, a protected disclosure. Even though the planned disclosure had not been made, the ET accepted that there was a sufficient basis for the claimant’s detriment claim to succeed (though his unfair dismissal claim failed). The ET reasoned that:

“... if employers are permitted lawfully to sanction workers whom they perceive to have considered making or be liable to make a protected public interest disclosure this would have a chilling effect on the making of public interest disclosures. ... it would also create a perverse incentive for employers to sanction workers in order to deter them from making public interest disclosures before they actually do so.

...

In a case such as this, if an employee does not know how to make a disclosure to a regulator, he or she will have no option but to research how to do so. If such research is discovered before the disclosure is made and an employee can legitimately be subjected to a detriment or dismissed as a result then the ability to make a protected disclosure is greatly diminished. The same would apply in respect of an employee who looked into making a protected disclosure but then decided, for whatever reason not to do so.

...

... the dismissal of such a person or subjecting them to a detriment because of that research would be an interference with that employee’s right to freedom of expression, where the right to freedom of expression clearly includes the right to make a protected disclosure. In such case the research is an integral part of making the disclosure.”

**Supp.35** The ET relied on Article 10 of the ECHR, following the approach in *X v Y* [2004] ICR 1634 (CA). It found that Article 10 was engaged because the claimant had been suspended for considering how he might make a disclosure to the Information Commissioner, and proceeded on the basis that the State has a positive obligation to secure enjoyment of the Article 10 right as between private persons (relying on *Paleomo Sanchez v Spain* (2012) 54 EHRR 24). It proceeded to find that the interference with the right by subjecting the claimant to a detriment for the act of preparing to make a disclosure, or looking into doing so, was not justified. It followed

from this finding that it would be necessary to construe the legislation in a manner which afforded protection unless such a construction would go against the grain, or a fundamental feature, of the legislation. The ET concluded that s.47B(1) could be read as providing protection in relation to detrimental treatment on the ground that the worker *has considered making* a protected disclosure, and that this did not conflict with any fundamental feature of the legislative scheme.

**Supp.36** The ET's decision is not being appealed. However the conclusion that the construction adopted did not clash with any fundamental feature of the legislation is a controversial one. Clearly there are some strong policy reasons for the approach taken by the ET; it furthers the objective of protecting those who want to blow the whistle. As noted above, subject to the limited exceptions in ss.49B and 49C for applicants for employment in the NHS or for a position in children's social care, the legislation is founded on the need for workers to establish that they *have* made a protected disclosure. It is at the point of the disclosure that the worker must have held the requisite reasonable belief. In *Bilsbrough* the ET felt able to proceed on the basis that it was sufficient that the employer believed the worker was considering making a disclosure of the data issue to the ICO and that the worker reasonably believed that the issue fell within the ICO's remit and the information giving rise to his concerns was true (and disclosure of it would have been a disclosure made in the public interest). As such the ET had no difficulty in applying the reasonable belief test at a point in time before any disclosure took place. In other circumstances, where the worker is still in the process of looking into the matter the reasonable belief test may be much more difficult to apply.

**Supp.37** Were the approach adopted by the ET in *Bilsbrough* to be followed, it would mark quite a fundamental change to the approach previously adopted, at least at Court of Appeal level. It would be in stark tension both with the approach adopted in *Beatt*<sup>4</sup> and the approach in a line of authorities, that the legislation only protects the detrimental treatment by reason of a protected disclosure and not conduct associated with or in preparation for it: see eg *Bolton School v Evans* [2007] ICR 641 (CA). However the Article 10 considerations relating to protection of expression were not considered in either *Beatt* or *Bolton School*.

#### *Contributing to/associating or being associated with someone else's disclosure*

**Supp.38** A closely related issue arises where a worker is subjected to a detriment not because of they have made a protected disclosure themselves but because they are seen as having contributed to or supported a disclosure made by somebody else. In general the whistleblowing provisions do not expressly provide protection for the

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<sup>4</sup> *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748 (CA), discussed at Supp. 407-416.

worker in that situation<sup>5</sup>. In some cases, however, at least in relation to contributing to someone else's disclosure, there may be scope for a purposive construction in favour of protection.

**Supp.39** The issue arose at first instance in *Aston and others v Chief Constable of Greater Manchester Police* Case No. 2402963/2017, 31<sup>st</sup> May 2019, Manchester ET (EJ Ryan). The context was a claim brought by three police officers following their involvement in the investigation of potential criminal acts and/or misconduct of other officers within GMP. In the course of an enquiry briefing documents were submitted to more senior officers by one of the claimants, Detective Inspector Aston. It was contended that the briefing documents were actually compiled by all three claimants and not just by DI Aston. An issue for the ET was whether DI Aston's colleagues could be considered to have made the disclosure when DI Aston alone presented the briefing document to which they had contributed. The briefing notes had not referred to the other claimants as being co-authors of it (and there was no suggestion that DI Aston, as the leader of the team, submitting a briefing report as part of his ordinary duties, was acting as the agent of the other claimants).

**Supp.40** The ET's approach was that a fact-sensitive determination as to whether the disclosure could be regarded as being made by the other claimants as well as DI Aston, even though they did not sign any document as co-authors. In the view of the ET it was not sufficient for Aston's colleagues merely to expect that evidence provided by them would be used by DI Aston for the purposes of his disclosure. But there could be circumstances, such as where a small team conducting the investigation attended a meeting together to relay their findings, where one person speaking up could be viewed as speaking on behalf of all of that team. The ET also took the view that a relevant factor would be recipient's knowledge of the involvement of those claiming to have contributed to the briefing documents relied upon as a disclosure. Here, in relation to two briefing documents, the ET found that there was no disclosure other than by the author, DI Aston. The other officers were not mentioned in the briefing document and it would not be possible for the recipient to infer from the information provided that the information was being provided by anyone other than him. But the ET held the position to be different in relation to another disclosure – a draft report on "Other Officers". Although this bore the name of DI Aston alone, it was clear from the content of the report that all three officers had contributed to it. Further it was made to the officer who was charged with managing the investigation who, it could be inferred would have considered the report as being made by all three officers, although he did not give evidence.

**Supp.41** In one sense that analysis might be thought problematic in that it relied upon the state of knowledge of the recipient. Whilst the recipient's knowledge, or lack

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<sup>5</sup> See by contrast the new EU Directive 2019/1937 relating to whistleblowing on breaches of EU law, which does include protection for facilitators as discussed above.

of it, would be highly relevant to the issue of whether any detriment inflicted by the recipient was “by reason” of the protected disclosure, it is less clear why knowledge should determine whether a particular worker had made a disclosure.

**Supp.42** An interesting alternative argument was advanced in reliance on s.43C(2) ERA which provides:-

“(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.”

It was suggested that the briefing papers were ‘a procedure’ by which the matters discovered in the investigation were to be raised with more senior officers. As such any input into the briefing paper, and the relaying of information to DI Aston, was “the procedure authorised by the employer” to be used for making a qualifying disclosure. That argument was rejected on the basis that s.43C(2) only applied to a procedure authorised specifically for the purposes of making a disclosure; it did not cover a procedure authorised for some other purpose which happened to be the medium used to make a protected disclosure. Further, the ET concluded that the evidence did not support any finding that the creation of briefing documents in the course of a criminal investigation was a procedure authorised for the purpose of making a disclosure.

**Supp.43** This was a narrow approach to s.43C(2) ERA, on the basis of what it found to be the natural construction of the wording. It might also have been supported on the basis of the need to preserve the boundary with other provisions, such as the disclosures to prescribed bodies under s.43F (ERA). Related to this, a narrow approach to s.43C(2) ERA might also be supported on the basis of the emphasis on generally encouraging matters to be raised internally in the first instance. This substantially reflects the arguments raised in *The Brothers of Charity Services Merseyside v Eady-Cole* UKEAT/0661/00, 24<sup>th</sup> January 2002 (which was not referred to by the ET in *Aston* but is discussed in the Main Work at 5.32; the EAT declined to give an exhaustive definition of the kind of procedures for disclosure that would fall within s.43C(2) ERA but held that it covered the telephone reporting procedure in that case). However the approach taken by the ET begs the question as to what is meant by the stated requirement for the procedure to be authorised for the purposes of making a disclosure. On its face the purpose of the briefing documents would indeed appear to have been for the purposes of conveying information. It may be that the procedure had to be specifically for making qualifying disclosures. However, given that this was in the context of a criminal investigation, on its face it would appear to be designed to convey information tending to show a relevant failure since s.43(1)(a) ERA. Further, the approach taken by the ET in *Aston* may be contrasted with that taken by the ET in *Speyer v Thorn Security Group Ltd*, 20<sup>th</sup> August 2004 (addressed at para 5.34 of the Main Work) where disclosures made in the course of an investigation, rather than in what would ordinarily be regarded as a whistleblowing procedure, were held to fall within s.43C(2).

**Supp.44** One alternative argument might have been that disclosures by the other members of the team to DI Aston<sup>6</sup>, as the leader of the team, were properly to be regarded as having been made “to the employer” within s.43C ERA, i.e. could DI Aston be regarded as “the employer”. The question of who is to be regarded as the employer is necessarily fact sensitive depending on the particular context. But where there is a report to someone with particular responsibility on behalf of the employer for dealing with the matter, the argument would seem to be available. That would though still leave difficult causation issues, particularly if the recipients in the chain after DI Aston were not aware that the other claimants had contributed to the disclosures. An example of such an argument is the first instance decision in *Stanton v Overbury Plc* (Case No. 2206729/2018, 10<sup>th</sup> December 2019), where the ET concluded that disclosure of health and safety concerns to another manager with particular responsibility for the area concerned, but at the same level in the hierarchy as the claimant, constituted a disclosure to the employer, but the detriment claims failed in part because none of those accused of subjecting the claimant to detriments were aware that the claimant had made the disclosure.

### **Paragraphs 3.05 to 3.45**

#### **What is a “disclosure of information”: *Kilraine v London Borough of Wandsworth*** *Introductory note*

**Supp.45** The leading guidance on the requirements for a statement to be “a disclosure of information” is now set out in the Court of Appeal’s decision in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, [2018] I.C.R. 1850, [2018] IRLR 846. In overview the Court of Appeal emphasised that there is no rigid dichotomy between information and an allegation or opinion, but nor is it the case that every allegation or statement of belief conveys information. What is disclosed must have sufficient factual content and specificity, viewed in context, for it to sustain a reasonable belief that the information tends to show a relevant failure. At least in less clear cases, this requires an evaluative judgment by the tribunal taking into account all the circumstances.

**Supp.46** The guidance given in *Kilraine* may be viewed in the context of an underlying policy tension bearing on the extent to which it needs to be made clear to the recipient of information that what has been disclosed amounts in substance to a protected disclosure. On the one hand it is clearly desirable to cater for the range of different situations in which a disclosure may be made. Whistleblowing may often be in circumstances where a worker has not had an opportunity to take advice as to the form that a disclosure should take in order to be protected, or where for various reasons (such as a desire not to be branded a troublemaker or due to not having the whole

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<sup>6</sup> The ET decision records a submission (at para 431) that the claimants had not advanced a case based on a disclosure made by them to DI Aston.

evidential picture) the worker makes the disclosure in moderated terms. An overly prescriptive or formulistic approach to how and what must be flagged up would risk undermining a fundamental policy of the legislation of encouraging those with critical information indicative of a relevant failure to raise it with someone, usually within the employer organisation, who may be better able to investigate.

**Supp.47** As against this, the making of a protected disclosure brings special protections for the worker and therefore potential liability to the employer (or co-workers) if treating the worker detrimentally by reason of it.. There will be no defence to the employer/co-worker to a claim of detrimental treatment if it is said that the recipient did not realise that what the whistleblower said or wrote amounted to a protected disclosure: *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748 (CA) at paragraph 80 and paragraphs 7.86 to 7.156 (and 9.19) of the Main Work. In addition the underlying public policy is that those to whom the disclosure is made, typically in the first instance the employer, should act upon and/or investigate the information disclosed, and should recognise the need to do so. These features point towards an approach which requires that a recipient of the communication from a worker should at least have a pretty good chance of appreciating that what the worker has said is something which an ET may, some time later, decide was a qualifying disclosure; albeit that whether that is the case is to be tested by reference to the reasonable belief of the worker making the disclosure. As it was put in *Riley v Belmont Green Finance Ltd t/a Vida Homeloans* UKEAT/0133/19/BA, 13<sup>th</sup> March 2020, it must be reasonable for the worker making the disclosure to believe that the disclosure would alert the person receiving it to the relevant failure – in that case a breach or potential breach of a legal obligation (see Supp.120-121). That would not be the case if the worker could say that they had in mind something which indicated that the information disclosed tended to show a relevant failure but if this could not reasonably be ascertained or anticipated from the perspective of the recipient of the information. There is therefore a policy interest in having certainty as to what amounts to a protected disclosure, and in it being clear on its face when such a disclosure has been made.

**Supp.48** Additional tensions exist between the interests in encouraging workers to raise the alarm on matters of public interest, and the concern not to reward those who have not acted out of a public interest concern. The thinking has been that the legislation should be kept in its proper boundaries as a public interest measure; but with the 2014 amendments the focus has moved away from the motive of those making the disclosure.

**Supp.49** The attempt to reconcile these tensions, and in some cases, to prioritise between them, can be seen in several different strands of the development of whistleblowing protection, including the degree of specificity required in a disclosure, the extent to which it must be apparent on its face that it concerns a relevant failure, and the introduction and development of the public interest test.

## **(1) The facts in *Kilraine***

**Supp.50** Ms Kilraine was employed by Wandsworth as an Education Achievement Project Manager. She was involved in projects aimed at trying to raise educational standards in schools. Over the years, she made a number of complaints about other members of staff and her managers. Four alleged protected disclosures were in issue in the proceedings in the ET. Ms Kilraine was placed on garden leave shortly after the fourth alleged disclosure and subsequently suspended on full pay pending a disciplinary investigation on charges that she had made unfounded allegations against colleagues. Later on (but before that investigation had been completed) Ms Kilraine was dismissed on grounds of redundancy. Ms Kilraine brought a claim in the ET alleging that she had been subjected to detriments and then dismissed for making the alleged protected disclosures.

## **(2) The ET's approach in *Kilraine***

**Supp.51** The ET decided to consider as a preliminary issue whether any of the statements relied upon by Ms Kilraine constituted protected disclosures. Having considered this issue before hearing any oral evidence, the ET decided that three of the four allegations of protected disclosures should be struck out, including those in relation to the third and fourth disclosures. The ET then proceeded with the substantive hearing in relation to the claims of unfair dismissal, automatically unfair dismissal and the remaining allegation of a protected disclosure. The ET found that Ms Kilraine had been dismissed on the ground of redundancy (not by reason of any protected disclosure); that the dismissal was unfair, because of a lack of consultation with her; but that no compensation was payable, because it was clear that she would have been dismissed on that ground even had she been consulted. The ET dismissed the other claims. It was Ms Kilraine's claim in relation to the third and fourth disclosures which were in issue on the appeal to the EAT and then the Court of Appeal.

**Supp.52** The third disclosure was contained in a letter from Ms Kilraine to Mr Johnson of Wandsworth. This letter, which was dated 10 December 2009, set out a complaint that Ms Kilraine had not been included in a meeting of the Performance and Standards Monitoring Group to present an annual report. In the EAT Ms Kilraine's claim was refined down to reliance on the following paragraph in that letter, and the particular sentence in it (italicised below) which was highlighted by Sales LJ who gave the substantive judgment of the Court of Appeal:

I think that it is also important to remind you that what has been achieved over the years has been despite bullying and harassment that was tolerated, and at times, not least at present, encouraged over that time by Stephen Pain, Liz Rayment-Pickard [Ms Kilraine's line manager], yourself and others, and also despite successive and repeated failure to honour LA [local authority] and individual agreements to extend my role and to provide career development. *Since the end of last term, there have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented. As*

an example, I have brought to your attention the inappropriate behaviour of Liz Rayment-Pickard, and despite your undertaking have received no feedback.'

**Supp.53** The ET directed itself by reference to *Cavendish Munro*<sup>7</sup> and held that the letter of 10 December 2009:

'does not disclose any information. Instead it makes allegations'

And on that basis the ET ruled that the third disclosure did not amount to a qualifying disclosure.

**Supp.54** The fourth disclosure was contained in an email dated 21 June 2010 from Ms Kilraine to a Mr Gaskin, the human resources officer at Wandsworth's education directorate. Ms Kilraine said that she had reported a safeguarding issue to Liz Rayment-Pickard (her manager) in relation to a particular school and received an unsatisfactory response. The passage relied on by Ms Kilraine in the refined submissions made on her behalf in the EAT was as follows:

'She did not support me, as she claims, when I reported a safeguarding issue during [a meeting on 16 June 2010]. Her response, which shocked me was "I can't comment, I am never there during the school day, only before ... or after ... so I can't comment". This was, repeated, belittling and I tried very hard to engage her as my line manager in the report.'

**Supp.55** Ms Kilraine's case before the ET was that the information disclosed tended to show her reasonable belief that Wandsworth had failed to comply with a legal obligation to which it was subject, within the scope of s 43B(1)(b). However, the ET referred to the agreed list of issues and Ms Kilraine's witness statement and found that she had failed to identify what legal obligation she said she relied upon. In closing it had been submitted on Ms Kilraine's behalf at the hearing that Wandsworth was under a legal obligation deriving from the contract of employment to provide support for her in complying with her own safeguarding obligations. This was discounted by the ET as 'a very recent thought' and one which had not been in the mind of Ms Kilraine at the time of the disclosure.

**Supp.56** The ET gave two reasons as to why the fourth disclosure did not amount to a qualifying disclosure within s 43B(1):

- the email did not disclose any information; it amounted only to the making of allegations (apparently applying the guidance the ET thought was to be derived from *Cavendish Munro*); and
- Ms Kilraine 'had not articulated any genuine legal duty to support her, or shown that she reasonably believed that there was such a duty.'

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<sup>7</sup> As to which see paragraphs 3.05 to 3.12 of the Main Work

### **(3) The EAT's decision in *Kilraine***

**Supp.57** The EAT (Langstaff P) dismissed Ms Kilraine's appeal (which included appeals in relation to the first and second disclosures as well). As regards the third disclosure, as noted in the Main Work at paragraph 3.14, Langstaff J disapproved of the way in which the ET had relied in its reasoning on a rigid dichotomy between information and allegations and accordingly carried out his own analysis of the position. Having done so he still reached the conclusion that there was nothing that could be taken as providing information. If one took away the word "inappropriate" before "behaviour" from the highlighted section, the letter said nothing that was at all specific. It did not sensibly convey any information at all. The Employment Tribunal was justified in concluding as it did, but even if it was not, it was difficult to see how what was said alleged a criminal offence, a failure to comply with legal obligations or any of the other relevant failures. It was:

'...simply far too vague. "Inappropriate" may cover a multitude of sins. It has to show or tend to show something that comes within the section.'

**Supp.58** As regards the fourth disclosure, Langstaff J upheld Ms Kilraine's appeal but only to the extent that he overturned the ET's ruling that the disclosure made an allegation and therefore could not constitute information for the purposes of s 43B: the disclosure made an allegation but it also gave information about what was or was not said at the meeting.

**Supp.59** However Langstaff J still dismissed Ms Kilraine's appeal. He did so on the basis that the ET was entitled to find that she did not have the requisite reasonable belief as to whether there was a relevant failure. In the EAT Ms Kilraine relied on the relevant failure as being an alleged breach by Wandsworth (acting by Ms Rayment-Pickard) of its duties under s 11 of the Children Act 2004 and s 175 of the Education Act 2002. Those provisions imposed an obligation on Wandsworth to 'make arrangements' for ensuring that its functions were discharged having regard to the need to safeguard and promote the welfare of children. However even, if Ms Kilraine had these statutory provisions in mind at the time she made the fourth disclosure, there was nothing in her disclosure which indicated that Wandsworth had failed to put in place the necessary procedures or arrangements as required or was in breach of its statutory duties in any way.<sup>8</sup>

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<sup>8</sup> Langstaff J also ruled that the ET had been entitled to conclude as a matter of fact that Ms Kilraine had not shown that she reasonably believed there was a relevant legal duty. However Sales LJ subsequently noted in the Court of Appeal that this was an error because the claim in relation to the fourth disclosure had been struck out by the ET at the outset of the hearing, before it heard any live evidence from witnesses.

#### **(4) *Kilraine in the Court of Appeal – review of *Cavendish Munro****

**Supp.60** In the Court of Appeal, Sales LJ started his consideration with a review of the *Cavendish Munro* case. He agreed that the concept of 'information' as used in s 43B(1) was capable of covering statements which might also be characterised as allegations. He endorsed the view expressed by Langstaff J in the EAT at [30] that section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other.

**Supp.61** As Sales LJ noted however, although sometimes a statement which could be characterised as an allegation would also constitute 'information' and amount to a qualifying disclosure, not every statement involving an allegation would do so. Rather than seeking to introduce a rigid dichotomy, all that the EAT in *Cavendish Munro* was seeking to say was that a statement which merely took the form, 'You are not complying with Health and Safety requirements', would be so general and devoid of specific factual content that it could not be said to fall within the language of s 43B(1) so as to constitute a qualifying disclosure. That had been emphasised by contrasting a statement which contained more specific factual content. The EAT had referred to s.43F, which indicated that some allegations do constitute qualifying disclosures. Indeed, the statement that “*The wards have not been cleaned [etc]*” could itself be an allegation if the facts were in dispute. Sales LJ commented that it was unfortunate that this aspect of the EAT's reasoning was somewhat obscured in the headnote summary which could be read as indicating that a rigid distinction was to be drawn between 'information' and 'allegations.' Thus the submission on behalf of Ms Kilraine that *Cavendish Munro* was wrongly decided on this point was rejected. The statements made in Mr Geduld's solicitors' letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within s 43B(1).

**Supp.62** However, Sales LJ accepted that, with the benefit of hindsight, para [24] in *Cavendish Munro* was expressed in a way which had given rise to confusion. Sales LJ said that in Ms Kilraine's case the ET seemed to have thought that *Cavendish Munro* supported the proposition that a statement was either 'information' (and hence within s 43B(1)) or 'an allegation' (and hence outside that provision). The ET accordingly erred in law, and Langstaff J in his judgment had to correct this error. The judgment in *Cavendish Munro* also tended to lead to such confusion by speaking about 'information' and 'an allegation' as abstract concepts, without tying the decision more closely to the language used in s 43B(1). Sales LJ explained (at [35,36]) that:-

“The question in each case in relation to s43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity

such as is capable of tending to show one of the matters listed in sub-s (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard.

Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.”

**Supp.63** The emphasis here on the need for an evaluative judgment is important. It reflects the variety of different circumstances in which a disclosure may be made, and the need to have regard to the particular context. In every case a focus is needed on what was, in the context, conveyed by way of information, and what (if any) reasonable belief that information tended to show.<sup>9</sup>

#### **(5) Ms Kilraine’s Third Disclosure: context and embedded disclosures**

**Supp.64** In Sales LJ’s view Langstaff J's reasoning and his conclusion that the third disclosure was not a qualifying disclosure was correct. Accordingly, the ET's decision in relation to the third disclosure was correct; the error in its approach was immaterial; and its conclusion was not affected by any error of law.

**Supp.65** A submission that Langstaff J had failed to consider how the third disclosure was embedded in and formed part of an ongoing series of communications between Ms Kilraine and various of Wandsworth’s officers and should be taken, in effect, to incorporate by reference other disclosures made by at different times, which upon examination might be found to contain sufficient relevant factual content, was also rejected. Sales LJ said this:

“It is true that whether a particular disclosure satisfies the test in s 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in para [24] in the *Cavendish Munro* case, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says 'You are not complying with Health and Safety requirements', the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to

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<sup>9</sup> See also eg *Gibson v (1) Hounslow LBC and (2) Crane Park Primary School* UKEAT/0033/18/BA, 20<sup>th</sup> December 2018, considered at Supp.178-179, 307, 418, where the EAT accepted that the ET had erred in its rejection of several of the alleged protected disclosures on a basis of a classification of them as consisting of allegations rather than disclosures of information.

dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.

However, in the present case the appellant and her legal representatives did not identify any relevant context for the statement said to constitute the third disclosure which might inform or supplement its meaning; nor did they specify any part of that context which was said to supply the relevant minimum factual content which could satisfy the test in s 43B(1). Even at the hearing before us, Mr Milsom did not do this with any particularity. Langstaff J was entitled to proceed on the basis of the third disclosure as he identified it in his judgment. In the circumstances, it would have been unfair to the respondent to have approached the appellant's case in relation to the third disclosure in any other way.”

## **(6) Ms Kilraine’s Fourth Disclosure**

**Supp.66** As to the fourth disclosure, this *did* involve disclosure of matters which had sufficient factual content so as potentially to qualify as a disclosure of information for the purposes of s 43B(1). However the Court of Appeal upheld Langstaff J’ conclusion that the ET was entitled to hold that this information was not such as tended to show that Wandsworth had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject. The ET was entitled on the material before it at the start of the hearing on 14 July 2014 to decide that Ms Kilraine’s claim that the fourth disclosure was a qualifying disclosure had no reasonable prospect of success on the facts and therefore to strike it out in the exercise of its case management powers. The agreed list of issues was supposed to explain the Ms Kilraine’s case but did not identify any relevant legal obligation. Her witness statement again did not identify any relevant legal obligation which she had in mind. Her then counsel had only been able to make submissions about a proposed legal obligation which was a later invention and one which Ms Kilraine did not have in mind at the relevant time. There had been nothing in Ms Kilraine’s case or witness statement to suggest that she had a relevant legal obligation in mind at the material time. Accordingly, she could not satisfy the subjective requirement that she believed at the time of the disclosure that the information in it tended to show that someone had failed, was failing or was likely to fail to comply with a legal obligation.

**Supp.67** Even if Ms Kilraine did in fact have the statutory provisions referred to above in her mind at the time of the fourth disclosure, Langstaff J was entitled to make the assessment he did about the relevance of those provisions which she relied upon (under s 11 of the Children Act 2004 and s 175 of the Education Act 2002) in the particular context in which that disclosure occurred. To say that an individual officer of Wandsworth might have been unsupportive on one particular occasion in responding in relation to a safeguarding issue was not indicative of a failure by Wandsworth to make appropriate general arrangements in accordance with those provisions.

## (7) The CA's approach in Kilraine: analysis

### (a) Embedded disclosures and the importance of context

**Supp.68** The reasoning makes clear the importance of pleading any particular meaning that is said to be drawn from the context, and the particular context which supports it. But it begs the question as to the extent to which, if the particular contextual meaning is pleaded, disclosures of information can be aggregated.

**Supp.69** The issue of aggregating disclosures is considered in the main work at paragraphs 3.45 to 3.51. As we discuss there, the EAT's decision in *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 indicates that in principle it may be possible for a disclosure to be read together with an earlier disclosure at least in the sense of giving meaning and context to the latter disclosure. The leading guidance on the scope for aggregation is now set out in *Robinson v His Highness Sheikh Khalid Bin- Saqr Al Qasbi* [2020] IRLR 345 (EAT). The EAT (Lewis J) set out the following:

1. Whilst it is theoretically possible that reading two disclosures together, neither of which by themselves contain information amounting to a qualifying disclosure (QD), could result in a QD, that is likely to be rare in practice (para 70). This echoed comments on Choudhury J in *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236 (EAT) (at para 35).
2. A later disclosure may be read as including an earlier disclosure, by referring expressly to it, or attaching or enclosing a copy or where the context makes clear that it is to be read with the earlier disclosure (para 71). However as to the latter, what is required is that by necessary implication the subsequent communication incorporates the earlier one (para 72). (That would also encompass cases of obvious implication, which is how the aggregation in *Norbrook* was explained in *Simpson* at para 32. Lewis J in *Robinson* noted that his analysis was consistent with that in *Simpson* at paras 31-34).
3. It will be important for the worker to identify why the incorporation is necessarily to be implied from the context. In *Kilraine* that had not been done. Ms Kilraine's third (putative) disclosure referenced her having previously documented numerous incidents" of "inappropriate behaviour". Other paragraphs of the relevant email within which the third putative disclosure was contained also made reference to what Ms Kilraine appeared to be saying were earlier representations (which, it may be supposed, might have contained more specifics as to her complaints). However it seems that those earlier communications were not before the ET (or the EAT or the Court of Appeal). In those circumstances it was not open to Ms Kilraine to contend that the earlier communications formed the

necessary context against which the quoted passage should be considered or that the quoted passage should be aggregated with any earlier statements by her).

**Supp.70** In *Robinson* the worker was found to have made six protected disclosures in relation (a) alleged deliberate breach of the obligation to deduct tax by PAYE and (b) manipulating information to conceal employment status. The employer's cross-appeal challenged the ET's approach to aggregation. This challenge was relevant to three supposed disclosures which would not have been qualifying disclosures unless they were aggregated. In one case the employer's challenge by cross-appeal failed. Ms Robinson's solicitor had attached a copy of her earlier disclosures to a letter written on Ms Robinson's behalf and it was clearly intended that the attachments would be read with the solicitor's letter. However in relation to the two other communications the employer's cross-appeal succeeded:

1. Another solicitor's letter had stated that the writer of the letter had taken over conduct of Ms Robinson's proceedings. The ET had said this letter contained a protected disclosure as it was part of a continuation of correspondence about manipulation of employee information by the respondent. The ET's approach in effect assumed the answer by proceeding on the basis that there would be a protected disclosure if the solicitor's letter was read with prior correspondence). But, as the EAT pointed out, the earlier correspondence was neither expressly referenced nor to be read in by necessary implication. Indeed, neither the ET nor the solicitor's letter in question specifically identified to which previous correspondence this referred.
2. A letter from Ms Robinson's tax advisers had set out a legal analysis of why Ms Robinson was an employee for tax purposes. However it did not refer to the claim that her employment status had been manipulated to avoid being included within PAYE. The ET said that the tax adviser's letter was not, on its own, a disclosure but was "when read in the light of the other disclosures". Again that approach assumed the answer. There was no context identified or referred to which would explain why the tax adviser's letter should be read with the earlier disclosures and no reasonable basis for doing so.

**Supp.71** The decision emphasises the need for considerable care in identifying the context which it is said (a) provides the basis for aggregation by necessary implication and (b) contributed something either to the meaning of what was disclosed in the latter disclosure or adds further information to be read with it. In essence the ET's approach appears to have fallen into the trap of regarding previous disclosures as capable of being aggregated simply on the basis of their being associated with a further disclosure. That would fall foul of the reasoning in *Bolton School v Evans* [2007] ICR 641 (CA). See also *Barton v Royal Borough of Greenwich* UKEAT/0041/14, 1<sup>st</sup> May 2015 for a further illustration of the principle that mere association with another disclosure is not sufficient (Main work paras 3.50 to 3.51). That is to be distinguished

from a case such as *Norbrook* where the earlier communication is relevant not merely by association but as giving context or meaning to a subsequent communication, such that the latter may be protected as a disclosure when viewed in that light.

**Supp.72** As noted above, Lewis J in *Robinson* noted that his analysis was consistent with that of Choudhury P in *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236 (EAT) at paras 31-34. Indeed *Simpson* provides a good illustration of the sort of case which the EAT in *Robinson* may have had in mind in restricting aggregation to express reference or necessary (or obvious ) implication, with the effect of limiting the scope for workers to seek after the event to piece together a variety of communications to seek to construct a protected disclosure which would not have been apparent at the time. Mr Simpson worked for Cantor Fitzgerald (“CF”) as a Managing Director on its Emerging Markets Desk between 23 February 2015 until his dismissal on 31 December 2015. The ET found that Mr Simpson’s behaviour was regarded by management and colleagues as amounting to constant complaining and a failure to get on with generating business. Matters came to head in October 2015, when Mr Cortellesi, having previously resisted suggestions that Mr Simpson be moved due to the difficulties in recruiting to the particular Desk on which he worked, said that he would refer the matter to Human Resources. He was then suspended and ultimately dismissed. He contended that the reason for his dismissal was that he had made a series of protected disclosures, initially to his line manager, Mr Charles Cortellesi, and subsequently to CF’s Compliance department.

**Supp.73** Mr Simpson’s ET claim referred to four alleged protected disclosures, although each of these were said to have been made in several communications both written and oral. By the time of the ET hearing these had been separated out in a chronology compiled by CF into 37 separate disclosures made between 27 April 2015 (just 2 months into Mr Simpson’s employment) and 25 November 2015, after Mr Simpson had been suspended from work. The alleged disclosures broadly related to CF’s trading practices, including that a colleague had engaged in a practice known as “front-running”, being a form of insider trading where a trader holds back a client’s order for certain bonus until after he has purchased the bonus, and therefore taken advantage of the price rise consequent on the client’s order.

**Supp.74** The ET rejected Mr Simpson’s complaint, finding that none of the alleged disclosures amounted to protected disclosures and that, in any event, it was “utterly fanciful” to state that the reason or principal reason for the dismissal was that he had made such disclosures. It found that communications from Mr Simpson were “cryptic in the extreme”, that his allegations were based on “just making constructs from overheard one-sided telephone conversations”, that his criticisms were “over general, lacking specific details of dates, times, traders, and clients” and that he had failed to provide information to CF even when it was requested and that CF was “probably correct in its contention that the claimant was merely trying to pass his commission concerns off as protected disclosures in order to leverage his personal

position”. It commented that his “tendency to insinuate and to challenge others, and his hesitation and equivocation when challenged himself, militate against him ever making a disclosure of information (as opposed to allegations or just queries).”

**Supp.75** As one ground of appeal, it was argued that the ET had failed to direct itself to look at the composite picture or to aggregate the separate disclosures. Relying on *Norbrook Laboratories*, it was submitted that each of the alleged disclosures made by Mr Simpson related, broadly, to concerns about trading practices and compliance with FCA rules, and that these disclosures had been made to various members of management within CF and also to the Compliance department.

**Supp.76** Choudhury P accepted that in some cases it would be obvious that aggregation was appropriate: where, for example, just two communications were relied upon and the second referred back to (or embedded within it) the earlier one containing information. That was the case in *Norbrook*. However Mr Simpson was seeking to rely upon a large number of communications said to give rise to three or four separate disclosures. In such circumstances, in the absence of clarity from the claimant, it would not necessarily be obvious to the Tribunal which particular communications should be grouped together for the purposes of supporting one or more of the four alleged disclosures. Mr Simpson had not identified when he was alleging that the various disclosures ‘crystallised’ into a qualifying disclosure. The need to identify the combination of communications relied upon, and the specific protected disclosure to which that combination gives rise, was “not academic” but was “a basic requirement in such claims.” Without such specificity, it might be very difficult for the ET to answer the further questions which arose as to whether or not (in a dismissal case) the reason or principal reason for the dismissal is that the employee made a protected disclosure(s). Thus there was no error by the ET in not aggregating the 37 communications in order to consider whether they amounted to a protected disclosure. There was no obvious link between the disparate communications so as to render it perverse for the ET not to have taken all of them together. Put in terms of the analysis in *Robinson*, the problem was not merely one of pleading or identifying which communications were to be linked. It was the fundamental issue as to the lack of any necessary or obvious implication that earlier communications were to be read into later disclosures.

**Supp.77** A related issue which may arise is whether when a worker refers back to a previous protected disclosure, there is a *further* protected disclosure made on each occasion when the worker does so. The issue may be significant, whether because the detrimental treatment can be said only to be by reason of the worker continuing to repeat the matter, or because as a matter of pleading only the subsequent reference to the protected disclosure is pleaded<sup>10</sup> This point arose in *Saha v Capita Plc* UKEAT/0080/18/DM, 29<sup>th</sup> November 2018. In that case the claimant had made what

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<sup>10</sup> In *Kilraine v Lion Academy Trust* UKEAT/0194/17/BA, 27<sup>th</sup> March 2018, the EAT (at para 30) noted this as an issue for a future case which did not need to be decided in the appeal.

the EAT held was arguably a protected disclosure in relation to failure to comply with the Working Time Regulations. She was then called into a meeting and made an offer to leave her employment. She claimed she had then been told that if she did not agree she would be managed out. She then wrote a further email, on 7 December 2015, in which she made an allegation referred to her previous whistleblowing (without saying anything further as to the facts disclosed in that whistleblowing). The EAT held that this mere reference in her email of 7 December to the previous whistleblowing, did not mean that the email of 7 December had *itself* been a (further) protected disclosure. It was a statement that the claimant had previously blown the whistle, rather than a disclosure in itself.

**Supp.78** However, and although the EAT did not explore this possibility, there could, we suggest, be circumstances in which repeating or referencing a previous disclosure might itself amount to a protected disclosure in that it drew attention to the facts contained within that previous disclosure. That was not the case in relation to Ms Saha's email, where there was only a bare reference and assertion of previous whistleblowing. This was in contrast to *Norbrook* where the worker's second communication added something to, and drew meaning from, his previous disclosure. By contrast, as noted above, the employer's cross-appeal in *Robinson* failed in relation to one of the PDs where the previous disclosures had been attached to Ms Robinson's solicitor's letter and the letter was intended to be read with its enclosures.

**Supp.79** Again in *Elysium Healthcare No.2 Ltd v Ogunlami* [2019] UKEAT 0116/18/RN, 12<sup>th</sup> February 2019, discussed below (Supp.122-123), there was held to be a qualifying disclosure where the worker referred to an earlier disclosure and expressed concern as to failure of the employer to investigate the subject matter of that earlier disclosure. The EAT accepted that the second disclosure referred back to, and could be aggregated with, the earlier disclosure which set out factual allegations reporting abuse of a service user. This approach was fortified by the finding that the second communication had actually been understood by the employer to refer back to the facts previously disclosed.

**Supp.80** A different part of the *Elysium* case highlights one respect in which the structure of the qualifying disclosure test may itself be regarded as contemplating aggregation of disclosures. The worker's first disclosure was as to alleged inadequacies of patient safeguarding by the worker's line manager, Ms Miles. The second disclosure, a week later, was that Ms Miles had access to and control of witnesses relevant to the investigation into the worker's concern. The EAT upheld the ET's conclusion that this second communication constituted a disclosure tending to show that a matter falling within one of the other categories of relevant failure had been or was likely to be deliberately concealed within s.43B(1)(f) ERA. A disclosure under this head therefore builds on some other relevant failure, and may well, as in this case, arise subsequent to and refer back to an earlier disclosure under one of the other heads.

## **(b) Reasonable belief, specificity and whistleblowers as an early warning system**

**Supp.81** Whilst the Court of Appeal highlighted confusion to which the decision in *Cavendish Munro* has given rise, we suggest that there remains a risk that this area has not been sufficiently clarified. In particular, there is a danger that may arise as a result of focusing on the criterion of “specificity”, without sufficient regard to (a) the yardstick of whether the information could reasonably tend to show a relevant failure and (b) the context in which that issue arises. We suggest that it is relevant to keep in mind four distinct, though to some extent overlapping, ways in which the decision in *Cavendish Munro* was likely to give rise to confusion. See J Lewis and J Bowers, “*Whistling to no avail: protected disclosures post Kilraine v Wandsworth LBC*” I.L.J. 2018, 567-582:

- “1. The definition of information as conveying facts was capable of being read too narrowly so as to permit fine distinctions such as between present facts and a statement of belief or opinion. A narrow approach might draw support from an analogy with the law of misrepresentation, where a distinction is made between a representation of past or present fact and a statement of opinion or intention. However even in that context a statement of opinion may entail a representation of fact that the person holds the opinion or the intention, or in some circumstances an implied representation that the person making the representation had reasonable grounds for it<sup>11</sup>. Further, there is no need to take a narrow view of the meaning of “information” given that the statutory formula itself regulates the quality of information which will suffice by reference to the test of whether there could be a reasonable belief that it tends to show a relevant failure. Information as to an opinion or belief might in some circumstances, for example by reason of giving weight to the views of the person holding that belief, be something which tends to show a relevant failure.
2. It was seen as suggesting that making an allegation and disclosing information were alternatives, whereas an allegation might also entail disclosing information.
3. In giving some generic illustrations as to the difference between information or an allegation or statement of position, there was a danger of failing to allow sufficiently for the potential significance of the context, including whether it was raised at an early stage in advance of providing more detail.
4. It did not place sufficient emphasis on the requirement, viewed as a whole, that the information disclosed must be such as the worker reasonably believed tends to show a relevant failure. It is the reasonable belief test which sets the yardstick as to whether the information disclosed is sufficient. As such most of the difficulties in identifying whether what was disclosed amounted to information could be resolved by applying the test of whether it was sufficient to sustain the requisite reasonable belief.”

**Supp.82** The decision in *Kilraine* directly addressed the second of these issues. It also addressed the relevance of context and the pleading issues arising in relation to this (as discussed above). Further, Sales LJ did emphasise the need for the requirement to disclose “information” to be read together with the qualifying phrase as to whether the information tends to show a relevant failure. That is, we suggest, key to the evaluative judgment which Sales LJ emphasised is required. The danger of confusion, and of misapplying the statutory test, arises if the criterion of specificity is applied without sufficient weight to those elements, and a consequent recognition that in some situations a disclosure which is not specific at all may suffice.

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<sup>11</sup> See Chitty on Contracts (2015), 32<sup>nd</sup> ed. at para 7-006.

**Supp.83** “Facts” may be of varying level of generality or specificity. The “fact” that a person holds an opinion or believes there to be wrongdoing, may still be said to be a “fact”. The key question is whether, in context, the facts are sufficient to sustain a reasonable belief in the relevant failure. The danger is that the dicta in *Kilraine* encourages an approach of applying a test of specificity as a standalone test for whether there was a disclosure of information, rather than reading the requirement for information together with the reasonable belief requirement and applying the specificity test flexibly by reference to the context. We suggest that would be a mis-reading of the decision in *Kilraine*, given the emphasis on the need to read the word “information” with the qualifying phrase which follows. But the risk is increased by the apparent approval of the reasoning in the EAT in so far as it entailed a distinct finding that there was no disclosure of information at all, rather than simply addressing the issue as a whole as to whether there was disclosure of information/ facts that could reasonably be believed to show a past, present or likely future failure to comply with a legal obligation. So far as concerned the third disclosure, the letter conveyed at least the fact of Ms Kilraine’s belief that there had been numerous incidents which she regarded as inappropriate behaviour and that she considered that she had been repeatedly side-lined. It also stated that she had previously documented this. As a whole the passage conveyed, at least, that she held the belief that there had been a failure to honour agreements to extend her role and provide career development. It also set out her belief or opinion that there had been bullying and harassment and identified specific individuals who she believed had tolerated this. The key evaluative judgment, we suggest, was the further finding that none of these matters provided a reasonable basis for any belief that there was a past, present or likely future failure to comply with a legal obligation.

**Supp.84** Whether the information was sufficiently specific to support such a belief could only properly be measured, not in the abstract, but by reference to whether, in the particular circumstances, the information was sufficient to sustain a reasonable belief that it tends to show a relevant failure. Critically, it is only by recognising that information may come with different levels of generality, and applying the reasonable belief test in the particular circumstances, that the legislation can be applied with sufficient sensitivity to the context as to provide adequate protection to those who raise the alarm with the reasonable expectation of then being afforded the opportunity to provide further detail. This aspect of the legislation, in facilitating an environment where whistleblowers act as an early warning system, has been regarded from the outset as a key element of the legislation. As Richard Shepherd MP put it, when introducing the Private Member’s Bill which led to the enactment of the Act:

“I hope that the Bill will signal a shift in culture so that it is safe and accepted for employees . . . to sound the alarm when they come across malpractice that threatens the safety of the public, the health of a patient, public funds or the savings of investors. I hope that it will mean that good and decent people in business and public bodies throughout the country can more easily ensure that where malpractice is reported in an organisation the response deals with

the message not the messenger.”<sup>12</sup>

**Supp.85** It is true that a further important element was the notion that workers should not only sound the alarm but should be encouraged to bring relevant matters to the attention of an appropriate person who may be better placed to investigate the issues. That chimes with the requirement to provide some *information* which can be acted upon or investigated further. That in turn goes some way to explain the contrast with the approach taken to victimisation claims in the context of the Equality Act 2010 where in order for there to be a protected act it is sufficient to make an allegation that a person has contravened the Act as long as the allegation is not false and not made in bad faith<sup>13</sup>. There is no additional requirement for a reasonable belief in the truth of the allegation, and bad faith in that context (in contrast to the meaning it has been given in a PIDA context) connotes only an honest belief: see *Saad v Southampton University Hospitals NHS Trust* [2018] IRLR 1007 (EAT).

**Supp.86** Ordinarily the objectives of the legislation in encouraging workers to act as an early warning system (and protecting those who so act), and providing information to allow this to be investigated, work in harmony. But a problem arises where the worker raises the alarm at an early stage, which might be done only in very general terms with the expectation that s/he will be able to follow up with more detail. The legislation provides no protection against victimisation on the basis of this kind of a “prospective” protected disclosure. The risk therefore arises that a focus on the search for specificity, or an overly narrow view of the requirement to make a disclosure of “facts” without sufficient regard to the context, would have the effect of undermining a key aspiration of the legislation in facilitating the conditions for workers to provide an early warning system.

**Supp.87** In our view, the reasoning in *Kilraine* should be viewed in that context. Sales LJ’s reasoning does not require an immutable/universal level of specificity irrespective of the context, although it does require any contextual factors to be identified. In our view relevant factors might include the position of the person raising the alarm, the degree of urgency, and whether implicitly or explicitly the person conveys that they hold and wish to follow up with supporting detail. The weight to be given to each of those factors are matters for the evaluative judgment of the Tribunal, measured against the yardstick of whether what was disclosed could in context support a belief that it tended to show a relevant failure.

**Supp.88** The situation might be illustrated by the example of an employed internal accountant who writes claiming to have spotted red flags which are indicative of fraud, without giving any detail, and who states a wish to meet urgently to explain her or his concerns. Depending on the circumstances the accountant might be taken to have disclosed facts which sustain a reasonable belief, given the position he or she holds

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<sup>12</sup> *Standing Committee, Richard Shepherd MP, 11 March 1998, p 4*

<sup>13</sup> S.27 Equality Act 2010.

and the wish to meet to explain further, that those facts tend to show a breach of a legal obligation. Protection against being dismissed for raising the alarm in that way falls comfortably within the policy of the legislation. There is no need for a narrow view of whether there is a disclosure of information: the reasonable belief test itself regulates whether what was disclosed is sufficient.

**Supp.89** As noted above, Sales LJ suggested (at paragraph 36) that:

“If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.”

**Supp.90** We suggest that this is to give too much weight to the criterion of specificity. On this approach, rather than reasonableness of the belief being the yardstick of whether there is sufficient specificity, instead if the information is sufficiently specific and there is a subjective belief, that points to reasonableness. However, it is difficult to see why subjective belief should *of itself*, even when taken together with specificity of information, be a sufficient indicator that the belief is reasonable. The fact that information is specific necessarily entails that it tends to show the relevant failure. Indeed, the approach to the fourth disclosure in *Kilraine* itself illustrates that disclosure of sufficiently specific information, together with a subjective belief as to a breach of a legal obligation, does not necessarily denote a reasonable belief.

### **(c) The evaluative judgment: common relevant considerations**

**Supp.91** Whilst the evaluation judgment called for in *Kilraine* requires that all relevant consideration be taken into account in deciding whether there has been a disclosure of information by the worker, there are several factors that will often be relevant. They are:

1. Insider/expert status of the discloser
2. Insider/expert status of the recipient.
3. The form of the disclosure
4. The timing of disclosure and the expectation of follow up.
5. Previous disclosures to/ communications with the recipient on the same subject
6. The extent of evidential picture available to worker.
7. The nature of the relevant failure.
8. Whether (in the case of an apprehended breach of criminal or civil law) the relevant failure is historic, ongoing or in the future

We will consider these factors in turn.

*1. Insider/ expert status of the person making the disclosure*

**Supp.92** As explained in *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT), and as discussed in the Main Work at 3.67, 3.68, the insider status, or specialist/expert knowledge, of the disclosing worker may be highly relevant in two diverging ways.

1. First, a higher standard might be expected when the ET assesses whether a belief was reasonable (and correspondingly a lower standard applied to those with less expert knowledge who raise a concern for investigation).
2. Second, the insider status/ insider knowledge of the discloser might mean that their expressed view or concern is entitled to respect. Clearly that may also bear on the assessment of what it could be expected that a disclosure of information, perhaps accompanied by an expression of concern, may tend to show.

**Supp.93** For a recent instance of the application of insider status considerations, see *Bassnett v Nutriculture UK Ltd* Case No. 2405266/2018, 23<sup>rd</sup> May 2019 (Liverpool ET, EJ Barker). The claimant, Mr Basnett, was employed as a manager and chemist by the respondent which manufactured vacuum formed plastics for gardening purposes. Mr Basnett sent an email to her line manager stating that there might be a health risk in handling a root stimulant known as Root Sim. Mr Basnett and his colleagues had fallen ill the day after handling the root stimulate, and he believed this was because of a fungal contaminant that might have been present in the product. The tribunal held that it was reasonable for an employee who, like Mr Basnett, had an MSc in Industrial Biology, to believe that health was endangered by contact with a particular root stimulant where he and others had become ill afterwards. On the other hand Mr Basnett was not a doctor and thus it was not unreasonable not to have been able to rule out or precisely identify the cause of his and colleagues' illnesses.

*2. Insider/ expert status of the recipient of the disclosure*

**Supp.94** The identity and expertise of the recipient of the disclosure may also be important. The fact that the recipient took a different view to that of the putative whistleblower of the facts disclosed does not necessarily mean that the discloser lacked a reasonable belief as to what the disclosure tended to show. However the extent to which the person making the disclosure could have (or should have) assumed a degree of knowledge on the part of the recipient may still be highly material.

1. It may be impact on what the discloser could reasonably expect the recipient to understand what it was that the information tended to show: more can go without saying.
2. But if the recipient is a person with insider or specialised status the fact that the recipient genuinely did not recognise what was disclosed as information tending to show a relevant failure may be evidentially significant. The distinction is illustrated by the approach in *Simpson*<sup>14</sup>. Simpson was a salesman specialising in bonds from CIS countries. As noted above (Supp.73), it was part of his case that he had made disclosures which showed there was an illicit practice of “front-running”, holding back a large client order until after the bank had placed an order to benefit from the increase in price that would result from the placing of the order. The disclosures were made to a Mr Cortellesi who was the head of the Emerging Markets business. The ET properly took into account Mr Simpson’s experience and background and his status as an FCA approved professional. But in concluding that Mr Simpson did not disclose information on this issue which he could reasonably believe tended to show a relevant failure, it also took into account Mr Cortellesi’s view that the practice described by Mr Simpson’s did not entail front-running. The EAT upheld that approach, noting that the ET had been entitled to take into account Mr Cortellesi’s “insider” status ie his specialism and expertise. That approach might be problematic if it did not make allowances for the claimant to hold a reasonable belief yet for there to be disagreement. But equally it was material to consider what Mr Simpson could reasonably have believed was shown by the facts disclosed, not in the abstract but on the basis of what it would tend to show to someone with the state of knowledge of Mr Cortellesi as the recipient.

### 3. Form of the disclosure (eg queries, allegations etc)

**Supp.95** Although *Kilraine* confirmed that the form of the disclosure is not determinative, it may still be a relevant factor in assessing what the information tends to show. Again, the position is illustrated by the decision in *Simpson*, in the context of a query which was said to amount to a protected disclosure. Mr Simpson placed particular reliance on the approach to one disclosure where he had said:

“Could you let me know if the following information raises any issues?”,

but he had later gone on to provide information in relation to a particular trade. For Mr Simpson it was submitted that although the supposed disclosure was framed as a query, this was merely the preface to the provision of information, and that in those circumstances the ET was wrong to reject his argument that he had made a disclosure of information. Choudhury P agreed that the mere fact that something is not framed as

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<sup>14</sup> *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236 (EAT).

a disclosure does not of itself mean that it cannot be a disclosure. As confirmed in *Kilraine*, s.43B(1) should not be read as entailing a rigid dichotomy based on the form of a disclosure. The issue was whether there was sufficient factual content and specificity to be capable of tending to show a relevant failure and this required an evaluative judgment. However whether or not something was just a query, or instead actually amounted to the provision of information albeit framed as a query, was for the ET to determine. In this case the tribunal was entitled to find that there was no qualifying disclosure.

**Supp.96** Choudhury P accepted that if a worker set out sufficiently detailed information which, in that worker's reasonable belief, tended to show that there had been a breach of a legal obligation then the fact that the information was contained within a communication that could be described as a query would not prevent it from amounting to a qualifying disclosure. But the ET was entitled to find that was not the case here. Choudhury P offered the following illustration:

“A straightforward example might be a communication to a manager in the following terms: “On 1 January 2019, I saw employee X manipulating and falsifying data to enhance the employer's year-end results. I consider this to be fraudulent conduct. Do you agree?” The query in that communication does not alter the fact that there is a disclosure of information which, in the reasonable belief of the worker tends to show that a criminal offence is being committed. However, the position might be different if the employee had merely said as follows: “On 1 January 2019 I saw employee X access the year-end results. Could you let me know if that raises any concerns?”. In the latter example, the information probably lacks sufficient factual content to amount to the disclosure of information within the meaning of s.43B. Moreover, the communication invites the recipient to form an assessment as to whether any concerns arise, rather than it tending to show, in the sender's reasonable belief, that a criminal offence is being committed.”

Choudhury P said that the communication considered by the ET in the particular example relied upon by Mr Simpson appeared to be closer to the latter example than the former. In any event it was open to the ET, based on the speculation and lack of detail identified, to conclude that there was no provision of information such as to sustain the requisite reasonable belief within the meaning of s.43B.

**Supp.97** In the second of the two examples given by Choudhury P the information provided was on its face inconsequential. Whether expressed as a query or as an allegation, it would not seem to indicate a qualifying disclosure. It is however possible to envisage other more borderline instances where the fact that the disclosure is expressed as a query might have some relevance. Taking Mr Simpson's case, had his description of the trade been accompanied by an explanation that he was concerned about front-running, rather than simply a query, than taken together with his insider status the form of the disclosure might have been highly relevant to the question of what the information conveyed. It is well established that there is no necessity for a disclosure of information also to contain an allegation (*Korashi*). Indeed that is of the essence of the distinction between the reasonable belief test in s.43B and the more

exacting test under s.43F ERA where there is a requirement for a reasonable belief that the information, and any allegations made, are substantially true. However the fact that there is an allegation may help signpost or to flag up what it is the discloser has in mind, and therefore assist in relation to what it would be reasonable to believe that the information tends to show.

#### *4. Timing of disclosure/ expectation of follow up*

**Supp.98** As discussed at Supp.81-90 above, sensitivity to issues related to the timing of the disclosure may be crucial if the test of sufficient “specificity” is not to lead to a new set of problems in place of those created by the false dichotomy that followed the *Cavendish Munro* decision. “Facts” may be of varying levels of generality or specificity. The “fact” that a person holds an opinion or believes there to be wrongdoing, may still be a “fact”. The key question is whether this is sufficient in context to sustain a reasonable belief in the relevant failure. A flexible context-based approach is particularly important given that a key strand underlying the introduction of the whistleblowing protection was that whistleblowers could provide a crucial early warning system by bringing relevant matters to the attention of an appropriate person who may be better placed to investigate the issues. Relevant factors might include the position of the person raising the alarm, the degree of urgency, and whether implicitly or explicitly the person conveys that they hold, and wish to follow up, with supporting detail.

#### *5. Context, previous disclosures to/ communications with the recipient on the same subject*

**Supp.99** As discussed above (Supp.68-80), in relation to aggregation, the context (including but not limited to whether there has been previous disclosures) will be highly relevant, albeit that it will be important carefully to set out any case relied upon in relation to this.

#### *6. The extent of evidential picture available to worker*

**Supp.100** This is closely connected to the issue of “insider” status. Clearly the extent to which the worker can be expected to have appreciated the full picture may be crucial to whether what has been conveyed could be regarded as tending to show a relevant failure

#### *7. Nature of the relevant failure*

**Supp.101** Where there nature of the relevant failure is obvious, less may need to be said by the disclosure for it to be apparent that the information being conveyed tends to show a relevant failure. See the distinction drawn between the approach in

*Fincham*<sup>15</sup>, referring to the need to spell out albeit not in strict legal language, the breach of the legal obligation relied upon, and that in *Bolton School v Evans*<sup>16</sup> and *Western Union*<sup>17</sup>, where this was not necessary as the nature of the legal obligation was, in context, obvious.

**Supp.102** In any event, whether sufficient information has been disclosed to tend to show the relevant failure is necessarily closely tied to the ingredients of the relevant failure. See eg *Mr N Williams v Michelle Brown AM* UKEAT/0044/19/OO, 29<sup>th</sup> October 2019, considered at Supp.125-129 below, where (together with lack of particularity as to the wrongful acts alleged) the fact that the relevant failure asserted was a criminal offence, rather than only a breach of a legal obligation, was material to the conclusion that it was insufficient to have asserted that a recruitment process had been “manipulated”; this did not necessarily connote dishonesty which it was noted was a hallmark of the criminal offence alleged.

*8. Whether (in the case of an apprehended breach of criminal or civil law) the relevant failure is ongoing/historic or in the future*

**Supp.103** On the current state of authority, there may also be a difference between a past or ongoing breach of a legal obligation and a likely *future* breach. In the case of the latter the whistleblower must show that they had a reasonable belief that a future breach was more probable than not: *Kraus v Penna* [2004] IRLR 260, EAT. For a recent illustration of the application of this approach, see *Tarrant and Tarrant v 3L Care Ltd and others* Case No. 1300128/2018, 9<sup>th</sup> July 2019 (Manchester ET, EJ Franey). Here the claimants were the CEO and MD of a company running a small number of residential care homes. There were disputes between them and an external investor, Mr Stock, about how the businesses should be run. Both of the claimants were suspended and subsequently dismissed after allegations of misappropriation for personal use of domestic items purchased by the company for its care homes. The ET found that the real reason for the dismissals was a conflict about how the businesses should be run and the dismissals were unfair. However the ET rejected the claimants’ case that they had been dismissed for making protected disclosures. Amongst the various alleged protected disclosures relied upon, were alleged disclosures made during a management meeting in which one of the claimants, Mr Tarrant, informed Mr Stock (the external investor) that his actions were depriving the company of necessary capital and were likely to jeopardise patient safety and amount to a regulatory (CQC) breach. The ET held that Mr Tarrant held a reasonable belief that the disclosure was about a matter with a consequent impact on patient safety and as such was in the public interest. However the ET concluded that he did not hold a reasonable belief that the information tended to show that a breach of a legal obligation had occurred or was likely to occur or that health and safety of any person had been endangered or was likely to be

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<sup>15</sup> *Fincham v. HM Prison Service* [2002] UKEAT/0925/01/RN, 19<sup>th</sup> December 2002.

<sup>16</sup> *Bolton School v Evans* [2006] IRLR 500 (EAT) affirmed [2007] ICR 641 (CA).

<sup>17</sup> *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13/LA, 21<sup>st</sup> February 2014.

endangered. The information disclosed that the practice of paying down bank debt rather than retaining operating cash reserves had placed the business in a position where it was unable to meet the July payroll at the end of the month and that more money would be needed. Mr Tarrant's concern was that this approach to the company's finances created a risk that costs would be cut and that there would be a breach of the CQC fundamental principles with a consequent impact on patient safety. However he was not saying that there had *already* been a breach of CQC regulations or any impact on patient safety but that these things *would* happen if the situation was not addressed. Further, he fully intended that he and the executive team would not allow the situation to occur. As such, applying the approach in *Kraus*, the ET held that Mr Tarrant did not hold a reasonable belief that it was more likely than not that the relevant failure would occur because steps were more likely to be taken to prevent it. The ET said it would have reached a different conclusion if it had applied a lower test of whether it "could well happen" that there would be a breach of legal obligation.

**(d) After-the event justification and identification of the legal obligation**

**Supp.104** As noted above, Sales LJ concluded the ET had been entitled to strike out Ms Kilraine's alleged fourth disclosure given the absence of anything in her case or witness statement to suggest that she had a relevant legal obligation in mind at the time she made her disclosure. The reasoning appears implicitly to have assumed that it would be insufficient simply to believe the disclosure tended to show a past, ongoing or likely future breach of *some* legal obligation without anything more specific in mind. It has been clear since *Babula v Waltham Forest College* [2007] ICR 1026 (CA) (see the Main Work at paragraphs 3.52 et seq) that, in principle, a worker may have a reasonable belief as to the existence of a legal obligation even if that belief turns out to be wrong. But it is first necessary to establish the existence of a subjective belief that there is a legal obligation even if that belief turns out to be wrong. Sales LJ concluded that the ET had been entitled to strike out Ms Kilraine's alleged fourth disclosure because of the absence of anything in her case or witness statement to suggest that she had a relevant legal obligation *of any kind* in mind when making her disclosure. However, there was no specific consideration of the impact of the Court of Appeal's reasoning, in relation to the public interest limb of the reasonable belief test, in (1) *Chesterton Global Limited and (2) Verman v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ 979; [2018] ICR 731. In *Chesterton* Underhill LJ considered that, provided that the worker held a belief when making a disclosure that doing so was in the public interest, it would be possible to show that the belief was reasonable by reference to matters that the worker did *not* have in mind at the time when the disclosure was made (see para Supp.147.4. below).

**Supp.105** Thus notwithstanding the approach in *Kilraine* we suggest that it remains arguable that Underhill LJ's reasoning in *Chestertons* carries implications for the approach to the requirement that there be a reasonable belief test as to whether the

information disclosed tends to show a relevant failure. The following scenarios merit separate consideration:

1. Where the worker believed in generic terms that there was a breach of some legal obligation but did not have any specific legal obligation in mind.
2. Where the worker believed that there was a relevant failure under one heading and subsequently seeks to show that this view was reasonable under the same heading on but on a different basis. An example might be where the worker believed that the information disclosed tended to show a failure to comply with a particular legal obligation but subsequently sought to demonstrate that he or she could have contemplated a failure to comply with a different legal obligation.
3. Where a worker held a subjective belief at the time under one head of relevant failure (eg breach of a legal obligation) but then seeks to assert that the belief was reasonable on the basis that there was a relevant failure under a different heading (eg that there was a danger to health and safety) which was not in the worker's mind at the time of disclosure.
4. Where the worker's belief was founded on a set of facts that could not reasonably have grounded such a belief, but there were other facts not known to the worker at the time, or at least not taken into account by the worker, which could have grounded such a belief.

**Supp.106** In relation to the first category (generic belief in breach of a legal obligation without something specific in mind) the approach in *Kilraine* might at first blush suggest there is no qualifying disclosure. Further, as noted at paragraph 3.118 in the Main Work, in *Eiger Securities LLP v Korshunova* [2017] IRLR 115, the EAT emphasised that save in obvious cases, “a necessary precursor” to the assessment of whether the claimant held a reasonable belief is:

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

**Supp.107** We suggest that the reasoning in *Chesterton* may indicate that this now needs some qualification. It is no doubt the case that identification of any specific legal obligation that the worker had in mind is an important factor in assessing whether there was a subjective belief as to a breach of a legal obligation rather than a moral or some other wrong. But there appears to be no reason in principle why a worker could not hold a subjective belief that the matters disclosed tended to show a breach of a legal obligation without having any specific legal obligation in mind. Whilst the reasoning in *Kilraine* proceeded on the basis that it was fatal that the worker did not have a specific legal obligation in mind, (a) there appears to have been no argument that the

approach in *Chesterton* supported a different approach and (b) there appears to have been no case advanced in the pleading or witness statement to the effect that she believed there would be *some* sort of legal obligation breached, even though she had not specifically identified any particular obligation. Instead the ET had been entitled to conclude that she did not have *any* belief (reasonable or not and however generic) as to the existence and possible breach of a relevant legal obligation at the point in time when she made her putative disclosure. In those circumstances it did not assist her that her representatives were able to suggest (at first instance and then on appeal) two legal obligations which she *might* have thought were being broken.

**Supp.108** The second category (where a different legal obligation was contemplated), may be regarded as presenting a stronger case for a qualifying disclosure on the basis of after the event justification. In this case it is possible to test whether there was the subjective belief as to a breach of a legal obligation, and indeed whether it was subjectively regarded as a legal or some other obligation, by reference to the obligation which the worker had in mind. It would seem to follow from the approach to public interest adopted in *Chesterton*, that if the worker subjectively believed that the information tended to show (e.g.) non-compliance with a legal obligation, in relation to whether that belief was reasonable, the worker should not be constrained by those matters taken into account at the time of the disclosure or by the particular legal obligation the worker had in mind.

**Supp.109** We suggest that the same should apply in relation to the third category at Supp.105 above (where a different category of relevant failure might reasonably have been invoked). In relation to subjective belief, subject to the requirement that there was a disclosure of information, all that is required is that it was believed that the information tended to show one or more of the relevant failures. Once that is done, the approach in *Chesterton* indicates that it is open to the worker to show that the view was reasonable on a different basis to that held at the time. Once it is concluded that the worker is not confined to the factors operating on the worker's mind when making the disclosure for the purposes of establishing reasonableness of the belief, there would appear to be no difference in principle between relying on a different basis under the same head, and relying on a different head of relevant failure.

**Supp.110** Different considerations arise in relation to the fourth category. There are, we suggest, two important parameters which limit the scope to rely on after the event considerations in this category:

- The information (ie facts) set out in the disclosure: the worker's reasonable belief must be based on what that information tends to show; and
- The principle that reasonableness of belief is to be assessed from the perspective of the particular worker, which includes making the assessment on the basis of the facts as they were reasonably understood by the worker (subject to considering

whether that understanding was reasonable and considering whether there ought reasonably to have been further investigation by him which may have revealed other matters): see *Darnton v University of Surrey* [2003] ICR 615 (EAT); *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT).

**Supp.111** Both these factors are crucial to the scheme of the protected disclosure legislation. So far as concerns the second factor, it is essential to the scheme that workers who may only have part of the evidential picture are protected in raising concerns with those who may be better able to investigate further. It equally follows from this, and the emphasis on the requirement to disclose information, that it cannot be sufficient for a worker to say that although the facts they disclosed did not sustain a reasonable belief, the disclosure should be protected in any event. There would seem to be no difference in principle between the position of a worker who makes an allegation without disclosing *any* supporting facts, and that of a worker who only discloses facts that objectively do not tend to show a relevant failure. It is established that the truth or falsity of the allegation is a relevant evidential tool in order to test the reasonableness of the belief as to what the information disclosed. But it is another matter to say that the reasonableness of belief is made out because there were different facts which were unknown to the worker (and therefore not disclosed) which would have sustained a reasonable belief.

**Supp.112** The position might be illustrated by the following example. Suppose a worker objects to the employer that a black colleague has been permitted to return to work after the Covid 19 lockdown and asserts it is a risk to health and safety. The only facts disclosed to the employer and known to the worker making the disclosure is the colleague's skin colour, and the worker's belief that those from the BAME community have been more adversely affected by Covid 19. The Tribunal decides that those facts were not sufficient to ground a reasonable belief that the health of one or more individuals would be endangered. Unbeknown to the worker making the disclosure, it later turns out that the colleague did not obey social distancing rules and did have as yet asymptomatic Covid 19, and so there was indeed a health risk from his being permitted to return to work. Since they were unknown to the worker neither of those two aspects could have operated on his mind when he made the disclosure. Accordingly, those facts should not affect the conclusion that, at the time he made the disclosure the worker did not have a reasonable belief that the information he did "know" and did disclose tended to show a relevant failure.

**Supp.113** These issues will no doubt arise in future ET and appellate cases. In the meantime the 'take away' point for claimants is that they should give evidence of what (if any) thought processes they went through as to what the relevant failure was or might be (and in particular the civil or criminal legal obligation they thought existed) before they made their disclosure.

### **Paragraphs 3.27 to 3.32: Information disclosed need not be known to the recipient**

**Supp.114** See also *The Office for Gas and Electricity Markets v Pytel* [2019] ICR 715 (EAT), considered below at Supp.135-137, where the contrast was drawn with the position under s.105 of the Utilities Act 2000 where the extended definition of disclosure in s.43L(3). An internal disclosure to a person to whom the information was not news did not amount to a (criminal) disclosure for the purposes of s.105 of the 2000 Act, despite being a disclosure for the purposes of s.43B ERA.

**Supp.115** S.43L(3) ERA makes it clear that the term bears a wider meaning in the context of protected disclosures. It extends, in cases where the person receiving the information is already aware of it, to “bringing [that] information to his attention”. The EAT has recently found an ET to have erred in appearing to have overlooked this in the context of an application to strike out a whistleblower’s claim (or make it the subject of a deposit order): *Arthur v Hertfordshire University NHS Foundation Trust* UKEAT/0121/19/LA, 13<sup>th</sup> August 2019.

**Supp.116** However it does not follow that s.43L will always come to the rescue where the recipient is known to be aware of the information being disclosed. There remains the issue of whether referencing what the recipient already knows is drawing anything to their attention. In some cases that will obviously be so. That will be the case if the person making the disclosure is unaware that the recipient already knows about it. Equally it will be the case where something else is added to the original disclosure, such as an enquiry whether the issue previously disclosed is being investigated, as in *Elysium Healthcare No.2 Ltd v Ogunlami*, see Supp 122-123 below.

**Supp.117** In other cases, the position may be different. The issue was recently highlighted at first instance by an interim relief application in *Young v Brit College Ltd* Case No. 3201701/2019, 5<sup>th</sup> August 2019 (East London Hearing Centre, EJ Reid). The claimant worked for the respondent college. She received a complaint from a student about payment being accepted by a member of staff for arranging for students to be admitted to the College when they did not have the required level of English. The next day the claimant emailed the Chief Executive asking for the matter to be progressed immediately because of a response to the Quality Assurance Agency for Higher Education which the claimant was then working on. The ET found that the matter was already being taken seriously and investigated before the claimant emailed the Chief Executive about it. The ET appears to have considered that the claimant would have been aware that this was the case. In those circumstances the ET concluded that it was not likely to be found that the claimant had disclosed information or drawn the Chief Executive’s attention to information (although it concluded that the claimant was not in any event likely to succeed on the issue as to the reason for dismissal). The communication to the Chief Executive added nothing to the complaint she and the Chief Executive had already received (and which was being dealt with). All that the claimant had been doing was asking the Chief Executive to hurry up and deal with something

that he was already aware of and already dealing with. In the ET's view that was not likely (at the final hearing of the claim) to be found to be drawing anything to his attention. The position would have been otherwise, in the ET's view, if there was something to indicate that the Chief Executive was not dealing with the issue or delaying unnecessarily in dealing with it; in which case it would be a distinct disclosure.

**Supp.118** However the decision in *Young* should be viewed in its context as only being essentially a summary assessment (at first instance) on an interim relief application. It might be said that the mere fact that the Chief Executive was known to be dealing with the matter does not mean that the claimant was doing anything other than drawing the information to his attention again. It merely indicates that there might have been no need to do so. That in turn may factor into the question of whether the disclosure was reasonably believed to be made in the public interest, rather than failing at the stage of whether there was a disclosure at all.

### **Paragraphs 3.33 to 3.44 and 3.118: Extent to which the disclosure must spell out the relevant failure**

**Supp.119** As expressly noted in *Arjomand-Sissan v East Sussex Healthcare NHS Trust* UKEAT/0122/17/BA, 17<sup>th</sup> April 2019 (Soole J) there is an important distinction between what must be spelled out by the worker at the time of the disclosure, and what is required to be clear in the course of the tribunal proceedings. The difference is one of degree as to the specificity required in identifying the relevant failure. Thus, at the stage of making the disclosure, other than where the position is obvious or a matter of common sense on the basis of the information disclosed, the relevant failure must be identified but this does not need to be in detailed or precise terms: *Fincham*. However before the Tribunal: “*Save in obvious cases 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*” (paragraph 98.5): *Blackbay*.

**Supp.120** The distinction was applied in *Riley v Belmont Green Finance Ltd t/a Vida Homeloans* UKEAT/0133/19/BA, 13<sup>th</sup> March 2020, where the EAT held that the legal obligation had not been sufficient even to satisfy the lesser degree of specificity required at the time of making the disclosure. The claimant had been assigned to the respondent to provide underwriting services. He claimed to have made protected disclosures in a meeting but it was found that he had only said that he had experienced problems with the system “freezing” and that this was preventing him from processing cases. In support of his contention that he believed that this tended to show a breach of a legal obligation, he argued that the problems with the respondent's IT system had caused the collapse of purchasing claims and that this entailed a breach of FCA principles. However this was not suggested at the time of his supposed disclosure. Dealing with the first stage of the analysis as to the degree of specificity required at the time of making the disclosure, the EAT accepted (at paras 42,43) that there was

“nothing close to the kind of specificity required, except in an obvious case (which this was not) to alert the person receiving the information disclosed to a breach or potential breach of a legal obligation.”

The EAT noted that it could not be said that a disclosure to an employer of this type of common IT problem obviously identified a breach of a legal obligation. It was merely a general complaint about the poor quality of the respondent’s IT systems without any reference to a belief that this entailed a breach of FCA principles, regulations, code or policy.

**Supp.121** Whilst this was sufficient to dispose of the appeal, turning to the second stage of the analysis (the degree of specificity required in the presentation of the case to the tribunal), the EAT also accepted that the claimant had not explained, whether before the ET or the EAT, how the information found to have been disclosed was capable of breaching a legal obligation, which in turn went to the issue of objective reasonableness of their belief. In particular the EAT accepted that there had been a failure to identify how a breach of FCA principles amounted to a breach of legal obligations on the part of the respondent, rather than being eg a breach of guidance. We suggest however that these dicta need to be treated with some care, at least where what is alleged is a breach of obligations under FCA rules, including the FCA principles<sup>18</sup>, given their statutory basis under s.137A Financial Services and Markets Act 2000.

**Supp.122** The approach in *Riley* may be contrasted with *Elysium Healthcare No.2 Ltd v Ogunlami* [2019] UKEAT 0116/18/RN, 12<sup>th</sup> February 2019 (Soole J), where the ET and EAT took what may be regarded as a generous view (from the employee’s perspective) of whether what was disclosed sufficiently identified the legal obligation. Elysium provided hospital treatment for patients detained under the Mental Health Act 1983. Mr Ogunlami was employed as a Healthcare Assistant. He attended a meeting at which a colleague expressed concern about their line manager (Ms Miles) taking a patient’s food into her office. Mr Ogunlami said at the meeting that he had also witnessed this and that it amounted to financial abuse, as well as raising a safeguarding issue. The tribunal made a finding of fact that Mr Ogunlami believed that taking the food from a patient was “a professional issue and breach of the respondent’s safeguarding policy”. The issue was whether he also held a reasonable belief that it entailed a breach of a legal obligation. The tribunal had recorded Mr Ogunlami had asserted that Ms Miles’ conduct was a breach of a legal obligation as the policies were or were likely to have been included in her terms and conditions of employment. The difficulty was that Mr Ogunlami had not given evidence to this effect. Instead it had been advanced as a submission by his counsel. The only document he had referred to in evidence had been a policy document on professional relationship boundaries. All the other documents referred to in the judgment, including the contract of employment,

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<sup>18</sup> See *R (BBA) v FSA* [2011] Bus LR 1531 at para 17.

had been produced after he had given evidence and then relied upon by counsel in closing submissions. Despite this the EAT (Soole J) concluded that the tribunal had found, and been entitled to find, that he held a reasonable belief that the disclosure tended to show a breach of a legal obligation. It placed reliance on the fact that he had said in cross-examination that any breach of the policy would lead to disciplinary action, and extrapolated from this the basis for the reasonable belief on the basis that disciplinary action would typically be the consequence of a breach of contract. The EAT emphasised that it was not necessary to have said in terms the information tended to show a breach of a legal obligation; to impose such a requirement would be to put form over substance and place too high a requirement on the worker. Soole J referred the policy arguments which the Court of Appeal accepted in *Babula v Waltham Forest College* [2007] ICR 1026 where Wall LJ stated at paragraph 80:

"... The purpose of the statute, as I read it, is to encourage responsible whistleblowing. 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."

This, said Soole J, must apply equally to knowledge of the civil law. Whilst Mr Ogunlami had not specifically formulated the legal obligation he had in mind, it was in the EAT's view open on the evidence for the ET to accept that he had a legal and not merely some other kind of obligation in mind.

**Supp.123** Whilst the emphasis on substance over form was uncontroversial, the conclusion that the likelihood of disciplinary action was sufficient to evidence a subjective belief as to a breach of a legal obligation was much more questionable. The outcome might have been explained on the basis of the latitude given to the employment tribunal in its evaluation of the facts, though that also is rendered more questionable by the tribunal's erroneous comment that Mr Ogunlami had said there was a breach of a legal obligation. However whilst the conclusion reached by the EAT might be questioned, crucially here there was clarity, at least before the ET, as to the nature of the legal obligation which was in question, namely a breach of contract. As such there was a clear yardstick against which the tribunal reached its assessment as to Mr Ogunlami's subjective belief and whether it was reasonable. That may be contrasted with the position in *Riley* where it was found that the basis on which FCA principles amounted to legal obligations was not set out. Similarly it may be contrasted with *Eiger Securities LLP v Korshunova* [2017] IRLR 115 (EAT), where the tribunal was found to have erred in finding that the claimant (a sales executive for a broker) had a reasonable belief that her manager had acted in breach of a legal obligation in dealing with traders from her terminal without revealing his identity. In that case there had been a lack of clarity as to the legal obligation in play and, since it was not obvious, it had been necessary at least at the stage of presentation before the tribunal, to identify that obligation and how it was alleged to have been breached, in order to make an assessment of the claimant's reasonable belief.

**Supp.124** See also *Ibrahim v HCA International Ltd* [2019] IRLR 690 (EAT) where the claimant, who worked as an interpreter at a private hospital, asked for an investigation into rumours among patients and their families about him. He stated that he had been blamed by some families for disclosing confidential information and that he needed to clear his name. The EAT considered (at paragraph 21) that the claimant’s complaint of damaging false rumours about him that he had breached patient confidentiality was clearly an allegation that he was being defamed. As such the Tribunal had erred in concluding that he had not identified any legal obligation that may have been breached. Although he may not have used the word defamation at the time, his allegation was clear despite his not having used the precise legal terminology.

**Supp.125** The decision in *Ibrahim* was exceptional in that there the claimant was permitted to revise relevant failure relied upon on appeal. The identification of the relevant failure relied upon may be crucial, as illustrated by the decision in *Mr N Williams v Michelle Brown AM* UKEAT/0044/19/OO, 29<sup>th</sup> October 2019, HHJ Auerbach. Here the case was advanced on the basis that the disclosure contained information which it was alleged was reasonably believed tended to show the commission of a criminal offence, in particular under the Fraud Act 2006, section 4 which provides:-

**“4 Fraud by abuse of position**

- (1) A person is in breach of this section if he—
  - (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
  - (b) dishonestly abuses that position, and
  - (c) intends, by means of the abuse of that position—
    - (i) to make a gain for himself or another, or
    - (ii) to cause loss to another or to expose another to a risk of loss.
  
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.”

Tested against that yardstick the ET concluded (and the EAT held that it was entitled so to find) that what was disclosed was insufficient to sustain the relevant reasonable belief. The EAT noted (at [45]) that the claimant might have made more ground in asserting that a relevant failure was being indicated if the case had been put on the basis of non-compliance with a legal obligation (though in any event there was also a lack of specific facts disclosed).

**Supp.126** The claimant, Mr Williams, was employed as a senior advisor to Ms Brown, a UKIP Welsh Assembly Member, on 11 May 2016 following Ms Brown’s election. Staff employed in this situation are employed for an initial six month probation period before a competitive recruitment exercise is undertaken. Before recruitment is undertaken, every assembly member is able to change the templates to

suit their personal requirements. The Assembly Member then undertakes the selection process, except in cases involving family members. In these cases the Assembly selects and interviews, with only the appointment decision reserved to the assembly member themselves. Ms Brown had been advised of the recruitment procedure required after the first six months and sought advice on the content of the job descriptions from the Assembly during November 2018. Mr Williams was aware of emails between Ms Brown and the Assembly discussing the post held by Ms Brown's brother (Mr Richard Baxendale) during this time due to the access that he had to the respondent's emails in undertaking his day to day duties. The post held by Ms Brown's<sup>19</sup> brother had to go through this recruitment exercise. On the 2 December Mr Williams formed part of the interview panel and recommended to Ms Brown the appointment of another candidate, not Ms Brown's brother. On 5 December Ms Brown asked for Mr Williams' access to her emails to be withdrawn. On 11 December Mr Williams wrote to Ms Brown detailing his concerns about the breakdown of their employment relationship. The letter contains the statement that Mr Brown's brother did not make the grade "despite you trying your best to manipulate the (recruitment) process beforehand so that he could be employed." Mr Williams relied upon this as a protected disclosure.

**Supp.127** The ET accepted that the letter disclosed some information and that it was made in the public interest given the position held by assembly members. However, applying *Kilraine*, it concluded that the reference to Mr Brown having manipulated the recruitment process was insufficient in that:

"The word manipulate is used, no reference is made to obtaining a pecuniary advantage or any sufficient specific information that tends to show that a criminal offence has, is or is likely to be committed in the whole of the sentence. As in *Kilraine* where one of the disclosures used the word inappropriate, the Tribunal finds that the word manipulate may cover a multitude of sins, it is too vague, the term denotes something underhand not a criminal act.

The disclosure is therefore devoid of factual content sufficient enough to be capable of tending to show one of the matters listed in subsection (1) of S43B."

Accordingly Mr Williams's letter did not constitute a protected disclosure.

**Supp.128** The ET's conclusion was upheld by the EAT. The EAT rejected an argument that the ET had erred in focussing solely on the word "manipulate" in isolation. It was argued that the reference to manipulation was to be read in the context of other information contained in the letter that Ms Brown's brother did not make the grade for the role in question and that the reason for manipulation was to secure her brother's continued employment, and the further relevant context was provided by the fact that Ms Brown held a public office and that the Assembly had specific recruitment processes in cases involving family members. As such it was argued that all the necessary factual elements of an offence under s.4 of the Fraud Act 2004 had been spelled out, and that whilst the ET had noted the absence of a reference to obtaining a

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<sup>19</sup> The Reasons for Judgment contain an apparent typo referring to the "claimant's brother" rather than the "respondent's brother".

pecuniary advantage, this was not a necessary element of that offence (see above). However the EAT concluded that the ET was entitled to find that the allegation of manipulation could cover a multitude of sins but did not obviously connote specifically that something *criminal* had occurred. The ET's reference to the absence of mention of pecuniary advantage did not show that it was applying too high a test. It was to be seen in the context that gain for oneself was still one of the ways in which the offence under s.4 of the Fraud Act could be committed, and also in the context of the allegation in the pleaded case that Ms Brown was wrongly seeking financial advantage for her brother. The EAT emphasised that the essential hallmark of criminal behaviour is dishonesty, and accepted that the ET had not been bound to conclude that the allegation of manipulation obviously connoted dishonest conduct as opposed to some improper attempt to interfere short of dishonesty. As set out above, in this respect it noted (at [45]) that the appeal may have fared better if the case as to relevant failure had been based on breach of a legal obligation rather than commission of a criminal offence.

**Supp.129** Further, even if, contrary to the EAT's view, the allegation of trying to manipulate the selection process should have been seen as amounting to an allegation of criminal behaviour, the ET had been entitled to conclude that there was insufficient factual content to show that some criminal offence had been committed. In this respect the EAT contrasted the particularity set out in the Particulars of Claim (which identified four specific things it was alleged that Mr Brown had done or tried to do, such as trying to fix the job description by downgrading the qualifications required) with the absence of any such detail in the letter relied upon as the alleged protected disclosure. Whilst it was said that there had been evidence before the ET as to why the claimant had "pulled his punches" in the letter, that did not detract from the failure to set out the specific things it was claimed that Ms Brown had done.

**Supp.130** Two first instances decisions further illustrate the application of the *Kilraine* specificity requirement. In *Samantha Walker v I. Co-operative Group Limited 2. Richard Pennycook* Case No. 2403044/2016 12<sup>th</sup> November 2018, decided by the Manchester ET, Mrs Walker had been employed as the Co-Op's Director, Group HR Strategic Projects and subsequently as Group Chief HR Officer. The Chief Operating Officer was Mr Richard Pennycook, the second respondent. Mrs Walker contended that she raised concerns with Mr Pennycook about the apparent pay inequalities between her and her colleagues on three occasions. She said that on the second of those occasions Mr Pennycook told her that the Co-op's Remco would not approve a salary increase for the role she was doing and that if she wanted more money she might consider an operational role. Mrs Walker said she replied that it was not about money but being valued equally with her peers and one way of accommodating this was allowing her to work reduced (more family friendly) hours on the same pay. The ET accepted that there was also a further conversation in which Mrs Walker raised with Mr Pennycook that she wanted to be recognised and valued on the same basis as her male peers. She had also made reference to continuing to carry out the same role on the same salary but working fewer hours and/or weeks which could have brought parity

between her and her male comparators on a pro rata basis. However, looking at the words used and their context, the Tribunal was not satisfied that Mrs Walker had disclosed information which tended to show that the employer was failing to comply with a legal obligation in connection with equal pay for men and women. No legal obligation had been referred to. Mrs Walker was the only person referred to. There was no mention of the rest of the Co-Op's female employees. Mrs Walker's pleaded case had referred to what "both parties knew and understood" from what she claimed she said. But in the ET's judgment a protected disclosure must contain information. It was not something that can be based upon an implication.

**Supp.131** Again in *Stead and Rain v Holley Park Academy* Case No. 2501388/2017, 18<sup>th</sup> July 2019, North Shields Hearing Centre there was found to be insufficient specificity. One of the claimants was a nursery teacher. Her disclosures were made after a potentially serious incident where a child had walked out of the nursery without being spotted. The claimant was suspended, and then subsequently disclosed information about the absence of training or instruction when she moved to the Nursery, that there was no register of dismissal (of children) from the Nursery, and no written policy detailing where staff should or should not stand when children were leaving the nursery. The ET took the view that the claimant had not, even in the broadest terms, identified any legal obligation, and took this into account in finding that the claimant did not have the requisite subjective belief as to a past, present or likely future non-compliance with a legal obligation. The ET emphasised that the claimant had made no reference at any time to the respondent's whistleblowing policy or otherwise that she was seeking to blow the whistle, and that

"Everything smacks in this case of an attempt after the event to shoehorn into the complex provisions of Part IVA of the 1996 Act matters spoken of during a disciplinary process without there being any belief, let alone a reasonable belief, held at the time that the matters disclosed tended to show any of the situations required in section 43B(1) of the 1996 Act."

### **Paragraphs 3.111 to 3.120: Legal obligation**

**Supp.132** Unsurprisingly, the EAT in *Ibrahim* confirmed (at paragraph 22) that s.43B(1)(b) ERA (past, ongoing or likely future non-compliance with a legal obligation) is broad enough to include tortious duties, including defamation and breach of statutory duty such as contained in the Defamation Act 2013.<sup>20</sup>

### **Paragraph 3.118: Specificity as part of case management**

**Supp.133** See paragraphs Supp. 292-298.

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<sup>20</sup> But see the Court of Appeal's comment ([2020] IRLR 224 at para 10), noting that it seemed counter-intuitive that a disclosure by a worker that he himself could be defamed could be a public interest disclosure and that, whilst the issue was not raised on the further appeal to the CA, it remained open to challenge before the CA in future cases.

### **Paragraphs 3.133 to 3.141: criminal disclosures, s.43B(3) and consequential procedural issues**

**Supp.134** In *Rihan v Ernst & Young Global Ltd and others* [2020] EWHC 901 (QB), discussed more fully at Supp.256-271 below, Kerr J held that the reference in s.43B(3) to an “offence” referred only to an offence under the laws of Great Britain. The protected disclosure provisions did not apply because the claimant worked abroad, but Kerr J therefore rejected an argument that the disclosures in that case would not have been protected due to being unlawful under UAE law. Kerr J accepted that this was supported by the contrast with s.43B(2) ERA which provides that a relevant failure about an offence can apply to foreign law (para 794), and that “it would be absurd if a whistleblower had to check all foreign criminal laws to see if the disclosure offended any of them” and that foreign criminal law might be offensive to British public policy (paras 795,812). Further, a blanket exclusion of protection for workers where a disclosure happens to breach foreign law somewhere in the world would be a breach of Article 10 ECHR (paras 798,812).

**Supp.135** The question as to the whether the making of a disclosure itself amounted to a criminal offence so as to fall within s.43(3) ERA, was also briefly touched upon in *The Office for Gas and Electricity Markets v Pytel* [2019] ICR 715 (EAT). Section 105 of the Utilities Act 2000 provides, subject to specified exceptions, that it is a criminal offence to disclose information which has been obtained by or under specified statutory provisions, including the 2000 Act, which relates to the affairs of any individual or any particular business, where the disclosure is made during the lifetime of the individual or so long as the business continues to be carried on. The claimant’s alleged protected disclosures fell within section 105 and none of the exceptions applied. At a preliminary hearing the respondent resisted giving disclosure of the documents containing the alleged protected disclosures and other relevant documents on the basis that to do so would be inconsistent with its obligations under s.105 of the 2000 Act. The EJ took the view that a prohibition on disclosure would have a profound and probably fatal effect on the claim. She considered that so as to construe section 105 so as to be compatible with the claimant’s convention rights, it was possible to read in an additional exception, not otherwise found in the legislation, for disclosures which amount to protected disclosures under the ERA. In the appeal to the EAT the respondent conceded that s.105 was incompatible with the claimant’s rights under Articles 6 and 10 of the Convention. However, Elisabeth Laing J concluded that it was not possible to construe it, or to read in words, such as to provide an exception for protected disclosures or otherwise to render it compatible with the claimant’s convention rights and therefore set aside the orders made as to disclosure.

**Supp.136** One issue considered by Elisabeth Laing J was as to whether s.43B(3) ERA had any bearing on the issue before her. She concluded that it had no application because although the claimant had made disclosures for the purposes of the protected disclosure provisions, they were not disclosures for the purposes of s.105 of the 2000

Act, and as such the making of the alleged protected disclosures did not entail any criminal offence. There was no breach of the 2000 Act because the disclosures were made internally to individuals who were already aware of the information. They constituted disclosures for the purposes of the protected disclosure regime by virtue of the extended meaning given by s.43L(3) which provides that a disclosure includes, in relation to disclosure of information to a person who is already aware of it, bringing the information to his attention. However, this did not amount to a disclosure for the purposes of the s.105 of the 2000 Act because it does not contain any such extended meaning of “disclosure”. There would however be a disclosure if the information was disclosed in the tribunal proceedings since it would then not be confined to providing the information to those already aware of it.

**Supp.137** The EAT’s approach therefore indicates that the broad meaning of disclosure in the protected disclosure regime cannot necessarily be transported to other contexts. In particular, as in *Pytel*, a narrower meaning of disclosure might well apply in a context where the very fact of making the disclosure is treated as a criminal offence. That did not resolve the case management difficulty in *Pytel* in relation to obtaining disclosure of the documents. In many cases it may be that this could be overcome by appropriate redaction so as to enable the relevant disclosures to be viewed without infringing the restrictions on disclosure of specified information.

## **CHAPTER 4: THE PUBLIC INTEREST TEST**

### **The *Chesterton* Guidance**

**Supp.138** See now (1) *Chesterton Global Limited and (2) Verma v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ 979; [2018] ICR 731, where the Court of Appeal dismissed *Chesterton*’s appeal. The decision of the EAT in *Chesterton* is discussed in the Main Work at 4.16 to 4.93, which now needs to be read as subject to what follows.

**Supp.139** Underhill LJ gave the leading judgment of the Court. Beatson LJ gave a concurring judgment, agreeing with the approach taken by Underhill LJ and making some additional observations (which are referred to below). Black LJ agreed with both judgments.

### ***The facts in Chesterton***

**Supp.140** The relevant facts in *Chesterton* are summarised at paragraphs 4.16 to 4.22 of the Main Work. In the Court of Appeal, Underhill LJ identified the following key elements:

- Mr Nurmohamed was employed as Director of *Chesterton*’s Mayfair office. In 2013 *Chesterton* had introduced a new commission system which Mr Nurmohamed believed would have a serious adverse impact on his own earnings. Although Mr Nurmohamed objected to this, he ultimately agreed to the new system.

- Against that background, in the months following the introduction of the new system, Mr Nurmohamed monitored Chesterton’s internal accounts.
- At a meeting on 14 August 2013 with Patricia Farley, the director responsible for the London area, Mr Nurmohamed demonstrated a number of what he said were discrepancies in the monthly accounts. These appeared to show that the profitability of the Mayfair office was being artificially suppressed so as to reduce the level of commission. Two examples were (a) a depreciation charge which was higher than budgeted for and (b) the inclusion of a figure for staff bonus when none had been paid. Mr Nurmohamed described this to Mr Farley as “manipulating the accounts to the benefit of the shareholders”. The employment tribunal found that there was a genuine and reasonable belief that this manipulation was occurring (without making any finding as to whether this was correct).
- Mr Nurmohamed repeated essentially the same disclosures to another director on 24 September 2013 and again to Mr Farley on 8 October 2013. He explained by reference to (inter alia) the monthly management accounts, how the commission accountant was being supplied with wholly inaccurate profit and loss figures to calculate commissions, transitional payments and profit bonus calculations. Mr Nurmohamed said that this affected over 100 senior managers earnings and that he believed that Chesterton was deliberately misstating between £2 and £3 million of actual costs and liabilities throughout the entire office and department network.
- The employment tribunal concluded that although the person that Mr Nurmohamed was most concerned about was himself, it was not the case that all he was doing was arguing about his own earnings. He believed that the disclosure was in the interests of the 100 senior managers and he had them in mind when making the disclosure.
- The employment tribunal also acknowledged that in the event of a sale of Chesterton’s business it was possible that potential purchasers might be misled by misstatements in the accounts. However the employment tribunal left out this group in assessing the public interest issue on the basis that there was no evidence that Mr Nurmohamed had that issue in mind at the time of making the disclosure.

### *The decision in Chesterton*

**Supp.141** The employment tribunal reasoned that a matter public interest could not mean something which was only of interest to the entirety of the public: that would be far too narrow. It would be sufficient therefore if a section of the public was affected. Here the tribunal was satisfied that in the circumstances the 100 senior managers was a sufficient group of the public, such that Mr Nurmohamed held the requisite subjective belief that the disclosure affecting them was made in the public interest.

**Supp.142** In upholding the ET’s decision, Underhill LJ stated (at paragraph 38) that viewed in the context of the ET’s factual findings this was not to be taken as

meaning the matter was in the public interest simply because of the number of employees affected. There were other features which supported the conclusion that the disclosure was reasonably believed to be in the public interest in that:

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

**Supp.143** Underhill LJ added that it was debatable whether the ET had actually fed those factors into its assessment but, even if it did not, they would only have reinforced the conclusion which it came to be based on numbers alone, so that any error of law in its reasoning was immaterial.

**Supp.144** In reaching that conclusion the Court of Appeal rejected the approach (advanced by PCAW), that the only effect of the public interest test was to exclude cases of an individual worker whose grievance was unique to him. On the approach advanced by PCAW the disclosure would have been regarded as "in the public interest" if it was in the interests of anyone else besides the worker making the disclosure.

**Supp.145** The Court of Appeal also rejected the polar opposite view advanced on behalf of Chesterton that the number of other workers sharing the same interest as the worker making the disclosure could never of itself be sufficient to render the disclosure in the public interest. Nor did the Court accept Chesterton's argument that the interests served must necessarily "extend outside the workplace" in the sense of furthering the interests of persons other than the workers themselves *qua* workers. Underhill LJ stated (at paragraph 36) that he was not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexo* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of employees share the same interest, albeit that a tribunal should be cautious about reaching such a conclusion.

**Supp.146** In his concurring judgment, Beatson LJ (at paragraphs 41 to 44) acknowledged that both of these polar opposite views would have the advantage of certainty. But they suffered from the disadvantage that they could "ignore substance and lead to undue formalism". That was particularly inappropriate where the legislation uses "open-textured terms such as 'public interest'" and seeks to protect the reasonable

beliefs of the worker making the disclosure. Essentially this would be to fasten on to a feature or features which are present in a plain case and treat them as necessary or sufficient in other cases. That would achieve a measure of certainty only at the cost of blindly prejudging the outcome in the range of future cases.

### *The Court of Appeal's guidance*

**Supp.147** The Court of Appeal therefore adopted what Beatson LJ (at paragraph 44) referred to as “a more nuanced approach”. We set out below the guidance to be drawn from the Court of Appeal’s decision (with comments interposed):

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

**Comment:** It might be observed that the formulation omitted the word “made” from the test of “made in the public interest”. That word carries an ambiguity. It might be regarded as focusing on the reasons why the disclosure was made (or the motive for making it). Alternatively, it could be regarded as focusing on outcome: whether it was believed that making the disclosure in the public interest irrespective of the reasons for making it. The omission of the word “made” implicitly adopted the latter approach, as was subsequently confirmed in the dicta relating to the approach to motive (see below). That was in turn consistent with the fact that good faith has been relegated to only being a remedy issue.

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

**Comment:** This aspect of the reasoning may be difficult to apply in practice because, save where legal advice has been taken before making the disclosure, the worker may not have formulated a view specifically in terms of the public interest. Given the range of circumstances in which the legislation is expected to apply, there needs to be sufficient flexibility to deal with this and to permit an assessment as to whether the factors which the worker did have in mind can nevertheless be regarded as equating to the public interest despite not having been precisely formulated in those terms at the time. This aspect of the reasoning is considered further at Supp.148-Supp.150 below.

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

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

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

**Comment:** This aspect of Underhill LJ’s reasoning is to be read together with the view that for the subjective element it is sufficient to have a belief that disclosure is in the public interest. We comment on it further below (at Supp.151-Supp.154) under the heading “*After the event justification*”.

5. **Motive:** As to the inter-relation with the public interest test and motive for making the disclosure (per Underhill LJ at paras 15-17, 30):
  - 5.1 While the worker had to have a genuine (and reasonable) belief that the disclosure was in the public interest, that did not have to be the worker’s predominant motive in making it<sup>21</sup>. Thus on the facts in *Chesterton* the

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<sup>21</sup> The distinction between public interest and good faith was starkly illustrated by the first instance decision in *Ndu v Coventry University London Campus* Case No. 3200531/2017, 2<sup>nd</sup> May 2018 (East London Hearing Centre, EJ O’Brien). Mr Ndu was a lead teaching fellow. He made disclosures that

claim did not fail merely because, as the ET recorded at paragraph 155, the person who Mr Nurmohamed was most concerned about in making the disclosure was himself.

- 5.2 As such, a disclosure could be made in the reasonable belief that it was in the public interest even though made otherwise than in good faith. That is apparent from the incorporation of the new ss.49(6A) and 123(6A) ERA, which make good faith a remedies issue. If it were otherwise those provisions could never bite.
- 5.3 Underhill LJ was inclined to think that the belief that the disclosure was in the public interest did not in fact have to form any part of the worker's motivation because the phrase "in the belief" was not the same as "motivated by the belief". However whether that is the case was left open to be decided in future cases. Underhill LJ commented that it was in any event "hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

**Comment:**

- (1) The approach here appears to confirm the view (expressed in the Main Work) that the statutory test may be best understood as meaning in effect that there must be a reasonable belief that it is in the public interest that the disclosure be made. Viewed in that way, it would indeed seem to follow that the motivation for making the disclosure does not enter into the equation. In practice, however, at least in marginal cases where the public interest is unclear, any factors bearing on whether the disclosure was made for an ulterior reason are also likely to be evidentially relevant to whether the worker in fact held the requisite belief that making the disclosure was in the public interest. In marginal cases, where it is not obvious that the disclosure furthered the public interest, it is still likely to be helpful to consider whether the claimant acted in a way to be expected if it was believed that the disclosure was made in the public interest: see eg *Muchesa v Central and Cecil Housing Care Support* (EAT/0443/07, 22<sup>nd</sup> August 2008), considered in the Main Work at paragraph 3.70.
- (2) It should also be borne in mind that for wider disclosures under s.43G and 43L, motive remains part of the test for protection in that it is a condition that the disclosure was not made for personal gain.

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two other employees, including the Principal Lecturer, had acted fraudulently in their application for employment. Mr Ndu's claim failed on causation grounds but the ET accepted that he genuinely believed this disclosure was made in the public interest even though the motivation for it was "to gain an advantage over and/or to exact revenge against those individuals".

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

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

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

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

**Comment:** It is understandable that the Court considered that other contexts are not helpful even though the Defamation Act 2013 received Royal Assent on the same day as ERA. There are considerations which are specific to whistleblowing that do not apply in the same way as in other contexts. Notably (a) there is a structure with different layers of protection depending on to whom the disclosure is made and (b) in other contexts the public interest defence is typically a defence to other conduct which on its face would otherwise be wrongful. It may however be going too far if it is suggested that there are no lessons to be learned from other contexts. Thus the Defamation Act 2013, s.4 has a two-fold test that there must be a reasonable belief both that it was on a matter of public interest and made in circumstances such that it was in the public interest to make it. This highlights the fact that the particular circumstances as well as the subject matter might be relevant. The issue, and illustrations of the circumstances in which it might arise, is discussed at paragraphs 4.83 to 4.92 of the Main Work.

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

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

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

6.4 As made clear in the Parliamentary materials:

- (a) A disclosure relating to the worker's own contractual rights could still be made in the public interest, since it could still engage wider public interest issues.
- (b) The amendment was not concerned only with contractual issues. It could also exclude other disclosures. In *Parkins v Sodexho* itself the disclosure could have been reframed as a health and safety issue.

6.5 As to the meaning of what is in the public interest, see further the discussion of *ABC & others v Telegraph Media Group Limited* [2018] EWCA Civ 2329, [2019] 2 All E.R. 684 at Supp.473-479 below.

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

“... the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character<sup>22</sup>), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case ...”

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

- “(a) the numbers in the group whose interests the disclosure served ...
- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and even more so if the effect is marginal or indirect;
- (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

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<sup>22</sup> In a footnote, Underhill LJ noted that: “Although disclosures tending to show breaches of the worker's own contract are the paradigm of disclosures of a “private” or “personal” character, they need not be the only kind: see the Minister's reference to disclosures “of minor breaches of health and safety legislation ... of no interest to the wider public”.”

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, “the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest” – though he goes on to say that this should not be taken too far.”

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

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

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

9.3 In practice the issue is not likely often to arise in that stark way because:

“The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.”

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

***Discussion:***

*Subjective belief in the public interest*

**Supp.148** A potentially important difficulty with the approach adopted by Underhill LJ is the emphasis that all that it required in relation to subjective belief is a belief that the disclosure is made in the public interest. As we note in the Main Work

(at paragraphs 4.67 to 4.69) the legislation must be capable of being applied in a sufficiently flexible way to cover a situation where a worker makes a disclosure before having taken legal advice. In those circumstances it will often be the case that the worker will not have formulated any belief in terms of “the public interest” as such. Yet the worker may still believe that the disclosure is of wider benefit than the worker’s own personal interests. The set of beliefs may be such that it can be regarded as equating to a belief that disclosure is in the public interest even though the worker did not specifically consider the issue in precisely those terms. Otherwise the purposes of the legislation in encouraging workers to raise the alarm with an appropriate person would be seriously undermined.

**Supp.149** In *Chesterton* itself there does not appear to have been any finding that at the time of making the disclosure Mr Nurmohamed specifically considered the question of whether the disclosure was “in the public interest” as such. There was a rather more generalised finding that he considered that the matter disclosed was one of interest not just to himself but around 100 senior managers. The employment tribunal proceeded to find that, in the circumstances (including the belief as to deliberate manipulation of the accounts) this amounted to a belief that the disclosure was in the public interest on the basis that it was sufficient for a matter to be in the public interest that it affected a section of the public and 100 senior managers since they could constitute a section of the public (paragraphs 147 and 151 of the ET’s reasons). The appeal did not focus on that aspect of the tribunal’s decision. Instead it proceeded on the basis of a finding of that there was a subjective belief that disclosure was in the public interest and focused on whether that belief was reasonable. On that basis it was able to side-step any question of whether the factors actually taken into account by Mr Nurmohamed at the time should have been regarded as sufficient to equate to the requisite subjective belief. But nevertheless we suggest it is illustrative of the need to piece together the factors that the worker had in mind and to assess whether it is to be regarded as equating to a belief that disclosure was in the public interest.

**Supp.150** In practice therefore, in cases where the worker has not specifically formulated a view in terms of the public interest, in assessing whether there was the requisite subjective belief, the tribunal (and the parties and those advising them) will need to identify the factors operating on the mind of the worker which may be said to engage some wider interest beyond the worker’s own personal position, and to assess whether those considerations amounted in substance to a belief that the disclosure was in the public interest even if not (even inwardly) formulated in those terms at the time. See the example given at 4.67 of the Main Text. As we suggest in the Main Work (at paragraph 4.67), and applying the reasoning in *Chesterton* as to the mischief which the amendment was intended to address, it will be necessary, before moving on to the question of whether the requisite belief was reasonable:

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

(b) by reference only to those factors, to assess having regard in particular (but not necessarily exclusively) to the four fold considerations identified in *Chesterton* at paragraph 34 (see Supp.147.8 above) whether that set of beliefs amounted to a belief that disclosure was in the public interest.

*After the event justification*

**Supp.151** One of the more controversial elements of the approach adopted by Underhill LJ was the view (at paragraph 29) that a belief that the disclosure was in the public interest could be shown to be objectively reasonable on the basis of matters which were not in the worker's mind at the time of making the disclosure. That view also has potential ramifications for the approach to the reasonable belief test in relation to whether the information tended to show a relevant failure (see Supp.104-113 above). The approach adopted might be regarded as connected with the emphasis that all that is required by way of the subjective element is the belief that disclosure was in the public interest. Where the belief is formulated in those broad terms, or some equivalent such as that making the disclose was "the right thing to do", it is understandable and indeed perhaps essential that it should be available to the work to draw on other factors in support of that broad belief, even though they had not been specifically formulated at the time of making the disclosure. It is less obvious that this should be the case where the worker has focused on specific matters to support the belief (such as, in *Chesterton*, the interests of the other senior managers). But it is clear from the reasoning in *Chesterton* that after the event justification should also be available in that situation.

**Supp.152** However the scope for after the event justification of reasonable belief is subject to some limits. First, as set out above, it is necessary to establish the requisite subjective belief. In cases where the public interest element is not obvious, and where the worker has not formulated a view precisely in terms of "the public interest", it will be necessary to assess whether the factors the worker had in mind beyond that worker's own personal interests amounted to a belief that disclosure was in the public interest. *Chesterton* itself provides a good example of how that issue is likely to arise. Underhill LJ noted it had been observed on behalf of Mr Nurmohamed that it was wrong for the tribunal to have excluded from its consideration of the public interest the interests of potential buyers of *Chesterton*'s business simply on the basis that Mr Nurmohamed did not have them in mind. On the basis that, as the tribunal found, he believed that the disclosure was in the public interest, it was open to him to advance additional reasons supporting the reasonableness of that view. Underhill LJ noted that it was accepted that this point had not been raised in the Respondent's Notice either in the EAT or before the Court of Appeal. For that reason it was only dealt with by way of footnote. However it is apparent from Underhill LJ's reasoning that he considered that the impact

on potential buyers could be taken into account. But the premise of the argument was that the tribunal had found that the disclosure was made in the public interest. Factors which Mr Nurmohamed did not have in mind, such as the interest of potential buyers, could have no bearing on whether there was a subjective belief that disclosure was in the public interest.

**Supp.153** Further, as Underhill LJ noted, the public interest reasonable belief test is to be read on the basis that it fits within the pre-existing structure including the requirement for a reasonable belief that the information tends to show a relevant failure. In that context it is established that the tribunal must consider the question from the perspective of the worker making the disclosure: see *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT). One important aspect of this is that it is necessary to assess reasonableness by reference to the facts as they were reasonably understood by the worker, albeit that the truth or otherwise of an allegation may be a useful evidential tool: see *Darnton v University of Surrey* [2003] ICR 615 (EAT). That is an essential aspect of the legislation in recognising that the worker may only have part of the evidential picture. Thus if there were facts of which the worker was not aware and could not reasonably have been aware which made the disclosure contrary to the public interest, the existence of those factors would not undermine reasonableness of the worker's belief. Equally this would suggest that the belief in the public interest cannot be shown to be reasonable by reference to facts of which the worker was unaware, as opposed to relying on factors of which the worker was aware but the relevance of which had not been specifically identified by the worker at the time of the disclosure.

**Supp.154** The position may be illustrated by the following example. Suppose a collective grievance is raised by a group of drivers complaining that overtime is being withheld. The drivers subsequently argue that this grievance was a qualifying disclosure of information tending to show a relevant failure on the part of the employer. After the disclosure is made, it emerges that there is some evidence that the reason for withholding the overtime from certain workers was by way of retaliation for their being scrupulous in carrying out safety checks.<sup>23</sup> In our view, if this was not known by the drivers at the time of making the disclosure, there would be no basis for their relying upon it in support of the contention that their disclosure was made in the public interest. The position would however be otherwise if the disclosure itself set out the facts which tended to suggest that there had been victimisation for carrying out the health and safety checks. Even if the workers had not made the connection between matters set out in

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<sup>23</sup> This example is loosely drawn by adapting the situation in *Underwood v Wincanton* (UKEAT/0163/15). In that case Recorder Luba QC considered that within the matters disclosed there seemed to be a suggestion that "overtime was being withheld specifically from those drivers who were seen to be awkward by reason of being scrupulous about the safety and roadworthiness of their vehicles." It should however be noted that there was no finding that there was any substance to that allegation and the issue came before the EAT prior to any evidence being heard.

the disclosure so as to register there was evidence of a pattern of victimisation, applying the reasoning in *Chesterton* it would still be available to them to make that argument.

### *Certainty as against flexibility*

**Supp.155** Once the Court of Appeal had decided to read the ET’s judgment on the basis that the “other features” set out at Supp.142 (to which the Tribunal had referred but had not expressly included in its reasoning) were to be taken into account on the question of reasonable belief, *Chesterton*’s appeal was surely doomed. It is true that the Court of Appeal has chosen not to offer the certainty that would have flowed from accepting either of the bright lines in PCAW’s approach or that taken on behalf of *Chesterton*. But the reasons for that course were, we suggest, convincing and the element of uncertainty that remains flows from the terms of the amended legislation.

**Supp.156** PCAW’s position would have involved treating every collective grievance as necessarily involving a matter of public interest. That would plainly be contrary to the legislative intention in introducing a public interest test. The rejection of the approach advanced on behalf of *Chesterton* is more controversial. On any view the approach of requiring an effect on a worker qua worker would need some qualification. At minimum for example it could not be applied to treatment that amounted to a criminal offence. To take an extreme example, plainly a disclosure as to a worker being subjected to conditions amounting to modern slavery within the meaning of the Modern Slavery Act 2015 would satisfy the public interest requirement. But more broadly we suggest that the Court’s reasoning was persuasive in emphasising that, given the broad-textured nature of the test and the range of circumstances in which the issue may arise, it would be inappropriate to require that there be some wider interest beyond that qua worker in every case or to insist that the number of employees effected could never be a sufficient consideration. Any other conclusion would have meant that, however extreme the exploitation of a worker qua worker, and however many people this applied to, there could be no reasonable belief as to a wider public interest.

**Supp.157** Beatson LJ referred (at paragraph 41) to the potential chilling effect of adopting the approach contended for by *Chesterton*. It might be said that equally the lack of certainty in the application of the test may have a chilling effect for those considering making a public interest disclosure. But this risk is qualified by the latitude afforded by the reasonable belief test, together with the fact that the issue is only likely to arise in borderline cases where the matters disclosed appear on their face to raise matters focusing on the private concerns of the employee raising the disclosure and/or their colleagues. The fact that it was acknowledged that matters of an ostensibly “personal” character could (as is *Parkins v Sodexho*) include “minor breaches of health and safety” points to the potentially difficult borderline issues that may arise. But the approach at least avoids the pitfall associated with the previous good faith of encouraging a focus on the motives of the messenger rather than the substance of the whistleblower’s disclosure.

**Supp.158** In some respects the lack of certainty may be more problematic when viewed from the employer’s perspective. This follows from the reasonable belief test. From the employee’s perspective it is possible to take into account the set of beliefs on the basis of which it is contended that the disclosure was made in the public interest. But the employer may not be privy to those beliefs if they are not identified by the worker at the time the disclosure is made. To some extent the same issue arises in the context of whether there is a reasonable belief as to whether the information disclosed tends to show a relevant failure. But at least in that context it is possible to focus on what the information “tends to show”. By contrast there is no legislative requirement for the worker to spell out that it is believed that the disclosure is in the public interest or to set out the factors which engender that belief (though failure to do so may be evidentially relevant to whether in fact the belief was actually held; indeed in *Chesterton* the impact on other senior managers was referred to in the course of Mr Nurmohamed’s disclosures). Further it is no answer to a protected disclosure claim that the employer genuinely did not believe that what was disclosed amounted to a protected disclosure: see *Beatt* (considered below at Supp.407-416). This reinforces the need for robust whistleblowing and grievance procedures. Whilst the failure to use a whistleblowing procedure is far from conclusive, if a procedure is used this will serve to flag up that the worker believes she or he is making a protected disclosure. Equally whilst the fact of not using a grievance procedure cannot safely be taken as indicating that there is no belief that the disclosure is in the public interest, (a) investigation of the apparently private concerns may flag up the potential wider interest being asserted or (b) may identify the concerns in sufficient detail to make it more difficult at a later stage to assert some wider public interest concern. In practice though, the prudent course from the employer’s perspective, is to be alert to the risk of a protected disclosure being asserted in each case where, aside from the public interest requirement, the other conditions for a protected disclosure are likely to be satisfied, albeit that by reference to the criteria at Supp.147.8 above it may be possible to assess the risk as being at a low level.

*Has the Court of Appeal raised the bar for protection?*

**Supp.159** On one view, the EAT’s judgment in *Chesterton* might be said to have proceeded on the same basis as that advanced by PCAW in the Court of Appeal. Supperstone J commented (at para 36) that:

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

**Supp.160** We suggest in the Main Work (at 4.26 to 4.28) that, read as a whole, the EAT were not saying that it would always be sufficient to establish that the interests of someone other than the claimant was affected. That would be inconsistent with the

emphasis on the need for a fact-sensitive approach. Consistently with this, the Court of Appeal's approach required that where the disclosure relates to the worker's own contract of employment, or some other interest of a personal character, that there be additional factors capable of taking the matter into the realms of a wider public interest. In broad terms the approach may be said to reflect a tension between two competing policy considerations. On the one hand lies the concern not to impose a test that will have a chilling effect which could deter those capable of raising the alarm from coming forward, or which could, through laying down over rigid rules, lead to protection being withheld in deserving cases. As against this is the consideration that the public interest test plays a crucial role in differentiating those cases that are deserving of the wider and deeper protection available in the whistleblowing provisions precisely because of the public interest element. To that end the test must be meaningful. In turn the non-exhaustive four-fold criteria provide a means of trying to give substance to the test, as a "useful tool" to measure whether what on its face appears to be a disclosure raising a matter of private concern, can reasonably be said to engage a wider public interest. The broad nature of the relevant factors identified as bearing on the public interest test (Supp.147.8 above), allows fairly wide scope for arguments to be raised that a wide variety of disclosures may properly be regarded as being raised in the public interest despite being focused on the position or treatment only of claimant and fellow workers. But the tenor of the decision, in particular at paragraphs 36 and 37, is that whilst allowing for the latitude inherent in a test of "reasonable belief", a cautious approach by tribunals is to be expected before accepting that disclosures in relation to matters which on their face appear to be essentially personal in nature are to be treated as engaging a wider public interest.

**Supp.161** One instance of a difference when compared with the approach advocated by PCAW would be a case where the disclosure essentially raises a collective grievance with no wider factor that could reasonably be taken to engage the wider public interest. As Underhill LJ implicitly recognised, there was a degree of tension between the acceptance that in some cases mere numbers of employees affected could make disclosure a matter of public interest, and the fact that a private interest does not necessarily become a matter of public interest merely because the private interest was shared (or believed to be shared) with his or her colleagues (however many colleagues there were). The "note of caution" Underhill LJ sounded indicates that, in practice, it would be unwise to rely merely on the number of employees affected rather than also identifying other features of the situation such as the seriousness of the wrongdoing. Indeed the tenor of Underhill LJ's judgment may suggest that absent the findings as to the "other features" (including alleged deliberate manipulation of the accounts on a wide scale) he might not have agreed with the ET's view that on the facts of this case Mr Nurmohamed had the requisite reasonable belief. But as he noted, where the numbers affected are very large it will often be possible to identify some wider feature.

**Supp.162** The application of the Court of Appeal's guidance would not, we suggest, have affected the outcome in the two other cases which have reached the EAT

on this issue: *Underwood v. Wincanton plc* (UKEAT/0163/15) and *Morgan v. Royal Mencap Society* [2016] IRLR 428. Both of these cases were appeals from decisions by employment judges to strike out the claims based on the disclosures in issue because there was no reasonable prospect of the claimants establishing that they had a reasonable belief that the making of the disclosure was in the public interest. In both cases the EAT judges recognised the limitations of a summary adjudication of that issue. There were questions which could only be answered if the tribunal received and considered full and tested oral evidence:

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

**Supp.163** Notwithstanding the legislative intention to reverse the decision in *Parkins v Sodexho*, even on facts similar to that case a factual enquiry would still be required as to whether it was believed that the disclosure was made in the public interest (taking into account that the disclosures concerned health and safety concerns) and the reasonableness of any such belief.

#### *Summary propositions*

**Supp.164** At the conclusion of Chapter 4 of the Main Work (at para 4.93) we set out 9 propositions summarising a suggested approach to the application of the public interest test. We suggest that those propositions remain appropriate in the light of the reasoning in the Court of Appeal in *Chesterton*. Indeed propositions 1, 4, 7 and 8 derive specific support from the reasoning of the Court of Appeal in *Chesterton*. However propositions 2 and 5 may now usefully be supplemented as follows:

- Proposition 2 (that it is not for the tribunal to assess what is in the public interest) is to be read in the sense that the tribunal/court should not substitute its own view. Put another way, the tribunal may form its own view but it is not determinative (at least in relation to whether a belief that the disclosure was made in the public interest was not reasonable).
- Proposition 5: This proposition suggests that the starting point is to identify the set of beliefs that are relied upon by the worker as indicating that the disclosure was made in the public interest. We consider that this continues to hold true. Further:
  - This will be important as the starting point in identifying whether the set of beliefs, or factors operating on the mind of the worker, amounted to a belief that the disclosure was made in the public interest, at least in the common case where the worker has not specifically formulated a view in terms of “the public interest”.
  - The fourfold considerations identified in *Chesterton* are likely to be relevant i.e. (a) the number in the group whose interests the disclosure served, (b) the nature of the interests affected and the extent to which they are affected by the relevant failure, (c) the nature of wrongdoing and whether it was deliberate and (d) the identity of the alleged wrongdoer. These considerations should not be regarded as exhaustive. Other factors may arise on facts of any particular case such as factors bearing on the circumstances in which the disclosure was made (see paragraphs 4.83 to 4.92 of the Main Work).
  - Those considerations are relevant both to whether those beliefs can be regarded as amounting to a (subjective) belief that the disclosure was in the public interest and as to whether that belief was reasonable.
  - In relation to whether the belief was reasonable, but not in relation to whether the worker’s beliefs at the time of making the disclosure amounted to a belief that it was made in the public interest, it is permissible to have regard to factors or beliefs other than those operating on the mind of the worker at the time of making the disclosure provided that this is based on facts known, or perhaps reasonably available, to the worker at the time of making the disclosure.
  - A useful evidential tool in marginal cases (ie those where on its face the disclosure appears to focus on personal concerns) is to compare how the worker acted with that which would be expected of the worker if s/he believed she was making a disclosure in the public interest.

## Case law since *Chestertons*

**Supp.165** In the following paragraphs we highlight cases at EAT and ET level in which *Chestertons* has been considered and applied. The case law illustrates the importance of a claimant providing at least *some* evidence upon the basis of which the ET can reach a conclusion that he or she applied his/her mind to the notion of a public interest in the information disclosed and of explaining, or at least attempting to explain, what thought processes occurred. If this explanation is not provided in the Claim Form (and it should be provided there) then certainly it should be provided in the witness statement. These requirements are similar to those articulated by Sales LJ in *Kilraine* in relation to the identification of the actual or supposed legal obligation/relevant failure. Satisfying this requirement is, obviously, going to be more difficult where there is good reason to suppose that personal reasons drove the decision to make the disclosure.

### (1) *Ibrahim v HCA International*

**Supp.166** The issue as to the public interest test came before the Court of Appeal for a second time in *Ibrahim v HCA International Ltd* UKEAT/0105/18/BA, 13<sup>th</sup> September 2018; [2019] EWCA Civ 2007, [2020] IRLR 224 (CA). As discussed at Supp.124, the claimant was found to have made a disclosure, in essence, that he was being defamed by false rumours being spread that he had breached client confidentiality. The ET concluded that the disclosures were “not made in the public interest, but rather with a view to clearing his name and re-establishing his reputation”. The EAT rejected the claimant’s appeal on the public interest issue, on the basis that this entailed a finding of fact that the claimant had no subjective belief as to whether making of the disclosure was in the public interest, and that his concern was only about himself. Before the Court of Appeal it was argued that there was a need to focus and make findings on the factors operating of the claimant’s mind and whether they amounted to a belief that the disclosure was made in the public interest irrespective of whether the claimant’s main or even his sole interest was to clear his name. Further, it was contended that it was necessary when considering the claimant’s case to consider not only what he said, but to make findings as to what was in his mind, and the circumstances around the disclosure, including in this case his call for an investigation. In particular it was argued that it was necessary to engage with three aspects of the claimant’s case in relation to this.

1. First, he believed that there had in fact been a breach of confidentiality (of which he had been falsely accused) and the investigation would need to address that breach, which would be in the interests of the patients (and their families) and the hospital. The fact that he was not found to have referred to there having in fact been a breach of confidentiality in his disclosure might be evidentially relevant as to his state of mind, but was not determinative of it, particularly given that his belief that there had in fact been a breach of confidentiality was evidenced

contemporaneously in his response to the rejection of his grievance which purported to address his disclosure.

2. Second, whether or not there had in fact been a breach of confidentiality, addressing the false rumours about this, and indeed showing that the rumours were false, would be in the interest of the patients (and their families) in restoring confidence and in the interests of the hospital's reputation.
3. Third, the false rumours were interfering with the claimant's ability to carry out his role, which engaged the public interest given the importance of this function as an interpreter in a hospital where a large number of patients and/or their families could not speak English. The tribunal's reasoning failed to address any of these elements, and instead used language, referring to the disclosure being "with a view to" clearing the claimant's own name, which was consistent with focussing on motive.

**Supp.167** Whilst the Court was not able to determine what evidence had been given on the public interest issue<sup>24</sup>, the tribunal's judgment also failed to adequately address the issue. Significantly, the Court set out, at paragraph 25, what should have happened:

"In the light of the judgment of this court in *Chesterton*, and with the benefit of hindsight, it is clear to me that the Claimant should have been asked directly by the ET whether at the time he made the disclosures on 15 and 22 March 2016 he believed he was acting in the public interest. If he had answered "yes" he could have been asked for an explanation, and it would no doubt have been put to him in cross-examination that the suggestion was no more than an afterthought. The ET would then have had to evaluate his evidence on the point and make findings about it. But I am not satisfied, on the material available to us in this court, that this is what happened at the ET hearing."

**Supp.168** The issue as to the claimant's reasonable belief should therefore have been specifically addressed, with the tribunal then making findings as to what factors were operating on his mind and whether it amounted to a belief that the disclosure was made in the public interest. Whilst the tribunal had found that nothing was *said* by the claimant as to the public interest, the Court accepted (at paragraph 26) that this did not resolve the issue as to what he had in mind when making the disclosure, whilst the finding that the disclosure was with a view to clearing his name was consistent with a focus on motive rather than considering his set of subjective beliefs. The matter was therefore remitted, with liberty for the claimant to adduce further evidence before the tribunal on the issue whether he had a reasonable belief that the disclosure was made in the public interest.

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<sup>24</sup> The employment judge's notes were not before the Court, having only been sought at the point when pro bono counsel began acting on the appeal to the CA, and although there were notes of evidence from the respondent and from the claimant's wife, these were not agreed.

(2) *Parsons v Airplus International Ltd*

**Supp.169** The EAT's decision in *Parsons v Airplus International Ltd* UKEAT/0111/17/JOJ, 13<sup>th</sup> October 2017 provides a useful practical illustration of the limits of the principle that a putative whistleblower can rely on after the fact reasoning to justify a belief that the disclosure was made in the public interest.

**Supp.170** Ms Parsons, a qualified non-practising barrister, was employed by the respondent as its Legal and Compliance Officer, subject to a six-month probationary period. From early in her employment, she raised numerous concerns. She was given training and support but those managing her became increasingly concerned as to the way in which Ms Parsons was raising matters, her inability to work with others and her rudeness. After attempting to reassure Ms Parsons and to remove some of the pressure on her, the respondent was unable to see any improvement and decided that she should be dismissed, essentially due to what was described as a "*cultural misfit*". Ms Parsons claimed in the ET that she had been dismissed contrary to s.103A. The ET dismissed her claim. Save in one respect, it did not accept the matters relied on by her amounted to protected disclosures and it was, in any event, satisfied that the dismissal was not for making disclosures. Ms Parsons appealed on various grounds, the point of present interest is that it was argued on her behalf that the ET had erred in holding (in respect of certain of her disclosures) that Ms Parsons did not provide information that tended to show the respondent was likely in breach of its legal obligations, and second, in holding that a disclosure made partly out of self-interest would not be a protected disclosure. The disclosure relied upon was Ms Parsons' statement that keeping minutes of compliance decisions for the purposes of accountability for an FCA regulated firm was important. In fact the ET found that Ms Parsons had asked Ms Haywood of the respondent whether the respondent kept minutes of key decisions and clarified later that she was referring to minutes of compliance decisions. The ET found that Ms Parsons also made it clear that the reason she was asking about this was that she wanted to make sure that if she made a suggestion which was not followed, she would be covered. The ET held that Ms Parsons did not give Ms Haywood any information that tended to show that the respondent was likely to be in breach of its legal obligations. All she had done was to make an inquiry as to whether certain minutes were kept and made clear that the reason she was asking was to ensure that she was protected. In the ET's view it followed that Ms Parsons could not reasonably have believed that what she was raising was in the public interest.

**Supp.171** In the EAT HHJ Eady said that the ET reached a permissible conclusion that Ms Parsons did not give Ms Haywood any information that tended to show the respondent was likely to be in breach of its legal obligations: she made an enquiry as to whether certain minutes were kept and made clear that the reason she was asking was to ensure that she was protected on a personal basis. HHJ Eady also rejected Ms Parsons' argument based on the ET's approach to the public interest issue. It was not a fair characterisation of the ET's findings to say that it required the disclosure to be made

*wholly* in the public interest, thus failing to adopt the approach laid down in *Chestertons*. The ET made no finding that Ms Parsons' disclosure was in anything but her own interest. Although a failure to comply with the provisions of the Companies Act in respect of certain minute taking obligations could be a matter disclosed in the public interest, the EAT was not concerned with a hypothetical case. On Ms Parsons' own evidence she was simply asking about minutes of compliance decisions. On the ET's finding, when she was asked why, she explained it was because she was concerned to make sure she was protected if any suggestion she had given was not followed. There was no basis for the contention that the ET ought properly to have found that Ms Parsons' desire to ensure her advice was recorded so she might not herself face criticism in the future was a matter of public interest. Essentially, taking into account her contemporaneous explanation for what she had said, Ms Parsons had failed to establish that she had anything in her mind at the time which showed a subjective belief that the disclosure was made in the public interest.

### (3) *Malik v Cenkos Securities*

**Supp.172** In *Malik v Cenkos Securities Plc* UKEAT/0100/17/RN, 17<sup>th</sup> January 2018, it was submitted on behalf of the claimant/appellant that the ET had mistakenly considered that good faith was relevant to the question of whether a disclosure was made in the public interest. On behalf of the respondent it was argued that the reference to "good faith" was not incorrect because of the obligation on the ET to take account of all the relevant circumstances: the presence of absence of good faith was, it was argued, a relevant circumstance. The respondent relied on the reasoning of Underhill LJ in *Chestertons*, at paragraph 3,7 where he said that the question of whether it was reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker was "...one to be answered by the tribunal on a consideration of all the circumstances of the particular case". Choudhury J disagreed. The reference to "*all the circumstances*" in that passage was in the context of determining whether or not there was a reasonable belief that disclosure was being made in the public interest. The circumstances to be considered were, therefore, those relevant to that question. The express removal, as from 25 June 2013, of any reference to good faith in section 43C, and the express inclusion of good faith elsewhere in relation to remedy, was intended to remove good faith as a separate requirement to be met by claimants before liability can be established. In the event the point was irrelevant because the ET had found (for different and proper reasons) that the relevant disclosures did not qualify for protection in any event.

### (4) *Smith v Scapa Group Plc*

**Supp.173** Whilst in some cases, such as *Parsons*, what the claimant said at the time may enable a tribunal to infer that he or she lacked the requisite subjective belief, in other cases the manner of the disclosure may be crucial. That was the case in relation to two of the disclosures relied upon in *Smith v Scapa Group Plc and others* [Case No

2400172/2017] ET 16<sup>th</sup> March 2018. The respondent company had approximately 1,400 employees worldwide and a dedicated HR function. It was a public limited company whose shares were traded on the Alternative Investments Market. The claimant had been General Counsel and Company Secretary. She alleged that she had made a disclosure (her first disclosure) by way of informing senior management that the suggestion of putting post termination restrictions within a Long Term Incentive Plan (“LTIP”) document, so that the signatories would sign them without realising them, was unreasonable, and that it was not sensible to attempt to unilaterally change the contracts of the executives concerned and that there was a risk that senior executives would be upset. The legal obligation relied upon was the duty of trust and confidence owed to the executives concerned.

**Supp.174** For other reasons the ET held that the claimant had not made this first alleged protected disclosure but went on to say that had it been a live issue they would have held that, applying *Chesterton*, the claimant had a subjective and reasonable belief that her disclosure was in the public interest. She saw it as a governance issue; some 23 members of the executive team of a listed plc were affected; the LTIP was a transaction which had to be notified to the stock market; the issue of restrictive covenants affected their employment outside the company, and the proposal came from the Chief Executive. The claimant had a reasonable belief that the information tended to show that the company was likely to fail to comply with its implied contractual obligation of trust and confidence by seeking to hide new covenants in the LTIP documentation.

**Supp.175** However, in relation to two subsequent disclosures – the third and fourth - the claimant failed to establish the requisite subjective belief that the disclosure was made in the public interest. As to the third disclosure, the claimant said she had a conversation with the Chair of the Board during which she informed him that the CEO behaved in a domineering way which was likely to expose the company to legal risk as she feared that poorly treated executives would resign and sue the company. The claimant contended that the company was likely to breach the implied duty of trust and confidence owed to senior executives by reason of the CEO’s domineering management style. Further, the CEO had breached and was likely to breach his duties under section 172 of the Companies Act 2006. As to the fourth the claimant said that she handed a document to the Chair of the Board in which she set out numerous examples of the CEO behaving in a domineering, discriminatory and heavy-handed manner which she feared would expose the company to legal risk.

**Supp.176** The ET was satisfied that the claimant believed that this information tended to show that there was likely to be a breach of a legal obligation, being a breach of the implied duty of trust and confidence in contracts of employment. It also concluded that the claimant reasonably took the view that the information she was disclosing tended to show that there would be a breach of trust and confidence towards her or others if the behaviour continued unchecked by the Board. The ET said that the real issue on this disclosure was whether the claimant believed that the disclosure was

made in the public interest, and if so whether that was a reasonable belief. In concluding that he the claimant lacked the requisite subjective belief, the ET placed particular emphasis on the way the disclosure was made. The ET said this:

“However, Miss Connolly [for the respondent] emphasised the precise wording of section 43B(1), which requires a reasonable belief that the disclosure is made in the public interest, not that the information disclosed is of interest to the public. That is a fine distinction but an important one. The section is not worded as clearly as it might be but the use of the words “made in the public interest” shows that the focus of that phrase is on the disclosure, which is “made” by the claimant; the phrase “tends to show” refers back to the information disclosed. Accordingly we concluded that the focus must be not on the content of the information disclosed, but on the disclosure itself.

This was a discussion which the claimant held in private with the Chairman. She prepared a written note to provide examples of her concerns about [the CEO’s] domineering management style, but she did not allow [the Chair] to keep a copy of that document. When asked in the grievance hearing what the claimant expected the outcome would be of her meeting with Mr Wallace, the notes of both Mrs Taylor (page 218) and of Mr Hardcastle (page 228) recorded the same answer from the claimant: that she wanted [the Chair] not to take everything [the CEO] said at face value. We construed that as the claimant wanting to have some support from [the Chair] in her dispute with [the CEO], rather than a disclosure which would enable [the Chair] to do something about the governance issues. The claimant’s witness statement at paragraph 27 said that she wanted to meet [the Chair] to see if he had any useful advice for her.”

**Supp.177** The Tribunal concluded unanimously that although the information provided by the claimant could have given rise to a public interest had it been disclosed in a different way, the circumstances of this disclosure meant that the claimant had not believed that the disclosure was made in the public interest. Had she believed that was so she would have allowed the Chair to keep a copy of the document, would have been expecting him to have done something about it, and would not have been so clear in her grievance that the matters she had raised were not to be considered further. Alternatively she could have used the employer’s ”Open Door” policy to raise her concerns. Instead she disclosed to the Chair information potentially of interest to the public in a way which ensured it was kept private.

*(5) Gibson v Hounslow LBC and another*

**Supp.178** The issue as to the relationship with factors bearing on motive was also briefly touched upon in *Gibson v (1) Hounslow LBC and (2) Crane Park Primary School* UKEAT/0033/18/BA, 20<sup>th</sup> December 2018. The disclosure in question was made against the background of disciplinary proceedings having been brought against the claimant, who was a teacher responsible for teaching autistic children. The claimant had informed the parent of one of the children (Child C) that another teacher had witnessed and informed the claimant of an incident where Child C had been kicked and mock-strangled by another child (Child B). The other teacher denied informing C about this. Disciplinary proceedings were brought both against the claimant and the other teacher for having told a lie about a work colleague. The proceedings were on the

premise that one or other must be lying and the truth would emerge during the investigation. The claimant then discovered on a school printer a statement made by a teaching assistant (W) recounting a conversation or encounter that she had witnessed between the claimant and the parent of Child C. The claimant instituted a grievance relating to this, stating that she considered it to be a clear example that staff were against her and attempting to target her in an unpleasant way. She relied upon the grievance as one of her protected disclosures. The Tribunal concluded that the grievance was “self-serving that a false statement had been made against her” and that it did not address any issue coming within the list of relevant failures in s.43B(1) ERA. It was submitted on behalf of the claimant that a disclosure could be self-serving and yet still in the public interest and that the tribunal had dealt with the matter “too cursorily”.

**Supp.179** In the EAT HHJ Stacey agreed (at paragraph 65) that “a more nuanced approach to public and self-interest is required than perhaps was adopted” in relation to this alleged protected disclosure. That was so notwithstanding that she considered that the facts were not attractive for the claimant in respect of that incident. For the claimant to have brought a grievance against a teaching assistant for having provided a statement in response to a request to do so as part of a disciplinary investigation presented as being overbearing, if not bullying, behaviour. Whilst recognising it was not necessarily conclusive that a disclosure was self-serving, HHJ Stacey noted that more problematic for the claimant was how the disclosure could be said to show a reasonable belief as to any of the relevant failures; all it showed was the respondent quite properly taking statements from relevant witnesses as part of its investigation. Ultimately this aspect of the case in any event failed on the basis of the findings as to causation.

(6) *Elysium Healthcare No.2 Ltd v Ogunlami* [2019] UKEAT 0116/18/RN, 12<sup>th</sup> February 2019 (Soole J)

**Supp.180** As discussed above (Supp.122-123), the claimant, Mr Ogunlami, who was employed in a hospital as a healthcare assistant, made a disclosure about his line manager taking a patient’s food into her office, which he said amounted to financial abuse, as well as raising a safeguarding issue. The Tribunal, in finding that the disclosure was made in the public interest, said that he had raised concerns about safeguarding and a breach of a legal obligation which:

“went beyond the confines [of] staff at the hospital as they raised wider issues of public concern, namely whether there is the practice of taking advantage of vulnerable people in the respondent's care. The respondent provides a service to the public and the public would need to know whether those in its care are either well-cared for or taken advantage of.”

**Supp.181** Elysium argued that when considering the ingredient of the public interest, the Tribunal failed to consider the subjective belief of Mr Ogunlami. It was submitted that the Tribunal omitted consideration of Mr Ogunlami's belief and substituted its own belief that the disclosure was in the public interest and, in any event,

there was no evidence of Mr Ogunlami's belief in respect of the public interest. In rejecting this, Soole J said that proof that the worker did hold a belief that the disclosure was made in the public interest cannot be dependent on the provision of a statement in those terms. That, he said, would be merely formulaic. The question of whether the worker held the relevant belief was “ultimately a matter of inference for the tribunal to determine.” Mr Ogunlami’s particulars of claim asserted that he and his colleagues had a reasonable belief that the information disclosed was a qualifying disclosure and that it was, therefore, in the public interest for them to make the disclosure because it concerned breach of a legal obligation and also they considered it a criminal offence. Whilst there had been no such statement in Mr Ogunlami's witness statement, and it was ultimately for Mr Ogunlami to prove his case<sup>25</sup>, it was, said Soole J, striking that there was no cross-examination to the effect that his belief was confined to his private and personal interest. Soole J concluded that Mr Ogunlami's concerns went beyond the private and personal or even the circumstances of the particular hospital.

**(7) *Okwu v The Shrewsbury & Rise Community Action* [2019] UKEAT/0082/19/00, 24<sup>th</sup> June 2019**

**Supp.182** The respondent, a small charitable organisation, run by a management committee and with a group of eight volunteers, supported individuals affected by domestic violence, female genital mutilation, or by HIV status. Ms Okwu was employed as its domestic violence and female genital mutilation specialist worker, initially subject to a three-month probation period. The ET found that at the end of her first three months of employment, Ms Okwu’s probation period was extended for a further three months to enable the respondent to assess her suitability, a decision confirmed by letter from the respondent’s Chair (Miss Faida Iga) of 14 February 2018. Upon receiving Miss Iga’s letter, Ms Okwu responded by letter dated 21 February 2018 which she relied upon as containing a protected disclosure (referred to as disclosure (iii)). Amongst other things, she said that

“There was no internet or phone for the first six weeks of my employment. There is still no reliable internet access and the mobile phone in the office is a shared one, and this is a breach of the DPA. It also has other people’s social media accounts and other things running in the background due to the sensitivity of the data emanating from my posts and to the DPA complaint, I should have been provided with a phone for my sole use. I have asked and nothing has been done. I have also raised concerns about other breaches of the DPA - for example, I have had to store a service user’s personal file containing personal, sensitive information in an unlocked drawer...”

**Supp.183** Following receipt of Ms Okwu’s letter and what the ET described as her “making unfounded allegations in respect of contractual documents which she said was not provided” the respondent’s management committee decided to terminate her

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<sup>25</sup> But see now *Ibrahim v HCA* [2020] IRLR 224, where the Court of Appeal indicated that a tribunal should specifically ascertain why a claimant should specifically ask whether and if so why a claimant believed he/she was acting in the public interest, and then evaluate that evidence. See Supp.166-168 above.

employment. The ET found that the respondent was “satisfied that the Claimant was not prepared to take reasonable instructions from it in respect of performance issues that had already been identified to the Claimant.” Having rejected Ms Okwu’s evidence as to any oral disclosures she claimed to have made, the ET referred to the issues she had raised in her letter of 21 February. It noted that the matters raised appeared to be principally personal matters that related to Ms Okwu personally such as her contract of her employment, her induction, the failure of the respondent to allegedly provide her with its own policies and procedures and matters that related to her employment tax status and/or pension entitlement. These were said to be personal contractual matters that she was dissatisfied with, rather raising matters of public interest.

**Supp.184** The EAT (HHJ Eady QC) allowed Ms Okwu’s appeal and remitted the case for a new hearing. Sub paragraph (iii) plainly dealt with sensitive information relating to service users, not strictly to Ms Okwu herself. It included the concern in relation to information in an unlocked draw, which plainly dealt with sensitive information relating to service users. The EAT noted that the ET had apparently considered that Ms Okwu was primarily raising those matters as relevant to her assessment of her own performance. However, that did not necessarily entail that she did not reasonably believe that her disclosure was in the public interest. Indeed, considering the nature of the interest in question it would be hard to see how it would not - in the Ms Okwu’s reasonable belief - be a disclosure made in the public interest, even if (as the ET appeared to suggest) she also had in mind the impact upon her in terms of her work performance. The EAT also accepted that the ET had erred in concluding that the disclosures in respect of alleged breaches of the DPA did not contain sufficient specificity.

### ***Conclusions***

**Supp.185** Whilst in his judgment in *Elysium No.2* Soole J was resistant to the notion that a worker needs to articulate the fact of (let alone the reasons for) their contemporaneous belief that their disclosure was made in the public interest, we suggest that should be treated with caution. It is undoubtedly correct that the worker’s belief at the time need not be formulated specifically in the terms of the public interest. The worker may have wider interests in mind which essentially equate to a belief that the disclosure would serve the public interest. As explained in *Ibrahim* it will be important in each case for the tribunal to hear evidence on whether a worker believed the disclosure was made in the public interest, and if so why, and then to evaluate that evidence. That will require findings as to the factors that were operating on the worker’s mind. In a borderline case where it is necessary to assess whether the factors amounted to a belief in the public interest, the same factors as relevant to the issue of whether the belief was objectively reasonable, as posited in *Chesterton* (see Supp.147.8 above), may also be material to whether the set of beliefs equated to a belief in the public interest. What the worker said or wrote as part of the disclosure will be relevant

but not necessarily determinative as to whether it was believed that the disclosure was made in the public interest (see *Ibrahim*). Further, as illustrated by *Smith v Scapa* and *Ibrahim* the focus may need to be not only on the public interest subject matter of the disclosure but also the circumstances in which the disclosure was made. If the worker appears to have not conducted themselves in a way which would be consistent with their intending to make a public interest disclosure there will be all the greater need to persuade the ET that there was nevertheless the requisite subjective belief.

## **CHAPTER 5: THE THREE TIERS OF PROTECTION**

### **Paragraph 5.57: Prescribed persons**

**Supp.186** See now the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2017, SI 201, which came into force on 1 October 2017 and also the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2018, SI 2018/795 (which came into force on 1<sup>st</sup> August 2018), and the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2018, SI 2019/1341 (in force 5 November 2019) each amending from their respective dates of coming into force, the list of persons to whom a disclosure can be made by a potential whistleblower.

### **Paragraphs 5.86 to 5.109: Wider disclosures under s.43G; reasonableness in all the circumstances**

**Supp.187** See *Jesudason v Alder Hey Children's NHS Foundation Trust* UKEAT/0248/16/LA, 29<sup>th</sup> June 2018; [2020] EWCA Civ 73. The claimant, Mr Jesudason, was a consultant paediatric surgeon. He had a contract with the respondent Trust as an honorary consultant from 2006 until his resignation in December 2012. Between March 2009 and November 2012 Mr Jesudason made a number of what were held to be protected disclosures raising matters of concern to him relating to the Trust's Department of Paediatric Surgery ("DPS"). These included strong criticisms of consultant paediatric surgeon colleagues as to their professional competence and general conduct, allegations of bullying and poor relationships, and of a hostile environment involving racial prejudice and institutional discrimination. In January 2011 the Trust referred the DPS to the Royal College of Surgeons (RCS). Following an investigation, the RCS produced a report which concluded that surgical care within the DPS did not fall below the general standard of acceptable practice in the UK. However, it also concluded that, in 5 of the 20 cases identified by witnesses, either the care given was sub-optimal or clinical governance appeared to have been weak. Mr Jesudason was dissatisfied with this outcome. In 2011 he issued ET proceedings against the Trust (and also Liverpool University where he was an Academic Consultant Paediatric Surgeon) claiming he had been subjected to whistleblowing detriment and race discrimination. Then in July 2012 he issued High Court proceedings and obtained an interim injunction to prevent the Trust from convening a panel to consider termination of his contract on the grounds of irretrievable breakdown in relationships

between himself and most of his consultant colleagues in the DPS (see Chapter 12 in the Main Work at paras 12.68, 12.69). During the trial it emerged in cross-examination that Mr Jesudason had provided the press with documents obtained during disclosure. The upshot was that Mr Jesudason discontinued his claim and agreed to pay £100,000 in costs to the Trust. He entered into a settlement agreement under which he withdrew any outstanding grievances, and agreed that he would not submit any further grievances.

**Supp.188** Mr Jesudason's employment ended on 19 December 2012. However, in October 2014 he issued further proceedings against the Trust in respect of whistleblowing detriment and race discrimination. He relied upon a number of communications which he alleged were protected disclosures. These included the pre-2012 (ie pre-termination of employment) qualifying disclosures including the letters of March 2009 and January 2011 to the Trust, and also communications made after the termination of his employment pursuant to the Settlement Agreement. It was conceded that the pre-Agreement disclosures made to the Trust and the CQC (but not those to the GMC or the media) were all qualifying disclosures. The post-Settlement Agreement disclosures which were relied upon were the following:

1. 5 September 2013; disclosures in the form of a letter sent to the Right Hon. Margaret Hodge MP, chair of the Public Accounts Committee of the House of Commons with copies sent to various recipients including the Health Secretary and the chair of the CQC.
2. 10 September 2013; disclosures to Channel 4.
3. 21 October 2013; further disclosures to Channel 4
4. 29 April 2014; disclosures to the BBC.
5. 23 June 2014; disclosures in a speech to the British Medical Association.
6. 16-19 October 2014; disclosures in an academic presentation to the European Association of Paediatric Societies ("EAPS").

**Supp.189** The Trust, accepted that the communication made with the CQC fell within the scope of section 43F since the CQC is a prescribed body. It was also accepted for all these disclosures that the subject matter fell within one or other of the matters listed in section 47B(1). However the other disclosures relied upon were neither disclosures to the Trust nor to any prescribed body and therefore could only amount to qualifying disclosures if they fell within the scope of section 43G<sup>26</sup>.

**Supp.190** The ET found that the disclosures did not satisfy the reasonableness requirement in s.43G(3). The disclosures repeated the same criticisms that Mr Jesudason had been reporting prior to the High Court proceedings in 2012. The seriousness of the alleged relevant failures had diminished because they were now old

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<sup>26</sup> Communications to an MP are now covered by section 43F because MPs are now prescribed persons, but they were not when these communications were sent.

allegations on which the RCS had since reported, and the Trust had since acted on the RCS's conclusions by providing an action plan which was being worked through appropriately. Accordingly the relevant failures of which Mr Jesudason had complained were unlikely to recur. Further, there was an issue for the Trust as to protecting the reputation of surgeons and the Trust, in circumstances where the Trust had acted appropriately to the previous disclosures. Many of the allegations were aimed personally at the surgeons and the Trust had been entitled to take action to protect their reputation. All in all, for Mr Jesudason to make the same disclosures as previously made but to different organisations was, given the history and background to the case, not reasonable.

**Supp.191** The EAT upheld this conclusion. It was argued for Mr Jesudason that the ET's conclusion was perverse because several concerns which he had raised remained uninvestigated. However, those matters had not been identified in the list of issues under the heading of reasonableness. Soole J commented (at para 47) that in an exceptionally heavy case with a mass of detail, and representation by counsel, the Tribunal was entitled to expect all relevant points to be made at the relevant stages of the argument. The EAT stated (at paragraphs 48 and 62) that it did not in any event think that the points might have assisted Mr Jesudason on the issue of reasonableness.

**Supp.192** The Court of Appeal dismissed Mr Jesudason's further appeal. Giving the only substantive judgment, Sir Patrick Elias commented that:

1. The structure of the legislation is that disclosure to "other bodies" should be a last resort and only justified where disclosures to the employer or a regulated body would, in the circumstances, not be adequate or appropriate.
2. Whilst s.43G does not say in terms that the worker can only legitimately disclose to another body if the employer or the prescribed body had failed properly to deal with the original disclosure, if the employer had dealt with it, or could reasonably be expected to do so, that would be highly relevant to the question whether the disclosure was reasonable. It was one of the factors which subsection (3) expressly required a tribunal to take into account when considering the reasonableness question. It would often be unreasonable to make the disclosure to a third party in those circumstances.
3. The requirement that the disclosure be reasonable is an important control mechanism in relation to disclosures falling within section 43G.
4. A tribunal had to have regard to all the circumstances and the specific considerations identified in subsection (3) are not exhaustive.
5. The question of reasonableness is essentially an issue of fact for the ET.

**Supp.193** The Court found that the ET had been entitled to conclude that the reasonableness requirement was not satisfied in relation to the post-termination external disclosures, other than to the CQC. One of the grounds relied upon to challenge the ET's finding as to reasonableness was a claim that two consultant surgeons in the DPS

had brought about the suspension of a consultant colleague (A) by falsely alleging that he was suicidal, and that far from investigating this, the Trust had tried to cover up the wrongdoing and conceal relevant incriminating material. Sir Patrick concluded that the EAT had been entitled to find that an alleged failure to investigate these matters had not been advanced before the ET, and that it was impermissible to seek to raise it on appeal. However, whilst that disposed of the point, Sir Patrick was critical of an additional reason given by the EAT for rejecting it. The EAT had considered the material in support of the allegations and concluded that it was unfounded and that the two consultant surgeons had acted appropriately. Sir Patrick commented that the fact that an allegation turned out to be false was not a reason for finding, for the purposes of s.43G, that it had not been reasonable to make it, provided that the worker held a reasonable belief (as required by s.43G(1(b))) that the information disclosed, and any allegation contained in it, was substantially true. Whether the disclosure is reasonable must be assessed at the time that the disclosure is made, and not with the benefit of hindsight after the complaint has been examined.<sup>27</sup>

**Supp.194** Sir Patrick also accepted (at para 49) however that even if the issue relating to A had been specifically raised before the ET, the result would have been the same. Many of the complaints raised in the post-termination disclosures relied upon had been considered in the RCS report. Some had been found to be unsubstantiated, and recommendations had been made and appropriate action taken in relation to those which had substance. The disclosures had also included manifestly false accounts by Mr Jesudason of the circumstances of his resignation and the alleged offers of a six figure sum to keep him quiet. As such, whilst Sir Patrick rejected a submission that the complaints relating to A were of no real significance, in the light of the ET's findings in the round about the complaints being old and/or false, he concluded that it was fanciful to believe that the ET might have found any of the communications relied upon to meet the reasonableness test for s.43G ERA. As Sir Patrick noted (at para 49):

“A worker cannot expect to have protection for a host of complaints unjustifiably brought to the attention of the media or other influential third parties on the basis that amongst them there is one issue which it might have been reasonable to disclose. A whistle-blower must take some responsibility for the way in which complaints or concerns are framed, and the requirement of reasonableness in section 43G enables an ET to refuse to give protection to irresponsible disclosures.”

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<sup>27</sup> Note however the line of authority that the truth of the allegation may be highly relevant to whether the belief was reasonably held that the information tended to show a relevant failure: see Main Work paras 3.79 to 3.85.

## CHAPTER 6: WHO IS PROTECTED UNDER PIDA?

### C. Workers under Section 230(3) (b) ERA

#### Paragraphs 6.08 to 6.16

**Supp.195** See now *Uber B.V. and others v Aslam and others* [2019] IRLR 257 (CA) in which the majority (Sir Terence Etherton MR and Lord Justice Bean, Underhill VP dissenting) dismissed Uber’s appeal from the decision of the EAT (HHJ Eady QC) holding that at the latest an Uber driver was working for (and a worker employed by) Uber from the moment when he accepted any trip. They also agreed that the driver could be said to be working for Uber when he is in London with the App switched on but before he has accepted a trip: that was a conclusion which the ET were entitled to reach. Uber were however given permission to appeal to the Supreme Court by the Court of Appeal, and it is/was due to be heard in July 2020.

#### Workers under the extended definition in section 43K ERA: *Day v (1) Lewisham*

*(1) Paragraph 6.20: Can an individual be a worker under section 230 for one employer whilst at the same time being a worker under section 43K for a different employer?*

**Supp.196** See now *Day v (1) Lewisham and Greenwich NHS Trust and (2) Health Education England* [2017] EWCA Civ 329, [2017] ICR 917. The Court has essentially approved the reasoning of Simler P in *McTigue v. University Hospital Bristol NHS Foundation Trust* [2016] ICR 1155 (EAT) on the issue of whether s.43K could be relied upon where the claimant also had another employer. We argued in the Main Work that this was clearly the preferred approach. Lord Justice Elias gave the leading judgment with which Gloster LJ and Moylan J agreed.

**Supp.197** It was acknowledged on both sides in the Court of Appeal that the opening words of s.43K(1) had to have *some* limitation on them: they could not be read literally. Otherwise, as Elias LJ pointed out, an agency worker (qualifying as a worker under s.43K against the agency) who had a second, unrelated, job serving in a restaurant in the evenings would be precluded from seeking to rely upon the extended definition of worker with respect to the agency work. Consistently with the approach taken by Simler P in *McTigue*, Elias LJ accepted the contention on behalf of Dr Day that the provision needed to be interpreted in the sense that “worker includes an individual who *as against a given respondent* is not a worker as defined by section 230(3)” (our emphasis). Elias LJ gave three reasons for this conclusion:

- the whistleblowing legislation should be given a purposive construction: that did not permit the court to distort the language of a statute on the vague premise that action against whistleblowers is undesirable and should be forbidden. But here

*some* words needed to be read into the provision because a literal construction could not be what Parliament intended.

- a worker might need protection against the introducer even if he had protection against the end-user if, as was alleged by Dr Day in this case, the victimisation came from the introducer itself.
- Dr Day could in principle be employed by both the end-user and the third party introducer (see above) and there was no obvious rationale in a provision which said that if the individual was a s.230(3) worker in respect of either the end-user or the third party, he could not rely upon the extended definition against the other. If it did have that effect the odd consequence would be that (a) if s/he is not a s.230(3) worker with respect to either, s/he may fall within the extended s. 43K definition of worker in respect of both and each may be an employer, but (b) if s/he was a s. 230(3) worker with effect to one of them, s/he could not be a s. 43K worker with respect to the other.

**Supp.198** What, then, was the intention of the opening words of s.43K? In Elias LJ's view it was understandable that Parliament might want to make it clear that the section was simply extending the standard definition and that there was no need to engage with s.43K at all if the worker fell within the scope of s. 230(3).

*(2) Paragraphs 6.47 to 6.53: s.43K(1)(a)(ii) and s.43K(2): who “substantially determined” the terms*

**Supp.199** The other aspect of the appeal in *Day* concerned the issues raised in s.43K(1)(a)(ii) and s.43K(2) as to who “substantially determined” the terms. Elias LJ emphasised that neither of these provisions require a comparison between the parties, other than the claimant, who exercise some influence over the terms on which the doctor was engaged. The focus of 43K(1)(a)(ii) is on excluding cases where the terms on which the individual is engaged are substantially determined by the worker himself. Clearly if that is the case, he cannot bring himself within this extended definition of “worker”. Elias LJ commented (at para 11) that this is so even if the end-user and/or introducer can also be said substantially to determine the terms of engagement. We return to this below because it highlights a potentially significant difference from the line of previous EAT decisions. Elias LJ commented that only an individual who is not a “substantial” participant in determining the terms of engagement is assisted by s.43K(1)(a). If that is not the case, the condition for protection is satisfied. S.43K(1)(a)(ii) envisages that either or both the introducer or end user may be regarded as the employer, either because the introducer and the end-user determine the terms jointly, or because each determines different terms but each to a substantial extent.

**Supp.200** On behalf of HEE it was submitted that notwithstanding that both introducer and end-user might substantially determine the terms of engagement, the definition of employer in s.43K(2)(a) was limited to the person (if there was more than one) who played the greater role in determining the terms of engagement. This, it was argued, followed from the reference to “the person” in that sub-section. Elias LJ

rejected this: s.6 of the Interpretation Act 1978 provides that the singular includes the plural unless the contrary intention appears. In Elias LJ's judgment it did not do so in this instance. Indeed HEE's construction involved impermissibly giving a different meaning to "substantially determines" in s.43K (1) than in s.43K (2). Elias LJ considered that in some cases both the introducer and the end-user would be employers and each would be subject to the whistleblowing provisions.

**Supp.201** Turning to the approach to s.43K(2) ERA, the Court of Appeal concluded that the tribunal and ET had incorrectly approached the question by asking who, as between the HEE and Lewisham, played the greater role in determining the terms and that the EAT's analysis was 'at least consistent' with that incorrect approach. There had been a failure to acknowledge that more than one party (other than the claimant) could substantially determine the terms and to ask whether HEE had done so. That may be viewed as a harsh reading of the EAT's judgment, which did not in terms refer to any comparison and instead (at para 14) relied on the employment tribunal's findings of fact that HEE was not responsible either for the terms governing training of doctors (the Gold Guide) or the terms and conditions on which the work was performed. However, Elias LJ placed reliance on the absence of any self-direction on the part of the ET that there could be more than one employer under s.43K(2) when taken together with the content of the parties' skeleton arguments below.

**Supp.202** But Elias LJ did not agree that if the correct test had been adopted, the inevitable conclusion would have been that the ET must have found in Dr Day's favour. In doing so he referred to an issue which emerged during the course of submissions: when considering the terms on which the person is engaged, is the tribunal limited to considering contractual terms and required to ignore other matters which might affect the way in which the work is carried out but are not contractual in nature? The argument for that approach was that in *Sharpe v Bishop of Worcester* [2015] ICR 1421 (considered in the Main Work at paragraph 6.32) the Court of Appeal had held that in order for s.43K to bite, there must at least be *a contract of some sort* with the putative employer. Reading between the lines, it may be that Elias LJ was sceptical of that reading of the decision in *Sharpe*. We suggest that scepticism was well-founded. *Sharpe* was dealing with the situation where the terms on which the work was carried out was not determined by a contract at all (it being an office held). That may be contrasted with the typical agency relationship where the relevant terms are contained in contracts at least between worker and agency and between agency and end-user, but there may be no direct contractual relationship between worker and end-user. Nothing in *Sharpe* determines that s.43K(1)(a) cannot apply in such a situation.

**Supp.203** In any event Elias LJ concluded that even if some of the terms of engagement had to be contractual (following the assumption in *Sharpe* that the relationship needs to be contractual) he did not accept that it followed that a tribunal should limit itself to focusing solely on the contractual terms. S.43K required the tribunal to focus on what happens in practice, and "*a tribunal should make the*

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

**Supp.204** The guidance provided by the Court of Appeal on the test of who “substantially determined” the terms has, to a considerable degree, endorsed the approach that had been established in a trio of EAT decisions: *Keppel Seghers UK Ltd v Hinds* [2014] IRLR 754; *Day* and *McTigue*. But in one potentially significant respect there was a departure.

**Supp.205** The wording of s.43K(1)(a)(ii) requires that two conditions be satisfied: (a) that the claimant does not (in practice) substantially determine the terms and (b) that the other parties (or one of them) do (or does). In *Day* in the EAT Langstaff J concluded (at para 40) that the test in 43K(1)(a)(ii) implicitly requires a comparison as between (a) the claimant on the one hand, and (b) the other person or persons, who are involved in determining the terms on which the claimant is or was engaged to do the work on the other. If cumulatively the other persons determine the terms more than the worker, then the condition in s.43K(1)(a)(ii) is satisfied. That view was followed by Simler P in *McTigue* at para 34. But as noted above, Elias LJ reasoned (at para 11) that for the purposes of s.43K(1)(a)(ii), the worker might be found to have substantially determined the terms even if the end-user and/or introducer (or both cumulatively) also did so. It would seem that on this view, the claimant could fail at the s.43K(1)(a)(ii) hurdle if found to have made a “substantial” contribution to the determination of the terms, even if the worker has a lesser influence than the other parties, or the others taken together. Further, since on Elias LJ’s analysis (at para 11) the introducer and end user might each be found to have substantially determined the terms by reason of each determining different terms, it would seem that the worker could in principle be found to have substantially determined the terms on the basis of determining only some of the terms. In all, unless (adopting a purposive approach) a different standard can be applied as between the end-user/ introducer and the worker to the test of whether they substantially determine the terms, the effect therefore appears to be to make it potentially more difficult to rely on s.43K(1)(a).

**Supp.206** However that still begs the question as to what is meant in this context by the term “substantially”. This question was not directly addressed in the Court of Appeal. Instead the Court was content to leave the matter to be addressed on remission as a question of fact, taking into account the suggestion of considering the matter in the round based on a relatively broad assessment.

**Supp.207** In the EAT in *Day* it was argued that the term “substantially” should be given the same meaning as in relation to the definition of disability in the Equality Act 2010, as meaning “more than merely trivial”. Langstaff J concluded that the issue did not arise (at least in relation to s.43K(1)(a)(ii)) because the question was determined by

the comparison between (a) the claimant and (b) the other parties. Nor was it addressed in relation to s.43K(2) ERA – which lends some support for the Court of Appeal’s view that a comparison had impermissibly been applied to determine who had the greater influence as between the two respondents.

**Supp.208** The question as to the meaning of the term “substantially” does squarely arise on the approach taken by Elias LJ. We suggest that Langstaff J was right to say, in the EAT in *Day* (at para 40), that in context “substantially” cannot mean simply “more than trivial”. Any other view would be inconsistent with the purposive approach to the legislation which the Court of Appeal in *Day* approved.

**Supp.209** More broadly, the issue highlights a quandary when it comes to considering the approach which may best meet the purposes of the legislation. It may be assumed that the term “substantially” has the same meaning for the purposes of s.43K(1)(a)(ii) and s.43K(2). As such, the lower the threshold is set the more likely it is that the claimant may be found to meet the threshold of substantially determining the terms, so that no question arises under s.43K(2). Conversely, the higher the threshold is set, the more likely it will be that the conditions in s.43K(1)(a) are satisfied, but equally the more difficult it may be to show that a particular respondent (in this case HEE) substantially determined the terms.

**Supp.210** Taken together with the guidance given by the Court of Appeal in *Day* we suggest that the following applies:

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

## Paragraphs 6.86 to 6.72: Police misconduct and judicial immunity

**Supp.211** See now *P v Commissioner of Police of the Metropolis* [2017] UKSC 65 [2018] 1 All E.R. 1011 (SC), in which the appeal against the decision of the Court of Appeal was allowed and the case remitted to the employment tribunal. The substantive speech was that of Lord Reed with which the other SCJs agreed. Lord Reed said that the principle of equivalence entailed that police officers must have the right to bring claims of treatment contrary to the Directive before Employment Tribunals, since those tribunals are the specialist forum for analogous claims of discriminatory treatment under our domestic law. They are expert in the assessment of claims of discriminatory treatment, and have the power to award a range of remedies including the payment of compensation, even in cases where the dismissal or other disciplinary action itself stands. They therefore fulfil the requirements of the principle of effectiveness. To leave police officers with only a right of appeal to the Police Appeals Tribunal would not comply either with the principle of equivalence, since analogous complaints under domestic law can be made to an Employment Tribunal, nor with the principle of effectiveness, since (for example) the Police Appeals Tribunal cannot grant any remedy in cases where the discriminatory conduct is not such as to vitiate the decision of the misconduct panel.

**Supp.212** It was not contended that the United Kingdom could deny police officers an effective and equivalent remedy where their rights under the Directive have been infringed. Even if it was designed to protect the officer under investigation, the creation of a statutory process which entrusted disciplinary functions in relation to police officers to persons whose conduct might arguably attract judicial immunity under domestic law could not have the effect of barring complaints by the officers to an Employment Tribunal that they have been treated by those persons in a manner which is contrary to the Directive. National rules in relation to judicial immunity could be applied in accordance with EU law only in so far as they are consistent with EU law: *Köbler v Austria* (Case C-224/01) [2004] QB 848; [2003] ECR I-10239. The reasoning of the Court of Appeal in *Heath* was not correct in relation to EU law.

**Supp.213** S.42(1) of the Equality Act 2010 had to be interpreted as applying to the exercise of disciplinary functions by misconduct panels in relation to police constables. That ran with the grain of the legislation, and was warranted under EU law in accordance with *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C- 106/89) [1990] ECR I-4135. In particular, s.42(1) could be interpreted so as to conform with the Directive if read as if certain additional words (italicised in the following version) were present:

“(1) For the purposes of this Part, holding the office of constable is to be treated as employment -

(a) by the chief officer, in respect of any act done by the chief officer *or (so far as such acts fall within the scope of the Framework Directive) by persons conducting a misconduct meeting or misconduct hearing* in relation to a constable or appointment to the office of constable;

(b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable.”

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

**Supp.214** Lord Reed emphasised that this conforming interpretation had to be understood broadly: the court was not amending the legislation, and the italicized words were not to be treated as though they had been enacted. The expressions “misconduct meeting” and “misconduct hearing”, for example, have not been defined by reference to the relevant regulations. Nor is the use of those expressions intended to exclude the adoption of a similar approach in relation to other types of panel if that was necessary in order to comply with the Directive. The italicised words were merely intended to indicate how s.42(1) should be interpreted in a case such as the present, in order to avoid a violation of EU law.

#### **(4) Holders of Judicial Office**

##### **Paragraphs 6.94 to 6.95: The decision in *Gilham v MoJ***

**Supp.215** See now *Gilham v Ministry of Justice* [2019] UKSC 44; [2019] 1 WLR 5905 reversing [2017] EWCA Civ 2220, [2018] ICR 827<sup>28</sup>. PCAW (now Protect) was given permission to intervene in the Court of Appeal where they sought and obtained permission to advance a further argument, based on article 14 of the Convention. That application was supported by DJ Gilham who also obtained permission to amend her grounds of appeal to incorporate that argument. Underhill LJ delivered the judgement of the Court of Appeal (the other members of which were Gloster and Singh LJ). The Court of Appeal dismissed DJ Gilham’s appeal but a further appeal to the Supreme Court, where Lady Hale delivered the judgment, was allowed on the basis of the Article 14 argument.

##### *Pure domestic law*

**Supp.216** Both the Court of Appeal and the Supreme Court agreed with Simler P’s conclusion that if the position was considered as a matter of domestic law, without resort to a purposive construction in accordance with the ECHR, the claim would fail. That was because judges are neither employed under a contract and nor are they (as was

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<sup>28</sup> See further, Bowers and Lewis, “Judges, human rights and worker status: *Gilham v Ministry of Justice*”, I.L.J. 2020, 49(1), 135-158.

also argued, for the first time, in the Supreme Court) in Crown employment. At paragraph 66 the Court of Appeal said that the essential point was that the core rights and obligations of a judicial office-holder derived from statute and not from any relationship with the Lord Chancellor (or indeed any other member of the executive). Similarly the Supreme Court noted (at para 18) that “The essential components of the relationship are derived from statute and are not a matter of choice or negotiation between the parties”. Various other factors were also noted as pointing against a contract, including the fragmentation of responsibility for judges (between the Lord Chancellor as a Minister of the Crown, the Lord Chief Justice as Head of the Judiciary), leading to difficulty in identifying the employer, and the separation of powers between the judiciary and the executive. Nor were District Judges in Crown employment, since it was impossible to regard the judiciary as employed under or for the purpose of the Ministry of Justice.

#### *Article 10 ECHR*

**Supp.217** On the Article 10 issue it was common ground that the right established by article 10 comprised a right in certain circumstances for a worker to make a whistleblowing complaint about her working conditions of the kind advanced by Ms Gilham. However all that Article 10 requires is that the free expression rights be adequately protected. Both the CA and SC accepted that was the case given that DJ Gilham was properly protected against dismissal or formal disciplinary sanctions, and from any reduction in her salary and had a right of action under s.7 of the Human Rights Act 1998 if she was a victim of a breach of human rights by a public authority. Provided that there was at least adequate protection, it was no answer, if viewing Article 10 by itself, to say that there was fuller protection or other advantages of being able to bring a claim in the employment tribunal under the protected disclosure provisions. Any such argument could only be advanced on the basis of relying on Article 10 of the Convention in conjunction with Article 14.

#### *Article 14 ECHR*

**Supp.218** Article 14 of the Convention provides:

"Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

**Supp.219** The Court of Appeal considered that the status of a District Judge as not working under contract could not be regarded as “other status” for the purposes of Article 14. However the Supreme Court took a different view and for that reason DJ Gilham’s appeal succeeded.

**Supp.220** Article 14 provides a basis for requiring protection going beyond the bare minimum floor of rights required to secure merely “adequate protection” of the Convention rights. If the State has provided a relevant group with enhanced protection, there may be the opportunity under Article 14 to claim equivalent protection. Whether that is so depends on four questions:

- “(i) do the facts fall within the ambit of one of the Convention rights;
- (ii) has the claimant been treated less favourably than others in an analogous situation;
- (iii) is the reason for that less favourable treatment one of the listed grounds or some “other status”; and
- (iv) is that difference without reasonable justification—put the other way round, is it a proportionate means of achieving a legitimate aim?”<sup>29</sup>

**Supp.221** As to the first question, it was trite law that Article 14 is not a freestanding provision; it does not require a *breach* of another article but merely that the subject matter of the case fell *within the ambit* of another convention right, as it did in DJ Gilham’s case under Art 10.

**Supp.222** As to the second question: it was argued against DJ Gilham that judges are not in an analogous position to workers because of the range of additional protections afforded to judges, including security of tenure, protection against demotion and pay reduction and ability to claim under s.7 HRA. This argument was rejected because it confused the difference in treatment with the grounds or reason for it. What mattered was that the claimant (and other judicial office holders) were denied the protection available to other employees and workers in relation to the exercise of their freedom of expression right. This included the right to bring claims in the employment tribunal, and to claim injury to feelings as well as injury to health.

**Supp.223** As to the third condition, the Court of Appeal considered (at para 117) that a “status” must entail a “personal” characteristic, albeit this need not be innate, inherent or exist independently from the complaint<sup>30</sup>. The Court of Appeal decided that the State was not drawing any line against judges as such: rather judges were treated differently because they had a relevant contract which was nothing to do with “personal” characteristics”. Personal characteristics were necessary to be another “status”. By contrast, the SC held (at para 32) that “an occupational classification is clearly capable of being a status”. That was consistent with the approach to the “other status” requirement adopted at both ECtHR and domestic level, which has generally been given a wide meaning not limited to personal characteristics in the sense of being

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<sup>29</sup> *Gilham* SC para 28, adopting the test originally set out in *Wandsworth LBC v Michalak* [2003] 1 WLR 617 per Brooke LJ at para 20 and developed in *Ghaidan Godin-Mendoza* [2004] 2 AC 557 (HL) per Baroness Hale at paras 133-134.

<sup>30</sup> See eg *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831 (SC) per Lady Black at paras 56,63.

innate or inherent, and has included amongst other things, being a long term prisoner<sup>31</sup>, possessing different categories of planning permission<sup>32</sup>, differences between tenants of the State and private landlords<sup>33</sup> and homelessness<sup>34,35</sup>. Lady Hale added that: “The constitutional position of a judge reinforces the view that this is indeed a recognisable status”. This reasoning does not suggest a narrow application confined to judges but of possible wider application. As Lady Hale put it, “it is the very classification of the judge as a non-contractual office holder that takes her out of the whistle-blowing protection which is enjoyed by employees”.

**Supp.224** As to whether there was reasonable justification for the difference which was identified, the respondent argued that the Court should allow a broad margin of discretion as to the choices made by Parliament. The respondent had referred to *R (Carson) v Sec of State for Work & Pensions* [2006] 1 AC 173 where at para 16 it was stated that:

“decisions about the general public interest which underpin differences in treatment...are very much a matter for the democratically elected branches of government”.

The respondent’s argument was in two parts.

- Firstly that in the context of socio-economic policy the correct test was whether the exclusion for Judges was “manifestly without reasonable foundation”. Lady Hale (at para 34) distinguished cases applying that test as having been applied in the context of the welfare benefit system, and noted that it had not always been applied in the context of social or economic policy.
- Secondly that, where the matter was within the field of social policy, various, sometimes complex distinctions need to be drawn by Parliament in setting the limits of who was included: where the ground of distinction was not one of the core grounds within Article 14 (such as discrimination by reason of a protected characteristic), a wide margin was to be given to the decision made by Parliament. The Court of Appeal had recognised at para 129 that

“this is a context in which the court should tread with care in case it inadvertently (but impermissibly) interferes in an area which is within the province of the democratically elected legislature”.

Lady Hale agreed that the courts might need to recognise that difficult decisions sometimes needed to be made as between the rights of individuals and the needs of society, so that the Courts might have to “defer to the considered opinion of

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<sup>31</sup> *Clift v United Kingdom* [2010] ECHR 7205/07.

<sup>32</sup> *Pine Valley Developments Ltd v Ireland* [1993] 16 EHRR 379.

<sup>33</sup> *Larkos v Cyprus* (1999) 30 EHRR 597

<sup>34</sup> *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311

<sup>35</sup> See the survey of cases in Lady Black’s speech in *Stott* at paras 23-63.

the elected decision-maker” (para 35). But there was no evidence that the executive or Parliament had addressed their minds to the exclusion of the judiciary from protection. Thus no legitimate aim had been put forward for exclusion (para 36). It was not explained how denying the judiciary the protection could enhance judicial independence.

**Supp.225** Thus there was “no considered opinion to which to defer”. It might be observed whilst various additional groups (such as police officers) have been brought within the scope of the legislation since it was introduced, there has been no general revocation of the requirement for a contractual relationship. As such it may be questioned whether the legislative intention to maintain the requirement for a contractual relationship is really undermined by the absence of consideration of each individual classification of worker to whom it might apply. In any event the Supreme Court’s approach suggests that greater difficulty may be encountered in challenging exclusions from protection that can clearly be shown to have been in the legislature’s mind when setting the limits of protection.

#### *Remedy*

**Supp.226** The Supreme Court fashioned an appropriate remedy by reading “worker” within limb b of the worker definition in ERA as encompassing holders of judicial office. In the EAT, Simler J had concluded that a fundamental feature of the definition of worker was the requirement for the existence of a contract, and that this was reinforced by the specific and carefully limited exceptions introduced in s.43K ERA. However the Supreme Court found this unconvincing, particularly where including judicial office-holders would only relate to an exclusion that was inconsistent with Convention rights. Instead there was a rather more holistic approach to the scheme of the legislation. That scheme broadly encourages disclosure to the employer or others responsible for the conduct in question. Their identity could readily be ascertained despite the division in responsibilities for judges. Rather than going against the grain of the statute, it was a necessary amendment so as to comply with the strong interpretative obligation under s.3 of the Human Rights Act 1998 that, so far as possible, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. This had the positive effect that the claim could be brought in the employment tribunal which was seen as having positive virtues as the appropriate forum for such disputes in *Michalak v GMC* (esp at paras 15, 16 and 19).

#### *Implications*

**Supp.227** Various other exclusions from whistleblowing protection may now be called into question in the light of the reasoning in *Gilham*. One point of distinction from *Gilham* would be that where there is a private employer it would be necessary to establish a positive obligation on the State. In *Bates van Winkelhof v Clyde & Co LLP* [2014] 1 WLR 2047 (SC) Lady Hale noted (at para 44) that whilst it was comparatively

easy to see where it was necessary to prevent the State acting incompatibly with Convention rights by virtue of negative obligations upon the State, it was “*a little more difficult to assess whether and when this is necessary to afford one person a remedy against another person which she would not otherwise have had.*” However Article 14 may be relied upon as providing an answer to this issue. It might be said that irrespective of whether there would otherwise be a positive obligation on the State, where it has provided protected disclosure protection to others in an analogous position, an exclusion based on lack of a direct contractual relationship requires justification as being proportionate to a legitimate aim.

**Supp.228** Against that context there are at least the following categories of broad categories where the issue may arise:

1. Requirement for a contractual relationship: Generally the definition of worker in s.230(1)(b) requires a direct contractual relationship. That would for example exclude volunteers. It has been said that even in relation to s.43K(1)(a) ERA, there is a requirement for a direct contractual relationship<sup>36</sup>, although in the Main Work (at 6.35) we question whether that is correct. The requirement for a contractual relationship might now be challenged relying on the reasoning in *Gilham*, on the basis that being a volunteer, or an agency worker with no direct contractual relationship with the end user, or otherwise a worker other than pursuant to a direct contract, is capable of being some “other status” within Article 14. If so, the focus would shift to whether the exclusion is proportionate to a legitimate aim, and in that context whether there is to be a lower standard applied on the basis that the legislature has considered the issue by virtue of the requirement for a contractual relationship.
2. Exclusions based on the personal service requirement: Ordinarily in order to be protected as a worker there is a personal service requirement. Again this might be challenged relying on the broad meaning given to “other status”. However given the express provision for a limited exception in s.43K(1)(b) ERA, this would seem to be an area where, if a legitimate aim can be identified for the exclusion, it may be argued that the Court should defer to the “considered opinion” of the legislature.
3. Applicants for employment: Subject to narrow exceptions set out in s.49B and 49C ERA, applicants for employment fall outside the protected disclosure provisions. Again, extrapolating from the reasoning in *Gilham*, reliance might be placed on Article 14 (in conjunction with Article 10), either by comparison with those who have become workers, or with the categories of applicants who are protected.

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<sup>36</sup> *Bamieh v Kosovo* UKEAT/0268/16, 19<sup>th</sup> January 2018; *Sharpe v Worcester Diocesan Board of Finance Ltd and another* [2015] ICR 1241 (CA).

In support of protection, for example in response to any argument that the exclusion is proportionate to a legitimate aim, it might be argued that the protection is narrower than the scope of protection required in relation to whistleblowing about EU rights in the new Directive 2019/1937, which although not directly applicable in the UK due to Brexit might be said to embody an EU wide consensus (see Supp.13-32 above). The Directive covers persons whose “work-based relationship is yet to begin” where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations (Art 4(3)). On its face this might appear to leave some ambiguity as to whether it applies to all applicants or only individuals who have been recruited but not yet started work. However as noted above (at Supp.24) when read together with Recital 37, a broad interpretation would appear to be appropriate.

4. Express exclusions: There are a number of express exclusions from whistleblowing protection such as Parliamentary staff and the armed forces, and on grounds of national security (covering e.g. GCHQ); s193 ERA<sup>37</sup>. The reasoning in *Gilham* turns attention to whether these can be said to be proportionate to a legitimate aim. However in contrast to the position in *Gilham* there is likely to be a significantly lower bar for justification given the weight to be given to the “considered opinion of the elected decision-maker”, and in addition, even allowing for the strong interpretative obligation, difficulty may arise in adopting interpreting the legislation to read out these exclusions.
5. Those associated with a disclosure or perceived disclosure:
  - 5.1 As discussed above (Supp.33-37), in *Bilsbrough v Berry Marketing Services Ltd* Case No. 1401692/2018, 5<sup>th</sup> July 2019, the ET considered that reliance could be placed on A.10 (without reliance on A.14) to extend protection to perceived disclosures. However there would appear to be a formidable argument that this goes against the grain of the legislation which is constructed around the reasonable belief tests for a qualifying disclosure.
  - 5.2 Those who facilitate a disclosure (see Supp.38-44 above) or who are otherwise associated with the disclosure (eg by standing up for the person who made the disclosure). Again, this is a category which, at least to some extent, falls within the scope of the new Directive. An initial issue arises as to whether this could be regarded as a status (eg whistleblower supporter). It might be said that the issue as to the limits of protection, and confining it to those who have made the disclosure, has been clearly considered by the legislature, and as such this affects the level of scrutiny if a legitimate aim can be identified. As to whether it goes with the grain

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<sup>37</sup> See pages 168-173 of *Whistleblowing Law & Practice* Third edition, J Lewis, J Bowers, M Fodder & J Mitchell, OUP, 2017.

of the legislation, some different issues arise from perceived disclosures. Issues would also arise as to whether this would go with the grain of the legislation. If for example the issue concerns someone who stands up for a person who has made a protected disclosure, could the reasonable belief tests be said to be satisfied on the basis of the beliefs of the person who made the disclosure, or could the legislation be read to apply on the basis of the state of beliefs of the person in effect claiming associative victimisation?

### **Workers whose Employment is not Confined to England and Wales: The territorial scope of ERA, sections 47B and 103A**

#### *The sufficient connection test and whether different principles apply in whistleblowing cases*

#### **Paragraph 6.122 and 6.131: *British Council v Jeffery; Green v SIG Trading Ltd***

**Supp.229** See now *British Council v Jeffery; Green v SIG Trading Ltd* [2018] EWCA Civ 2253, [2019] ICR 929 (CA). Jeffery lived in Bangladesh, where he worked for the British Council. The ET held that it had no jurisdiction to entertain his claims of unfair dismissal, whistleblower detriment and discrimination, but the EAT reversed that decision. Green lived in Lebanon and was employed by the respondent, SIG Trading Ltd ("SIG"), to work for it in Saudi Arabia. The EAT upheld the ET's decision that it had no jurisdiction to entertain his claims of whistleblower detriment and unfair dismissal. The first issue that was common to the appeals was whether the "sufficient connection" question is to be characterised as a question of fact or law: the importance of the characterisation being that it determines the scope of the review permissible on appeal. By a majority the Court of Appeal (Longmore and Peter Jackson LJJ, Underhill VP dissenting though agreeing on the substantive disposition) ruled that it was a question of law. The second issue was whether, in answering the sufficient connection question, it is relevant that the contract of employment contains a provision to the effect that it will be governed by English law. The Court held (unanimously) that it was relevant to the assessment.

**Supp.230** In *Green* permission was given to take a point not argued in the ET or the EAT based primarily on article 10 of the European Convention on Human Rights, protecting freedom of expression. The ground, as developed on behalf of Mr Green, was that

- His claims were that he had been subjected to detriments, and ultimately dismissed, for making protected disclosures - in other words, for whistleblowing.
- It was well-established that article 10 encompasses the right of a worker to make responsible disclosures relating to his or her employment, and that Convention states are required to ensure that the right is effectively protected in law - see

*Heinisch v Germany* [2011] IRLR 922 (which is dealt with in Chapter 18 of the Main Work).

- If a point was taken on where the acts complained of, or the disclosures, occurred, the effect of the phrase "regardless of frontiers" in article 10 (1) is that the worker is entitled to protection wherever the disclosure or the breach of his or her rights occurred – reliance was placed on *Cox v Turkey* [2010] ECHR 700, *Women on Waves v Portugal* [2011] ECHR 1693 and *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546.
- On this basis, the primary submission for Mr Green was that it was sufficient if he was physically present in Great Britain or alternatively it was enough that the act complained of - i.e. the detriment - occurred or was decided on in Great Britain. A fall back submission was that article 10 would require the employment tribunal to assume jurisdiction where there was a sufficient "nexus" with Great Britain; and that such a nexus existed in the present case (a) because SIG was an English company, and (b) because the acts complained of (or in any event most of them) occurred in England - i.e. because most of them (including the dismissal) consisted of telephone fax or e-mail communications from SIG managers in England to Mr Green in KSA.
- It followed that the UK would be in breach of its rights under the Convention if Mr Green was unable to bring proceedings to obtain an effective remedy for the detriments (including dismissal) that he had, as alleged, suffered for making protected disclosures.
- It was open to the Court to exercise its powers under section 3 of the Human Rights Act 1998 to interpret the ERA as conferring jurisdiction on the ET to determine those claims notwithstanding that Mr Green was employed outside Great Britain and that he fell outside the territorial reach of the ERA for the purpose of other provisions of the Act: sections 48 (1A) and 111 (1) of the 1996 Act should be treated as if they read (with the added words italicised):
  - [s.48 (1A) ERA] "A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B *and where the act or deliberate failure to act complained of was done in Great Britain.*"
  - [s.111 (1) ERA] "A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. *Where the dismissal is alleged to be unfair by virtue of section 103A an employment tribunal may consider a complaint where the dismissal was decided upon in Great Britain.*"

**Supp.231** Underhill VP said that the primary submission was, "to say the least, extravagant" and he had no hesitation in rejecting it. It would mean that if a Japanese employee working in Japan for a Japanese company were, while he was on a one-day business trip to London, rebuked by his manager for making a disclosure or were so

rebuked in Japan over the phone by his manager who was temporarily in London - the employment tribunal would have jurisdiction. The Convention could not on any view be interpreted as treating so adventitious a connection as bringing a worker within the jurisdiction of the UK.

**Supp.232** Underhill VP had “hardly less hesitation” in rejecting the fallback submission. In the case of protected rights arising out of an employment relationship with a foreign element the dispositive question must be whether the relationship is within the jurisdiction of the state in question, rather than depending on the chance of where a particular act is done or whether the worker happens to be within its territory at any particular moment.

**Supp.233** Underhill VP considered that, whilst there may be cases where for the purposes of the Convention a State is to be treated as having jurisdiction over an employment relationship even though it does not itself seek to exercise such a jurisdiction, in the generality of cases there was no reason why the jurisdictional parameters recognised by a particular State should not be respected for the purposes of the Convention. Certainly, in the present case, he could see no reason why the Convention should be understood as requiring the UK to exercise a more extensive jurisdiction than is established by reference to the *Lawson/Ravat* principles. Indeed he could see very good reason why it should not, in that Convention rights may be engaged in a variety of different ways in the context of the rights afforded by the ERA and the Equality Act 2010. Apart from article 10, articles 8, 9, 11 and 14 were frequently invoked. In Underhill VP’s view it would lead to “extraordinary incoherence and confusion” if the jurisdictional rules differed as between causes of action that do or do not engage a Convention right.

**Supp.234** A similar argument for Mr Green under article 11 of the EU Charter of Fundamental Rights also failed. Underhill VP said that the submissions ignored the essential starting-point, which was to establish that the Convention applied to the treatment of Mr Green in the first place. Article 1 of the Convention provides that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. So the question was whether, for the relevant purposes, Mr Green was "within [the] jurisdiction" of the UK.

**Supp.235** Reliance had also been placed on *Bleuse* (see para 6.139 of the Main Work) in which Elias P had held that since, as the result of an express choice of law clause, the proper law of the claimant's contract of employment was English, an employment tribunal was obliged to seek, so far as possible, to afford the claimant the rights deriving from the EU Working Time Directive notwithstanding that he worked wholly outside Great Britain (but within the EU): see paras. 52-61 (pp. 501-3). On behalf of Mr Green it was contended that the same reasoning should apply in his case because of the rights to freedom of expression contained in the EU Charter of Fundamental Rights. Underhill VP noted that Elias P's reasoning on this point had since

been adopted by the Court of Appeal both in *Ministry of Defence v Wallis* [2011] EWCA Civ 231, [2011] ICR 617, and in *Duncombe*, in both of which the employees worked entirely in the EU. However, said Underhill VP this argument suffered from the same fundamental defect as the claim based on article 10 of the Convention. The essential first step was to establish that the Charter applied to employments where the employee works wholly outside not only the UK but the EU. It did not.

**Supp.236** Underhill VP noted that the EAT had reached the same conclusion in *Smania* (see paragraphs 6.136 to 6.140 of the Main Work) and that Simler P had followed *Smania* in *Bamieh* (see Supp.237-254 below) saying, at para. 132 of her judgment, "there is no obvious justification for introducing a more generous test of extraterritoriality in cases involving whistleblowing."

#### ***Bamieh: claims against co workers***

**Supp.237** In *Bamieh v (1) Eulex Kosovo (2) Foreign & Commonwealth Office (3) Mr G Meucci (5) Ms C Fearon (6) Mr J Ratel* UKEAT/0268/16/RN, 19<sup>th</sup> January 2018; [2019] IRLR. 736 (CA), Ms Bamieh was employed by the FCO and seconded to work as an international prosecutor for EULEX in Kosovo. EULEX is a multinational Rule of Law mission established by an EU Council Decision under the Common Foreign and Security Policy of the EU (the Council Joint Action 2008/124/CFSP, "the Joint Action"). When her employment came to an end, she brought protected disclosure detriment and unfair dismissal claims against the FCO, EULEX and a number of individuals who worked in Kosovo for EULEX. The FCO accepted that the Tribunal had extraterritorial jurisdiction against it. The ET held that there was no jurisdiction to hear any of Ms Bamieh's claims against respondents other than the FCO.

**Supp.238** The ET held that

1. EULEX has no domestic legal personality;
2. Even if EULEX had domestic legal personality, the ET had no territorial jurisdiction over acts done by EULEX or Mr Meucci (who was the Head of Mission). In common with other contributing countries, the FCO had no control over or relationship with EULEX, though it sends staff on secondment to EULEX;
3. The ET had no territorial jurisdiction in respect of the unlawful detriment claims against Mr Ratel and Ms Fearon who had both been seconded by the FCO to work for EULEX;
4. Neither EULEX nor its Head of Mission acted as agents of the FCO so as to make themselves liable under s. 47B(1A) ERA, or the FCO vicariously liable for their acts or omissions in Kosovo. Although the FCO contributed to the EULEX mission, it worked for the European External Action Service ("EEAS") and not for the FCO at all. As Head of Mission, Mr Meucci had no role in relation to the FCO, and if he was agent for any country, it would have been Italy;

5. Neither Article 6 or 10 of the European Convention on Human Rights give an extended right to a “European” remedy in Kosovo. Further, the EU Charter of Fundamental Rights could not assist as there is no EU right to enforce in this case.
6. No decision was made on whether EULEX and/or Mr Meucci had submitted to the jurisdiction;
7. The Joint Action determined the capacities of the respondents. It did not intend that EULEX or Mr Meucci should be Ms Bamieh’s employer.

**Supp.239** Ms Bamieh challenged some (but not all) of these conclusions. Save for the conclusion at (3) that the Employment Tribunal had no territorial jurisdiction in relation to whistleblowing detriment complaints against Mr Ratel and Ms Fearon, all grounds of appeal failed and were dismissed, substantially for the reasons given by the ET. The appeal was however upheld in relation to extraterritorial jurisdiction in respect of Mr Ratel and Ms Fearon. The EAT held that there was an exceptionally strong connection between them and Great Britain and British employment law, and that was the only conclusion available so that claims against them should not have been struck out.

**Supp.240** We address below those points in the judgment which are of particular relevance to whistleblowing claims. As we explain in more detail below *Bamieh* was appealed to the Court of Appeal. The Court of Appeal [2019] IRLR 736, (Gross LJ giving the substantive judgment with which Lewison and Singh LJJ agreed), allowed the appeal of the FCO and the co-workers and restored the decision of the ET that there was no extra territorial jurisdiction under the ERA in respect of the whistleblowing detriment claims pursued by Ms Bamieh against the co-workers.

*The 43K point*

**Supp.241** The ET’s findings made it clear that the claimant’s contracts of employment were, throughout, with the FCO; and that English law applied. EJ Wade made no express finding of any express or implied contract with EULEX. It was submitted however that there was liability under s.43K ERA on the basis that the terms on which she was engaged were in practice substantially determined by EULEX, with whom she had a line manager and a second line manager. Simler P did not accept this. First, the point was not in issue and was not therefore properly investigated or addressed by the respondents in their evidence and submission. For that reason Simler P refused permission to amend to add this additional ground. Secondly, Simler P considered that the Court of Appeal had made clear in *Sharpe v The Bishop of Worcester* [2015] EWCA Civ 399 that there must be a contract between the two parties for the extended definition of worker under s. 43K(1)(a) or (b) ERA to apply (see the Main Work at paragraph 6.35). The ET had made no finding that there was a contract of any kind between EULEX and Ms Bamieh; and the findings of fact did not obviously support an inference that there was one, still less was it an inevitable inference. Ms Bamieh was obliged to comply with directions from her line managers in Kosovo but that was as a consequence of her contract with the FCO which required her to do so. It was unnecessary to imply any contract between Ms Bamieh and EULEX (or Mr Meucci).

*The point relating to territorial jurisdiction over the individual named respondents*

**Supp.242** The individual respondents, Ms Fearon and Mr Ratel, had been seconded by the FCO to work for EULEX in Kosovo. Ms Bamieh alleged that Ms Fearon and Mr Ratel subjected her to unlawful detriments in the course of their employment by the FCO because she made protected disclosures. Simler P concluded that the ET had erred in relation to the assessment of territorial jurisdiction by wrongly focussing on the co-worker's base when assessing whether there was a sufficiently strong connection with GB. She reasoned that a foreign base and employment, though usually decisive, could be overcome where the connection with Great Britain and British employment law was sufficiently strong. She also rejected a contention that if the co-workers were not domiciled in GB that was decisive. In concluding that there was a sufficient connection with GB, Simler P took into account a range of factors including:

1. the co-workers worked under secondment contracts with the FCO in Kosovo;
2. their contracts of employment were with the UK Government and governed by English law;
3. they were required to conduct themselves consistently with their position as representatives of Her Majesty's Government;
4. they were bound by the terms of the Official Secrets Act 1989;
5. they were UK passport holders; and
6. whilst they carried out work wholly in Kosovo and were not resident in the UK, they were paid in sterling and paid national insurance contributions (but were not UK resident for tax purposes).

Accordingly, both Ms Bamieh and the two co-workers were all employed by the UK Government to discharge the UK's obligations in European law. EULEX was the means by which those obligations were managed and controlled.

**Supp.243** The Court of Appeal disagreed, and allowed the appeal of the FCO/co-workers. Gross LJ first addressed an argument that the Brussels Regulation<sup>38</sup> pointed towards a policy against co-workers being sued other than in their country of domicile and that the territorial reach of the legislation should be construed consistently with this. Rejecting this contention, Gross LJ stated (at para 51) that the Brussels Regulation was not concerned with which court should hear a claim; it had nothing to say on the content of the substantive law applicable to a claim or the extraterritorial application of the ERA.

**Supp.244** Gross LJ also agreed with Simler P that the co-workers' "base" was not in any way dispositive, although the position might be different when an employee working abroad sought to invoke the jurisdiction of the ET in an unfair dismissal claim against his/her employer rather than a co-worker. The test of whether there was a sufficiently strong connection with GB to establish jurisdiction called for an intense consideration of the factual reality of the employment in question focussing on the individual circumstances, and had to be adapted in the case of individual (rather than employer)

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<sup>38</sup> Council Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

liability to included consideration of the relationship between the claimant and the co-worker in question. In relation to this, the Court accepted the FCO's contention that the correct focus was on the relationship between the claimant and the co-worker respondent, rather than on the relationships between Ms Bamieh and the co-workers with the FCO, their common employer. Whilst it was necessary for Ms Bamieh and the co-workers to have a common employer to found a claim under s.47B(1A) ERA, the fact that there was a common employer was not sufficient to determine that s.47B(1A) applied extraterritorially to the relationship between them. Instead, the focus was on the factual reality of the relationships concerned. Ms Bamieh's case needed to surmount two hurdles to warrant the application of s.47B(1A), ERA to her relationship with her co-workers as seconded EULEX staff members, which were:

- extraterritoriality, itself calling for an exceptional application of the statute.
- the need to establish a sufficient connection between the common engagement of herself and the co-workers at EULEX, and British employment law.

**Supp.245** Here the common employment by the FCO was little more than happenstance. No doubt but for their employment and secondment by the FCO none of Ms Bamieh and the co-workers would have been in Kosovo at all; but the key relationship upon which Ms Bamieh's whistleblower detriment claim against the co-workers turned arose not by reason of the FCO being their common employer but instead from the conduct of their EULEX roles. As to this, the Court highlighted that Ms Bamieh and the co-workers:

- had never worked together in the UK; they worked together solely in Kosovo.
- were seconded to EULEX separately not together; that they were in post together at all was a matter of coincidence.
- were only brought into contact at all through their performance of their respective EULEX roles at theatre level, not by reason of the FCO being their common employer. They were in Kosovo, to act in the "sole interest of the mission" and, so far as concerned Ms Bamieh, to report to and take lawful instructions from her EULEX manager. Thus, Mr Ratel became Ms Bamieh's line manager in succession to a line manager who was not a FCO secondee, and himself reported to a Czech line manager, also not a FCO secondee. Ms Fearon was Special Adviser to the EULEX HoM; her predecessor was French; as EJ Wade held, when advising the HoM, Ms Fearon saw herself "as loyal to EULEX first and FCO second".

**Supp.246** Accordingly although the contracts of employment of Ms Bamieh and the co-workers were governed by English law and whilst they all owed duties to HMG, the centre of gravity of the relevant relationship between them was to be found in the theatre level performance of their EULEX roles, rather than their underlying FCO contracts of employment. The correct point of focus therefore had to be the relationship between Ms Bamieh and the co-workers as seconded EULEX staff members. EULEX was an international mission, not a UK mission. In EJ Wade's words the base of Ms Bamieh and the co-workers was "...the international world that was EULEX not the territorial bubble of the UK". Insofar as EULEX was an enclave at all, it was an international enclave not a UK enclave – and, unlike the position in *Duncombe*

there was no or no sufficient reason for the default option here to be found in British employment law. All matters considered, the British connection was not or, at most, insufficiently, established. The combination of extraterritoriality and the international setting of EULEX were fatal to Ms Bamieh's case.

**Supp.247** Gross LJ also noted that there was confirmation of, or at least support for, this conclusion in the provision for the choice of law of the tort in question (if there was tortious conduct) based on the application of Article 4 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II"), which was applicable given that the relationship between Ms Bamieh and the co-workers was non-contractual. Art. 4 provides as follows:

"1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the county or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

**Supp.248** Gross LJ noted that plainly Art. 4.1 pointed to Kosovan law rather than English law. On the facts, Art. 4.2 did not point to British law; neither Mr Ratel nor Ms Fearon had their "habitual residence" in the UK even if that could be said of Ms Bamieh (indeed if Ms Bamieh was habitually resident in Kosovo it might be that Art. 4.2 would likewise point to Kosovan law, though it was unnecessary to reach a firm conclusion as to this). So the only route to English law under Rome II would be by way of Art. 4.3. This required a "still more searching inquiry than that already undertaken". The tort of whistleblowing detriment, if tort there was, had to be found in the context of the relationship between Ms Bamieh and the co-workers as seconded EULEX staff members, but as set out above, the EULEX co-worker relationship furnished an inadequate basis for underpinning such an Art. 4.3 argument. here could be no such foundation unless the governing law of the tort in question was English (or British). The crucial linkage between choice of law and extraterritorial jurisdiction had been highlighted by Lord Hoffmann in *Lawson* (at paragraph 1 of his speech).

**Supp.249** Gross LJ also referred to the need to take into account the practical consequences. These too supported the conclusion he had reached. As to this:

1. First, the absence of an international consensus on whistleblowing, even more so with regard to the personal liability of co-workers (where the UK might be regarded as an outlier), applying the ERA whistleblowing provisions extraterritorially might create real

difficulties for the administration of EULEX. The Court would be applying a UK policy solution to an international mission, which the UK does not control.

2. Secondly a decision against the extraterritorial application of the ERA whistleblowing protection provisions would not result in the regressive and “seismic” consequences for the pursuit of other claims, such as discrimination or sexual harassment claims. In these other areas there was a far greater international consensus than there was in respect of whistleblowing, so the risk of conflict between different national systems of law was significantly reduced. Curtailing the extraterritorial scope of whistleblowing protection did not necessarily curtail claims under the Equality Act 2010.
3. Third, Gross LJ considered that there was practical force in the FCO concern that the EAT judgment would expose it to liability for matters over which it had no control – in that “it had no power to implement, unilaterally and effectively, a whistleblowing policy for EULEX based on British law” (para 81). There would be obvious ramifications for UK secondees to other international missions from the FCO and other government departments and agencies.

**Supp.250** Gross LJ noted that it had been argued that the relationship between Ms Bamieh and the co-workers had no connection with any system of law other than English law; that argument found favour with Simler P (EAT judgment, at [121]). Gross LJ disagreed: the relationship in question had a closer connection with EU law, alternatively (as a fallback) Kosovan law, than it did with English law. It was strength of the connection which mattered – not the strength of the protection.

#### *The ECHR and Charter points*

**Supp.251** It was Ms Bamieh’s case that Article 10 of the Convention has wide application and the rights which it guarantees are to be exercised “regardless of frontiers” requiring positive state protection for whistleblowers and affording her a right to an effective remedy against all respondents in this case for unlawful, detrimental treatment following her whistleblowing complaints. It was argued that to the extent that domestic law is limited territorially or otherwise, so as to prevent her from pursuing claims under the ERA against any of the respondents, the relevant legislation could be interpreted compatibly in accordance with the strong interpretive obligation under s. 3 of the Human Rights Act 1998, so as to afford her a right to a remedy in each case. It was submitted in the alternative, that where the law operates as a bar to any of her claims being pursued without consideration of their merits, this constitutes a breach of Article 6 (and Article 47 of the Charter). Any such bar must be justified by reference to a legitimate aim to which the infringement is proportionate.

**Supp.252** Simler P said that her conclusions that the ERA *did* afford a cause of action in domestic law that extended to the actions of Ms Fearon and Mr Ratel in addition to the FCO had been reached without reference to Convention or Charter rights. She also expressed the view that there was no obvious justification for introducing a more generous

test of extraterritoriality in cases involving whistleblowing. As discussed above (Supp.229-236), that view has since been confirmed in *Jeffery v British Council* [2019] ICR 929 (CA).

**Supp.253** In relation to EULEX (and/or Mr Meucci in his representative capacity as Head of Mission), as a matter of domestic law EULEX had no legal personality as a Mission and the unchallenged finding of EJ Wade was that there is no territorial jurisdiction in respect of EULEX which was based only in Kosovo and staffed by people drawn from many countries. Exceptional circumstances were required to found a non-territorial jurisdiction for Convention rights. Exceptions had been recognised and developed in the Strasbourg jurisprudence: see *Al Skeini v United Kingdom* (2011) 53 EHRR 589 (paragraphs 131 to 137) where the ECHR held that as an exception to the principle of territoriality, a contracting state's jurisdiction under article 1 of the convention may extend to acts of its authorities which produced effects outside its own territory. However EULEX and Mr Meucci were not diplomatic or consular agents of the UK, and nor were Ms Fearon or Mr Ratel such agents. The mere involvement of state agents was not enough. What they did had to amount to the exercise of authority and control, and what was decisive in such cases is the exercise of physical power and control over the person in question. The effective control of an area as the foundation for an extension of the territorial jurisdiction of the Convention could not arise unless the member state acting outside the legal space of the Convention has such a degree of control of an area or over the person that it acquired the capacity to determine or control events there or was in a position to secure the relevant Convention right relied on.

**Supp.254** Here there was no basis for the submission that Kosovo ceded control over the conduct of criminal trials to the UK or the EU. Even if it did, Ms Bamieh was not the subject of a criminal trial in Kosovo, so that even if control over the conduct of criminal trials has been ceded to the EU (or the FCO) through EULEX, it was unclear how that related to the exercise of control over Ms Bamieh herself. To the extent that EULEX exercised day to day line management over Ms Bamieh that was not state control and was insufficient. Compelling evidence would have been required to establish that either the FCO or the EU exercised the required authority and control in Kosovo. There was no sufficient factual basis for a conclusion that state agents of the UK or the EU (through EULEX) were in a position to secure Ms Bamieh's Article 10 rights in Kosovo or exerted control and authority over her to a sufficient extent so as to engage their Convention obligations in Kosovo. Accordingly, there was no proper basis for concluding that the EJ's decision that Kosovo was not under the state control of the UK was in error of law or perverse and Ms Bamieh had no cause of action against EULEX in Kosovo in respect of which Article 6 rights could bite.

### **Paragraph 6.35: Requirement for contractual relationship?**

**Supp.255** As to the requirement for a contractual relationship for the purposes of s.43K(1)(a), see *Bamieh* and *Gilham* discussed above, at Supp.215-228 and 237-254.

## **Scope for claim in tort to fill the gap where protected disclosure claims are excluded by extra-territoriality?**

### **(1) *Rihan*: overview of the facts**

**Supp.256** In circumstances where there cannot be a claim under the statutory protected disclosure provisions because of extra-territoriality (and where there are no equivalent local protections), there may be scope, if the employment relationship is subject to English law, for this gap to be filled by a claim in tort. The scope for such a claim is highlighted by the decision of Kerr J in *Rihan v Ernst & Young Global Ltd and others* [2020] EWHC 901 (QB). Here the claimant, Mr Rihan, brought claims for negligence and conspiracy to injure arising from his involvement on behalf of Ernst & Young in an “assurance” audit of a Dubai based precious metals dealer. The defendants were United Kingdom based limited companies and limited liability partnerships (LLPs) within the EY network. The second defendant (EY Europe) is a member body of the Institute of Chartered Accountants of England and Wales (ICAEW). The ICAEW is a member body of the International Federation of Accountants (IFAC). Mr Amjad Rihan was formerly a partner of Ernst & Young Middle East & North Africa Limited (EY MENA) which was *not* a defendant. Mr Rihan was the ‘engagement partner’ on a ‘conflict minerals’ audit of a leading Dubai gold refiner, Kaloti Jewelry International. The audit was conducted by EY MENA in 2013. The purpose of the assurance audit was to provide an independent written view on the quality and propriety of the Kaloti’s business practices, particularly its gold sourcing practices. The audit was supposed to assess Kaloti’s practices against standards set by the Dubai Multi Commodities Centre (DMCC), the regulator set up by the government of Dubai, and the London Bullion Market Association (LBMA). As Kerr J put it, an assurance audit is not a financial audit but shares some of the characteristics of a financial audit. The word “assurance” is used because the auditor’s written views are intended to assure a reader of the auditor’s assurance report that the audit client’s business practices, in the auditor’s independent view, are as stated in the report.

**Supp.257** Mr Rihan’s case was that early in the audit he became aware of serious irregularities which, as the defendants accepted, gave rise to a reasonable suspicion that Kaloti was involved in money laundering. Mr Rihan’s case was that he informed DMCC of these irregularities and that DMCC then progressively put improper pressure on Mr Rihan and EY Dubai to the reporting in a way that would reduce to vanishing point the visibility of the relevant transactions, thereby misleading readers of relevant reporting documents into thinking that Kaloti’s business practices were essentially sound, when clearly they were not. Mr Rihan resisted this and, with the agreement and encouragement of his line manager, escalated the matter to the defendants’ representatives at regional and global level. He claimed that senior officers acting on behalf of the defendants, whilst professing to take his concerns seriously and engage with them, then made and developed proposals that amounted to acquiescing with DMCC’s agenda and protecting Kaloti against adverse audit findings and preventing them being made public. Mr Rihan claimed that when he protested against this, and argued that there was an obligation to report the concerns to the London Bullion Market Association (LBMA), his concerns were dismissed. He refused to sign the assurance audit in

the form proposed and was then replaced as audit partner by an accountant who helped DMCC and Kaloti to conceal the findings.

**Supp.258** EY then required him to return to Dubai despite his expressed safety concerns, which Mr Rihan refused to do. He then approached a non-governmental organisation and disclosed the gist of his concerns, though not at that stage in the public domain. His lawyers then warned EY that if it did not itself disclose the findings and address his claims for compensation he would disclose the wrongdoing he had found to mass media organisations as a whistleblower. He then resigned and did so. In his claim against EY Mr Rihan claimed that his career with the EY network had been ruined and that his employment prospects and earning capacity had been largely destroyed. It was accepted that the dispute was subject to English law. Because Mr Rihan had been working outside the United Kingdom, he was not able to pursue statutory protected disclosure claims that are the exclusive jurisdiction of employment tribunals. Instead he argued that the defendants had acted in breach of duties of care owed to him.

## **(2) Duty of care to be protected against post-termination economic loss?**

**Supp.259** The duty of care was put on two alternative bases. Mr Rihan argued that the defendants owed a duty him, referred to as the “Safety Duty”, to take reasonable steps to prevent the claimant from sustaining financial loss, i.e. loss of earnings, as a result of his reasonably apprehended concerns for his safety and that of his family, if he were to return to Dubai. This contention was rejected. Kerr J concluded (at 467-489) that it would not be legitimate to extend an employer’s duty to safeguard its employees against personal injury to a duty to safeguard them against pure economic losses arising from the employee’s need to cease working to avoid a perceived threat to the employee’s safety. Protection of purely economic interests was not within the scope of the duty to provide a safe place and system of work.

**Supp.260** However the alternative basis on which the case was put succeeded. In the circumstances of the case it was found the defendants owed Mr Rihan a duty (referred to as the “Audit Duty”) to take reasonable steps to prevent him from suffering financial loss, i.e. loss of earnings, by reason of the defendants’ failure to ensure that the Kaloti audit was conducted in an ethical and professional manner. Kerr J noted that law does not recognise any general duty, whether in negligence or as part of the implied term of trust and confidence, to protect the employee against economic loss suffered after the termination of employment [569]. Nor does such an obligation turn on whether there is a direct contractual relationship; the presence or absence of contractual relationship determines whether the cause of action must be in tort or contract rather than whether the duty to protect against loss after the end of the relationship arises [572]. An important factor in relation to whether the duty exceptionally arises is the quality of the defendant’s conduct. If the conduct is immoral and unethical and causes serious unjustified financial harm that is a pointer towards a duty of care (or the contractual equivalent). If the conduct is only careless but causes serious and unjustified harm that is a less strong indicator but it is still an indicator that a duty should be recognised [575].

**Supp.261** Kerr J then turned to consider the three elements necessary for the imposition of a duty of care namely, that of foreseeability, proximity and whether it is fair, just and reasonable for the duty to be imposed [579]. He concluded that so far as concerned the Kaloti audit (but not otherwise) there was a sufficiently proximate relationship between he and the defendants. His role and the escalation of his concerns involved dealing with the relevant individuals at a global level to a major extent [583]. Whilst he was a partner of and had a contractual relationship with EY MENA, which was not a party, he had many duties of collaboration and cooperation with persons and bodies above it in the EY global hierarchy [586]. It was readily foreseeable that he would suffer financial loss if the Kaloti audit was conducted and concluded in a manner which he considered unethical and unacceptable [587]. Indeed through the escalation of his concerns and meetings/ discussions around these, it became progressively clearer to those acting for EY that he would feel bound to disassociate himself from the audit and EY's role in it, if his protests went unheeded [587]. It was obvious that this would involve financial loss through sacrificing his career with EY [588]. Indeed Kerr J commented (at [590]) that:

“It is generally known to professional persons such as accountants that to become a whistleblower often involves a major risk of financial loss through subsequent ‘unemployability’”

**Supp.262** EY argued that although it was foreseeable that Mr Rihan would make public disclosures if he resigned, it was unforeseeable that he would make them in his own name rather than anonymously. Rejecting that submission, Kerr J noted that it would be very difficult for Mr Rihan to hide the fact that he had made the disclosures when applying to other employers given the need to explain why he had lost a good career with EY. In any event it was foreseeable that Mr Rihan would decide that the public should know about how he had been treated and that this element of the story would lose much of its force if his identity was not known [593].

**Supp.263** Kerr J further concluded that it was just, fair and reasonable to impose the Audit Duty. It simply required the defendants to do what their professional ethics already bound them to do. An important further consideration in favour of the imposition of the duty was that, for a person such as Mr Rihan, who worked outside Great Britain, a duty of care in tort was the only “gap filling” option (adopted the phrase used by Lord Steyn in *Williams v. Natural Life Health Foods Ltd* [1988] 1 WLR 830, HL at 837F-G). As Kerr J put it (at para 621-622):

“The duty is part of the obligation of the employer (or quasi-employer) to provide an acceptable work environment. The physical integrity of the employee is protected against injury by the classic duty of care to take reasonable steps to provide a safe place of work and a safe system of work. By parity of reasoning, I see no reason why, in certain circumstances, the moral and professional integrity of the employee (or quasi-employee) should not be protected by a duty to take reasonable steps to provide an ethically acceptable work environment, free of criminal conduct (see *Mahmud's* case<sup>39</sup>) and free of

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<sup>39</sup> *Malik v. Bank of Credit and Commerce International SA (in compulsory liquidation); Mahmud v. Same* [1998] AC 20, HL.

professionally unethical conduct.

Aside from the statutory regime of employment law and the jurisdiction of employment tribunals, to which I shall return in a moment, I think the law of tort would protect an employee or quasi-employee from having their career ruined by becoming “tainted with unemployability” after being embroiled by the employer or quasi-employer in unethical conduct and forced to dissociate themselves from the wrongful activity. I have already mentioned the example of the solicitor instructing a subordinate to bury a disclosable document or a barrister instructing a junior to mislead the court. A doctor instructing a more junior doctor to falsify medical notes is another obvious example.”

**Supp.264** Kerr J proceeded to find that there had been a breach of the duty. The defendants’ conduct fell to be assessed in the light of the code of ethics published by the International Federation of Accountants, and by that measure, it was unethical, improper and unprofessional. They were found to have put improper pressure on him to acquiesce or take part in concealing the wrongdoing. An audit could be ethical by the standards of the country in which it was carried out, but unethical by the standards of the IFAC Code and English law.

### **(3) Causation, remoteness and protected disclosure regime “as a shield”**

**Supp.265** Kerr J also rejected the argument that Mr Rihan’s losses were too remote or that there had been a break in the chain of causation. In this context there was some consideration as to whether the disclosures would have been protected disclosures. The defendants argued that the disclosures were unreasonable and that as such they operated to break the chain of causation and that the claimant was the author his own misfortune in having resigned and disclosed the matters to media organisations. One aspect of Mr Rihan’s response was that the fact, it was contended, that they would have been protected disclosures if the legislation had applied, showed that they should not be regarded as unreasonable. Kerr J found that the disclosures were not unreasonable and also held that the protected disclosure regime was relevant not “as a sword” (ie not relying on them directly to bring a claim) but as ‘a shield’ against the contention that the disclosures were unreasonable and so broke the chain of causation. The statutory provisions were to be taken as indicating “in general terms the policy of the law but are not to be applied mechanically to determine causation or remoteness.” [813] As such it was not appropriate to deal in detail with issues such as whether Mr Rihan was a worker. But in broad terms Kerr J considered that if the protected disclosure regime had been applied and a claim brought in time against the appropriate EY entity, Mr Rihan would have had a strong claim. In relation to the EY’s reliance on *dicta* in **Jesudason** that disclosure to the media should be the last resort, Kerr J was satisfied that the last resort had been reached. Kerr J considered that on the basis that Mr Rihan had mixed motives, in part a personal benefit to himself<sup>40</sup> and in part disclosure in the public interest, he would have been found by a Dubai Court to have committed an offence under UAE law [820]. But that did not entail that it would not have been a protected disclosure. Section 43B(3) ERA, which provides that there is not protected disclosure if a person commits an offence in making it, did not apply

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<sup>40</sup> It is not clear from the Judgment whether there was any argument as to whether the disclosure would therefore have failed to the criterion in s.43G(1)(c) ERA of not being made for personal gain, and how this applies in cases of mixed motive.

to foreign law (see further the discussion at Supp.134-137 above).

**Supp.266** It was not unreasonable for Mr Rihan to make the disclosures publicly; it was reasonable for him to consider that the matter belonged in the public domain, and it was very strongly arguable that the disclosures were in the public interest and in accordance with the policy of English law. Nor did it follow that the chain of causation had been broken simply because the disclosures were made to the media, or because they breached EY Dubai's confidentiality obligations, or constituted a criminal offence under UAE law.

**Supp.267** As to remoteness, the damage was of a type that the duty existed to prevent and it had been foreseen. Further, Kerr J emphasised that if the duty of care was to have any substance, a party who breached it by exposing the victim to the taint of involvement in unethical conduct had to expect that the victim would publicly dissociate himself from that conduct.

**Supp.268** Kerr J also rejected the contention that Mr Rihan had failed to mitigate his loss and of contributory negligence (given that he had not been bound to diminish the impact of his disclosures by making them anonymously). He concluded that had he been supported by the defendants, Mr Rihan would have continued his career with EY up to retirement. Damages were awarded of some US\$10,843,941 and £117.950.

It should be noted that the defendants have said that they intend to appeal.

#### **(4) Application beyond extra-territoriality cases**

**Supp.269** In summarising the principles to be applied in relation to whether there should be a duty of care, Kerr J noted (at para 576) that:

“the court may be unwilling to allow the common law to develop in a manner that cuts across the content of a statutory scheme ordained by parliament and occupying the same territory: *Johnson v Unisys* [2003] 1 AC 518, HL. Parliament having trodden the relevant ground, the judiciary should leave the field clear for parliament to decide if or how the law should develop within the occupied territory.”

**Supp.270** Applying this reasoning Kerr J commented (at paras 630-635) that he would not have considered that it was reasonable to impose the Audit Duty if (which was not the case due to his working being outside the UK) he could have availed himself of the statutory protected disclosure protection. It would for example have been inappropriate to enable an employee, through a claim in tort, to circumvent the time limit for bringing a claim in the ET.

**Supp.271** The reasoning however leaves open the question whether there may be other circumstances, aside from extra-territoriality, where the law of tort might be available to fill the gap where a claim under the protected disclosure legislation is not available. Clearly on the basis of Kerr J's reasoning it would not apply in the case of a worker. That would seem to apply even if the worker fell outside the scope of protection, for example because they were

subjected to unfavourable treatment due being associated with someone else's disclosure. Such a case would seem to fall squarely within the principle of being ground which Parliament had trodden and where it has chosen to limit the protection (subject to any challenge that could be made on the basis that the limits on the legislative protection should be overridden to comply with A.10, 14). It remains open to be argued whether the same would apply in relation to categories of person falling outside the definition of worker, such as an equity partner.

## **CHAPTER 7: THE RIGHT NOT TO SUFFER DETRIMENT**

### **Paragraphs 7.14 to 7.30: Meaning of detriment; unjustified sense of grievance**

**Supp.272** Consistently with the emphasis in *Tiplady* on reading across from the discrimination context, two recent decisions have re-affirmed that the test for detriment in discrimination claims also applies to s.47B ERA. As it was put in *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73 (at para 28), if a reasonable worker might consider that they were prejudiced or disadvantaged in any way, and that is the claimant's genuine view, that is enough.

**Supp.273** In *Jesudason* (discussed at Supp.187-194 above), the claimant (a paediatric surgeon) had made various external disclosures (including to the press) after the termination of his employment in which he made serious allegations against his former employer (the NHS Foundation Trust) and colleagues. There were strongly worded responses put out to the effect that all of Mr Jesudason's disclosures were false and implying they had not been made in good faith, saying he was weakening genuine whistleblowing. The EAT (UKEAT/0248/16/LA, 29<sup>th</sup> June 2018) upheld the ET's finding that this was not a detriment because they could not reasonably have been regarded as such because this had simply been responding to Mr Jesudason's allegations and putting the Trust's side of the story. The Court of Appeal held that it was an error to bring in causation/reasons why issues (as to why the statements had been put out), and that statements indicating that Mr Jesudason had made unsubstantiated allegations in bad faith were clearly a detriment. Whilst an unjustified sense of grievance was not enough to constitute a detriment this was not the case here. The Trust's communications did not fairly or accurately reveal the fact that *some* of Mr Jesudason's complaints were justified. The only sensible inference from the offending passages was that Mr Jesudason had made specious, unjustified and unsubstantiated complaints, with perhaps some suggestion of bad faith resulting from the Trust's use of the phrase "weakening genuine whistle-blowing". Any worker could reasonably treat those comments as damaging to his reputation and integrity and could reasonably believe that they might bring him into disrepute with his peers. However Mr Jesudason's claim failed on causation because (para 73):

“the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.”

**Supp.274** In *Robinson v His Highness Sheikh Khalid Bin-Saqr Al Qasmi* [2020] IRLR 345 (EAT), Lewis J (discussed at Supp. 69-70), the EAT again read across from the discrimination context to apply the test drawn from *Shamoon*: whether a reasonable worker would or might take the view that s/he was disadvantaged in the circumstances in which s/he was expected to work. Here there had been a change in reporting arrangements so that in relation to certain matters the claimant, Ms Robinson, no longer reported to the Sheikh. The ET held that the employer was entitled to change working arrangements. But it had failed to consider whether the change in reporting arrangements amounted in the view of a reasonable worker to a disadvantage in the circumstances in which Ms Robinson worked. However the claim failed on causation grounds.

#### **Paragraph 7.45: Post-termination disclosures**

**Supp.275** In *Jesudason v Alder Hey Children's NHS Foundation Trust* UKEAT/0248/16/LA, 29<sup>th</sup> June 2018, [2020] EWCA Civ 73 (see Supp.187-194) the claim was brought almost two years after termination of the claimant's employment with the respondent Trust, relying on post-termination disclosures. The respondent's cross-appeal sought to distinguish *Onyango v Berkeley Solicitors* [2013] IRLR 338 (EAT) on the basis that the disclosures were made not as an ex-employee whistleblower but as a "campaigner". In the EAT Soole J (at paragraph 124) questioned the use of the word "status", whether in the context of the claimant's "status" as a campaigner or whistleblower. However, the EAT held that if the appeal had been allowed and the case remitted, it would have allowed the cross-appeal on the basis of deficiency in the tribunal's reasons for rejecting the respondent Trust's argument. The cross-appeal was also raised before the Court of Appeal, but not addressed in the light of its conclusions dismissing Mr Jesudason's appeal.

#### **Paragraph 7.46 Limitation of detriment claims to the employment field during employment**

**Supp.276** In *Fiona Tiplady v City of Bradford Metropolitan District Council* [2019] EWCA Civ 2180 Mrs Tiplady was a Senior Planning Officer employed by Bradford. Between February 2014 and September 2016 she and her husband had extensive dealings with Bradford about problems affecting a property owned by them within Bradford's metropolitan district. There was the so called the "sewer episode" in 2014 when Mr and Mrs Tiplady expressed extreme dissatisfaction with Bradford's Environmental Health Department and the "shed episode" arose out of a complaint made to Bradford that an outbuilding was being constructed by Mr and Mrs Tiplady without planning permission. Bradford eventually applied for and was granted a search warrant, which was executed on 14 September 2016. Neither episode had, as such, anything to do with the employment relationship between Mrs Tiplady and Bradford: they concerned the exercise of the council's powers as a local authority. Mrs Tiplady was unhappy about what she perceived as the unreasonable way in which the Council and its staff handled both episodes, culminating in the issue and execution of the search warrant. On 16 September 2016 she lodged a formal grievance, and on 21 October she resigned. She presented a claim in the ET complaining of unfair (constructive) dismissal - both "ordinary"

unfair dismissal under S98 ERA and automatic unfair dismissal contrary to 103A ERA. She also complained of sixteen detriments occurring between 2014 and 2016, to which she said Bradford had subjected her by reason of the same disclosures. The ET found that Mrs Tiplady had made some protected disclosures, though not all those that she claimed. The ET dismissed all of Mrs Tiplady's claims. One of the elements in its reasoning as regards the whistleblower detriment claim was that most of the detriments of which Mrs Tiplady complained concerned how Bradford had dealt with the sewer and the shed episodes and had accordingly been suffered by her in her capacity as a householder and not as an employee: they were not within the employment field. Mrs Tiplady appealed to the EAT, which allowed the appeal to proceed but only on a single ground relating to the Tribunal's reasoning as regards constructive dismissal. An appeal as to whether the ET had been correct to reject the detriments as being outside the employment field, and on this point Mrs Tiplady appealed to the Court of Appeal. Underhill LJ gave a judgment with which Rose and Simler LJ agreed.

**Supp.277** As noted above the ET had ruled that the detriment had to be in the employment field. This did not include detriment in the private or personal capacity. There were sixteen alleged detriments. The ET relied on the employment field point in relation to ten of the alleged detriments though in each of those cases it was not its principal reason for rejecting Mrs Tiplady's case: in each, it made findings that she had not suffered a detriment at all and/or that any detriment suffered was not on the grounds of the protected disclosures, and the employment field point was only a fallback alternative. Underhill LJ said that the ET's conclusions that Mrs Tiplady had not suffered the detriments alleged, or, if she had, that they were not on the ground of a protected disclosure, were entirely self-contained, and there was no basis on which they could be affected by the view taken by it on the employment field point. Mrs Tiplady's appeal was therefore dismissed.

**Supp.278** However the Court decided to address the employment field point: the point was one of some importance and there was no authority directly covering it. Underhill LJ began by considering the structure and key provisions of the Equality Act 2010 and the predecessor statutes and statutory instruments. He then turned to case law and in particular to *Woodward v Abbey National Plc* [2006] EWCA Civ 822, [2006] ICR 1436 dealt with in the Main Work at paragraphs 7.35-7.39, where the Court of Appeal had held that the phrase "detriment in employment" in the title to Part V must be understood to mean "in the employment relationship" and could extend to detriments suffered in connection with that relationship even after it had terminated: see para. 64 (p. 1455G). At para. 68 (p. 1456 F-G) Ward LJ had said that it:

“simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted.”

**Supp.279** Mrs Tiplady said that *Woodward* showed the Court taking a wide view of the statutory language on the basis that Parliament must have intended to proscribe retaliation

against a whistleblower at whatever point in time it occurred, and she submitted that the same reasoning required treating the term "detriment" as covering things done outside "the employment field": the essential policy of the Act was to prevent whistleblowers from being punished. Underhill LJ said that the questions of the temporal reach of the proscription and of the kind of act to which it applied were different, and *Woodward* could not be treated as decisive of the question.

**Supp.280** Underhill LJ then turned to the position under discrimination legislation. In *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] ICR 337 (HL) Lord Hope expressed the view (at p.349E-F) that detriment within the predecessor legislation of the Equality Act 2010 referred was confined to discrimination in the employment field. That was *obiter* but had been applied in *London Borough of Waltham Forest v Martin* [2011] UKEAT 0069/11. There the claimant, Mr Martin, who was black, was employed by the council as a bus driver. In his capacity as a resident of the borough he made false claims to the council for housing benefit and council tax benefit. It decided to prosecute him. Mr Martin contended that this constituted a detriment within the meaning of section 4 (2) of the 1976 Act and that the decision had been made because of his race. The EAT (Keith J, sitting alone) held that the ET had no jurisdiction in relation to the alleged detriment because it was not "in the employment field": the prosecution was against the claimant "as a local resident". If it were otherwise it would mean that employees of those public authorities who have prosecutorial powers would have additional rights over other members of the public who were prosecuted, because they, unlike the latter, would be able to pursue claims of discrimination in the Employment Tribunal.

**Supp.281** Underhill LJ considered that this reasoning was persuasive, and that the approach in *Shamoon* was right: the structure and language of the pre-2010 legislation meant that the phrase "any detriment" should be understood to refer to a detriment to which the employee has been subjected "in the employment field". As Lord Hope said that imposed a limitation on the otherwise broad meaning of the phrase, and it had the result that some detriments to which an employee may be subjected by an employer on a protected ground could not be complained of in the ET. Underhill LJ equally had no doubt that the position is the same under the 2010 Act. The headings to the relevant Parts no longer use the language of "fields", but the division of protection between different kinds of relationship, enforceable in different tribunals, is retained, and the essential basis of Keith J's reasoning was unaffected. Thus if Mrs Tiplady's claim had been a discrimination claim based on, say, her sex, Mrs Tiplady could not have proceeded in the ET in respect of the detriments in question, because they did not arise in the field of "Work" (to use the terminology of Part 5 of the 2010 Act) but in a different field (namely "Services and Public Functions", which are covered by Part 3).

**Supp.282** The question was whether the same restriction applied to a claim under the whistleblower provisions. The CA concluded that it did. Underhill LJ acknowledged that there were clear warnings in the case-law that it is not possible straightforwardly to read across between the two legislative schemes: *Timis v Osipov* [2018] EWCA Civ 2321, [2019] ICR 655 (p. 666 A-B), quoting para. 48 of the judgment of Mummery LJ in *Kuzel v Roche*

*Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799 (p. 809 D-E). The phrase "any detriment" in section 47B (1) is subject to no express limitation in the sub-section itself (and the same went for sub-section (1A)), nor did it contain any associated language of the kind on which Lord Hope relied in *Shamoon*. There was force in the point that the hat which the employer is wearing when it subjects a whistleblowing worker to a detriment should be immaterial, and that all that should matter is that it has acted on the proscribed ground: if there is indeed an "employment field" requirement, it is satisfied by the fact that liability would depend on the existence of the employment relationship.

**Supp.283** However the Court concluded the approach of the ET and of Judge Eady had been correct. As Ward LJ had observed in *Woodward*, despite the differences in their particular structure and language, the whistleblower legislation and the discrimination legislation were fundamentally of the same character. Equally at para. 26 of his own judgment in *Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632, [2018] ICR 982 Underhill LJ had observed that the frequently used phrase "whistleblower discrimination" was not inapt, since the concept underlying section 47B was the same as that of the discrimination legislation; and he said that, that being so, it made sense to interpret identical language in the two statutes, where it occurred, in the same way (p. 991B). Underhill LJ also referred to his observations to similar effect in *Osipov* at para. 69. Parliament had to be taken to have intended, when using the terminology of detriment in the discrimination legislation and in Part V of the 1996 Act, that it should have the same scope in both. The point was reinforced by the title to Part V referring to detriment "in employment", though Underhill LJ would not have regarded that by itself as determinative. Whilst the Equality Act provides for protection in the context of other kinds of relationship beyond that of employer and worker and there is no statutory provision preventing public bodies from discriminating against people who have blown the whistle on their activities, he concluded that this was not a sufficient reason to construe the language of detriment differently. Rather, it reflected the legislative choice to afford whistleblower protection only as between worker and employer and not to members of the public more widely. Once that choice was made, it made sense that the scope of that protection corresponded to that provided to workers in the analogous field of discrimination.

**Supp.284** That left the question of how exactly a detriment was to be recognised as arising, or not arising, "in the employment field": what were the boundaries of the field. Underhill LJ said that broadly, the test suggested by Mr Lewis on behalf of the council to the ET, and which it accepted, of asking in what "capacity" the detriment was suffered - or, to put the same thing another way, whether it was suffered by the claimant "as an employee" - seemed likely to produce the right answer in the generality of cases. This was not strictly the same as the "two hats" analysis because the focus was not on the hat being worn by the employer but on that being worn by the employee; but in practice these might be two sides of the same coin. But the boundaries of the employment field should not be drawn narrowly. It would not mean that detriments would only be within the scope of section 47B if they occurred in the workplace or during working hours. It might be a useful thought-experiment to ask whether, if the claim had been based on a protected characteristic under the 2010 Act rather than on the making of a protected disclosure, it would fall under a Part of that Act other than

Part 5 : if, say, the detriment was suffered by the claimant as a consumer of services or as a student or as an occupier of premises and thus would fall under Parts 3, 4 or 6 , it could not be suffered as a worker. But Underhill LJ was chary about suggesting that that is a touchstone which would provide the answer in every case. There were bound to be borderline cases, and he did not think that it would be right to attempt any kind of definitive guidance but it was sensible of the ET to give Mrs Tiplady the benefit of the doubt as regards detriments (11) and (12), relating to the making and application of an application for a search warrant. The ET had held that this arguably had a sufficient connection to the employment field because was only due to Mrs Tiplady being a senior planning officer that she was given the opportunity to reconsider whether to allow officers to access her property.

**Supp.285** Underhill LJ said that all of the other the detriments which the ET excluded on this basis plainly concerned Mrs Tiplady as a resident/householder seeking, or being subject to, the exercise of the council's powers as a local authority; and, that being so, they did not arise in the employment field. If that had been the decisive issue in relation to any of them the appeal would have failed.

**Supp.286** The decision is controversial. Given the strong public interest in protection of those who blow the whistle, it might be regarded as surprising that the Court should regard it as necessary to read in limits to the legislation, where the legislature did not see fit to include this in the express wording. That is particularly so where the reasoning depended on reading across from discrimination legislation which was based in part on the demarcation of the separate protection provided in other fields. Section 47B ERA, like the other detriment provisions in Part V ERA, do not contain similar wording, save only for the demarcation provision in s.47B(2) to the effect that claims of detriment consisting of dismissal of an employee are not included. Whilst the CA saw force in the reasoning in *Martin*, it is questionable whether that justifies depriving employees of protection. The underlying policy of the whistleblowing legislation lies in a worker raising the alarm on matters of public interest to someone, typically their employer, better able to investigate or address the concern. It may be questioned why the protection against victimisation by the employer for doing so should depend on the form the detriment takes. There may be cases, as appears to have been the situation in *Tiplady*, where the reason for the Council being an appropriate recipient of the Mrs Tiplady's whistleblowing had nothing to do with its status as her employer. However, this places a focus on the nature of the protected disclosures, rather than on the capacity in which the detriment is imposed. Further, the comparison made in *Martin* with someone who is not a worker may not be of like with like. It may be highly artificial to suggest that, merely because a detriment is imposed in a non-employment capacity, it could not have an effect on the employment relationship. Mrs Tiplady offered the example of a worker of an NHS Trust which gave inferior treatment to a whistleblowing employee. It is not difficult to see that the very fact that this was treatment meted out by the NHS Trust as an act of victimisation for the protected disclosure might seriously damage the relationship with the employer.

**Supp.287** On the basis that, as required by *Tiplady*, an employment field test is to be applied, we suggest it is essential not only that, as the CA said, the limits should not be

narrowly drawn, but also that there be consideration of the potential for treatment of a worker in other capacities to impact on their situation as an employee. Detriments imposed by the employer, even in what is a non-employment field, may fundamentally undermine the employment relationship and the trust and confidence which must lie at the heart of it. Where the detriment is reasonably regarded as impacting on the employment relationship, even if only indirectly, there should be no reason why a tribunal cannot recognise the reality that although a detriment is directly suffered in some other capacity, it also has an impact that can be treated as falling within the employment field.

**Supp.288** The approach of the Court of Appeal to the detriments consisting of application and execution of the search warrant may suggest that there is indeed scope to take into account such considerations. However, beyond recognising that the limits were not to be narrowly drawn, the Court offered no explanation of why these detriment could be regarded as within the employment field. On its face the only involvement of the employer was to confer an additional benefit (the opportunity to reconsider) rather than contributing to the detriment. The danger, without further elaboration, is that there is a lack of clarity as to when and on what basis protection is provided.

**Supp.289** The answer we suggest, lies in applying the familiar test of detriment but with full regard to the realities of those matters that might impact on the employment relationship. A worker is subjected to a detriment if the worker subjectively considers that he or she had been disadvantaged in the circumstances in which he or she is expected to work and if that is a view that the worker could reasonably hold. That is not necessarily determined by the nature of the act. A range of other factors may bear on whether it is reasonable for the worker to suffer a loss of confidence in the employer and as such to be disadvantaged in continuing to work for the employer in such circumstances. We suggest that the relevant factors may include:

1. The subject matter of the detriment.
2. The nature of the protected disclosure (e.g. whether it was made to the employer and/or concerned work related matters, or whether it was raised with the employer by reason of being the employer, rather than the happenstance, as in *Tiplady*, that the employer was the relevant public authority).
3. The identity of the individual imposing the detriment (which as above might have an effect on the likely impact on the employment relationship).
4. The objective of imposing the detriment (for example, whether although dealing with an issue unrelated to employment it is designed to impact on the working relationship), or situations where the perpetrator's act might be seen as highly likely to have had this effect.
5. (Applying Underhill LJ's suggestion in *Tiplady*) whether, if the claim had been brought under the 2010 Act on the basis of a protected characteristic, it would have fallen under a part of that Act other than Part 5 (Work).

**Supp.290** Despite the Court’s emphasis that the limits of the test should not be narrowly drawn, we suggest that a failure to focus on the potential indirect impact on the employment relationship may indeed lead to an overly narrow approach to the employment field test. Mrs Tiplady’s case illustrates that the exclusionary effect of the employment field is not limited to preventing claims where the detriment is imposed by some remote separate department within a large employer. It also applied in *Tiplady* to decisions made by the planning department in which she worked. In any event, where such issues arise in future it will be essential for the worker to spell out his or her case as to the impact that the treatment has had on their employment, whether in terms of undermining confidence or trust in the employer or otherwise. It would be regrettable, and risk undermining the important public policy underlying protection of whistleblowers (especially in those cases where the employer’s sphere of influence extends over their private lives), if issues as to whether there has been a detriment were to be determined without taking a broad and realistic view of the potential interaction between work and non-work life.

## **F. ‘On the Ground That’**

### **(1) Paragraph 7.66: Overview**

**Supp.291** When a disclosure is made to more than one person, it is possible that it may be a protected disclosure only in relation to some but not all of the recipients. It is then in principle open to the employer to show that there was no significant influence on the basis that the concern which influenced the detrimental treatment was only in respect of a disclosure made to a person in respect of whom the disclosure was not protected. That arose in *Jesudason v Alder Hey Children’s NHS Foundation Trust* UKEAT/0248/16/LA, 17<sup>th</sup> July 2018; [2020] EWCA 73 (discussed at Supp.187-194, 275 above). Here the claimant had copied a letter to the CQC. In that respect it amounted to a protected disclosure. However the letter had also been sent to the Chair of the House of Commons Public Accounts Committee and to Stephen Dorrell MP. In that respect it was not a protected disclosure, and the alleged detriment was a letter in response to them. Giving the leading judgment in the Court of Appeal, Sir Patrick Elias (at para 67) endorsed the EAT’s comment that it was a fallacy to say that merely because the letter was copied to the CQC, that it must be treated as a protected disclosure to all the recipients. He added that:

“It would wholly undermine the carefully structured safeguards in the legislative scheme if copies of a letter are to be treated as protected disclosures with respect to all recipients merely because there is a protected disclosure with respect to one of them.”

### **(2) Paragraphs 7.66 to 7.68: The importance of a structured approach to consideration of the “On the Ground that” issue**

**Supp.292** In the Main Work we reference the EAT’s judgment in *Blackbay Ventures Ltd (t/a Chemistree) v Gahir* [2014] IRLR 416, [2014] ICR 747 in terms of its importance for

pre-hearing Case Management and the provision of particulars by parties (see paragraph 11.15). The judgment also provides guidance to ETs as to the importance of structured decision making. In *Patel and Metcalf v Surrey County Council* [2018] UKEAT/0178/16/LA, 8<sup>th</sup> March 2018, the EAT held that the ET had erred in failing to apply the approach of whether the alleged protected disclosures materially influenced the related detriment. The EAT also endorsed what it referred to as the “important guidance” in *Blackbay* as to the required structure approach to the determination of protected disclosure claims. In particular at paragraph 98 the EAT had said in *Blackbay* that:-

- “1. Each disclosure should be identified by reference to date and content
2. The 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 or as the case may be should be identified.
- ...
4. Each failure or likely failure should be separately identified.
5. ... It is not sufficient ... for the employment tribunal to simply lump together a number of complaints ... Unless the employment tribunal undertakes this exercise it is impossible to know which failures ... attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act ... it is of course 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.
- ...
7. 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. ...”

**Supp.293** In *Metcalf* a schedule had been provided to the ET setting out, with date and subject matter, each disclosure and each detriment, showing which were admitted and which were not. The EAT held that the ET had erred in failing to identify which of the disputed disclosures were held to be such. The ET had stated that it was “not proportionate to make individual findings about each and every disputed disclosure. ...”. That was not a permissible approach because it was not possible to know which disputed disclosures were not accepted in light of the ET having said that “for the most part, the nine disputed disclosures had been made”. The ET had faced a daunting task given the length and document heavy nature of the hearing (the Judgment ran to 110 pages and 597 paragraphs). However it had erred in failing to set out and to consider each disclosure and each detriment to which it was said to relate, making findings of fact in relation to each. In accordance with the guidance in *Blackbay* and in order to reach a determination as to whether a detriment was on grounds of an alleged related protected disclosure, the disclosure and detriment needed to be considered in a related pairing. The ET had failed to undertake in a structured way the necessary exercise; whether the claimants had established that the respondent had subjected each claimant to each admitted or established detriment on the ground of their making a particular protected disclosure. The failure to consider the individual detriments alongside the individual protected disclosures might have led the ET to concentrate on the reasonableness of the respondent in imposing a detriment for the reason they gave rather than considering and deciding whether the detriment was materially influenced by a particular disclosure. The failure by the ET to

adopt a structured approach to the claims as suggested in *Blackbay* was a defect in substance, not merely one of form.

**Supp.294** See also *City of London Corporation v McDonnell* UKEAT/0196/17/JOJ, 28<sup>th</sup> February 2019 where the EAT held that the ET had not carried out the necessary task of identifying with specificity the disclosures being relied upon. It did not matter that the respondent had, in broad terms, accepted that there were qualifying disclosures (subject to its contentions as to reasonable belief and the public interest). In the absence of clear findings as to the date on which a disclosure was made, the form which it took and the substance of its contents the ET was simply not in a position to reach a conclusion that the disclosures were the reason for the matters complained of.

**Supp.295** The failure to make specific findings as to the disclosures relied upon also gave rise to difficulties with the Tribunal's analysis of the reason for the dismissal. The Tribunal's conclusion that the sole or principal reason for the claimant's dismissal was the fact that he made protected disclosures was almost entirely based on the Tribunal's interpretation of the evidence of one witness, the chair of the dismissing panel, a Mr Bennett. However, an analysis of the Tribunal's approach to that evidence revealed serious flaws which were (in part) the result of particular questions never having been put to Mr Bennett, either by the Tribunal or by the claimant.

**Supp.296** The failure to identify with any precision the actual disclosures in question also meant that the Tribunal lacked the firm factual foundation necessary for the drawing of any inferences as to the reason for the dismissal. It was not clear which disclosures the Tribunal considered that the dismissal had been based on. This was important because the disclosures made on each separate occasion in issue were not necessarily protected: the mere fact that the respondent had admitted that the disclosures made at one stage were qualifying disclosures does not mean that disclosures coming at another stage were also necessarily protected. It might also be possible to draw a distinction between the disclosure of information and steps taken by the employee in relation to the information disclosed: *Panayiotou*. It would not necessarily be unlawful for the respondent to dismiss an employee because of the manner in which earlier disclosures were pursued or repeated. However, the Tribunal had disabled itself from any analysis along these lines because the actual disclosures relied upon were never clearly and precisely identified. The ET identified the following principles:

1. The Tribunal does have the power to deal with points not identified by the parties, although it would be especially careful not to do so where both sides are represented: *BAE Systems v Paterson* at [31]
2. Although it is open to the Tribunal to make findings of fact not contended for by either party, where the Tribunal's conclusion of fact is likely to be tantamount to a conclusion that there was bad faith on the part of a decision-maker or reliance upon an improper reason, then it is likely to amount to a serious procedural irregularity for the Tribunal to reach such a conclusion without giving that decision-maker an opportunity to respond: *BAE Systems v Paterson* at [31] and *NHS Trust Development Authority v Saiger* at [99] and [100];

3. Parties should usually be given an opportunity to make submissions as to the effect of a finding of fact not contended for by either party, although that would not apply where the legal effect of the findings of fact that are to be made is obviously and unarguably clear: *Judge v Crown Leisure* at [21].

**Supp.297** The EAT accepted the respondent's submission that there was a serious procedural irregularity in that Mr Bennett did not have the opportunity to answer the Tribunal's interpretation of the evidence, particularly where that interpretation led to the drawing of an inference that was tantamount to a finding of bad faith on the part of Mr Bennett and was not one which the claimant himself was pursuing. None of the Tribunal's interpretations of Mr Bennett's evidence were put to him and they ought to have been.

**Supp.298** It is important to stress that, whilst ETs are directed to focus on each disclosure and to consider whether and which communications constituted protected disclosures and caused detriment, it does not follow that the precise causal impact of each separate disclosure has to be established in every case. Where there is a finding that the disclosures operated on the mind of the employer cumulatively the focus can be on the cumulative impact: see *El-Megrisi v Azad University (IR) in Oxford* (UKEAT/ 0448/ 08/ MAA, 5<sup>th</sup> May 2009). We would suggest that an ET may be able to conclude that protected disclosures were a material influence without being able to identify which of a number of disclosures influenced which particular detriments, provided that in making the assessment the ET does not take into account any communications that are not protected disclosures.<sup>41</sup> It will depend on the facts, the overall timing and the incidence of any other factors that might have operated on the mind of the employer.

### **(3) Paragraphs 7.127 and 7.128: Separability**

#### **(a) Analogy with union activity cases**

**Supp.299** The decision in *Bass Taverns* and *Lyon* were considered, in the context of a claim of dismissal by reason of trade union activities, by the Court of Appeal in *Morris v Metrolink RATP Dev Ltd* [2019] ICR 90 (CA). Underhill LJ specifically noted (at paragraph 21) that similar distinctions had been drawn in analogous contexts and made reference to the decision in *Martin v Devonshires Solicitors* [2011] ICR 352 to the whistleblowing cases of *Bolton School v Evans* [2007] ICR 641 and *Panayiotou v Kernaghan* [2014] IRLR 500 (EAT). He considered that the principle of separability in relation to the trade union activities was most clearly stated by Philips J in *Lyon*. Summarising the principle (at paragraph 19) he stated that there will be cases where it is right to treat a dismissal for things said or done by an employee in the course of trade union activities as falling outside s.152 TULRCA because

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<sup>41</sup> See eg *Aston and others v Chief Constable of Greater Manchester Police* Case No. 2402963/2017, 31<sup>st</sup> May 2019, Manchester ET, considered below, where the ET adopted this approach (we suggest correctly) and accepted a submission that: "in a case such as this where a number of disclosures are relied upon, involving substantially the same information being disclosed to different recipients it will be an artificial exercise to cross-reference each individual protected disclosure to each detriment."

the things in question can fairly be regarded as a distinct reason for the dismissal, notwithstanding the context in which they occurred. The reference to something “unreasonable, extraneous or malicious” captured the flavour of the distinction. The key point is that in such a case it can fairly be said that it is not the trade union activities themselves which are the principal reason for the dismissal but some feature of them which is genuinely separable. An employee’s deliberate breach of confidence, as in *Azam v Ofqual* UKEAT/0407/14, 19<sup>th</sup> March 2015, was an instance of something which could be treated as “fairly and sensibly” distinct. Underhill LJ added that the distinction should not however be allowed to undermine the important protection of the legislation; an employee should not lose the protection simply because something which he or she did in the course of trade union activities could be said to be ill-judged or unreasonable.

**Supp.300** In *Morris* the Court of Appeal concluded that the EAT had been wrong to overturn the decision of the employment tribunal that a dismissal had been by reason of union activities. The employee union representative had made reference to a photograph he had been sent from a line manager’s work diary which was believed to show inappropriate interference in selection for dismissal following on from a restructuring. There was no finding that the claimant had been involved in the copying of the diary, and it was not uncommon for a union representative to be given, without soliciting, information which he realised had been obtained without the owner’s consent. There may be cases where the only right course would be to destroy the information. But here the tribunal was entitled to conclude (at paragraphs 39-41) that the very limited way in which the claimant made use of the leaked information, which directly concerned his members as individuals and which it was in their interests to follow up, was not a sufficient departure from good industrial relations practice to take his conduct outside the scope of trade union activities.

**(b) Paragraph 7.156: “Separability”: *Riley* and limits to separability**

**Supp.301** Significant limits to the *Panayiotou* approach, akin to that applied in the context of trade union cases (referring to “unreasonable, extraneous or malicious” behaviour), were highlighted in *Riley v Belmont Green Finance Ltd t/a Vida Homeloans* UKEAT/0133/19/BA, 13<sup>th</sup> March 2020. The EAT emphasised the importance of the ET carefully considering whether the factors relied upon by a respondent were properly separable from the protected disclosures, and that something more than “ordinary” unreasonable behavior may be required. Mr Riley was a mortgage underwriter, contracted to Rockstead Ltd, who would be assigned by them on temporary placements with Rockstead’s clients. The temporary assignment with the respondent was terminated with immediate effect following a meeting where Mr Riley had made several complaints which he contended were protected disclosures. The Tribunal’s ruling was that the detriment was

“not because of any information provided by the claimant .... but because of the claimant's manner in the meeting which was generally negative and dismissive about the respondent and because [his managers] were unhappy with the way in which the claimant had dealt with staff...”.

The ET continued by saying that if (which it had not) it had found the claimant had made any protected disclosures it would not conclude that he was subjected to any detriment by the respondent on the ground of those disclosures.

**Supp.302** The EAT (Mathew Gullick sitting as a Deputy High Court Judge) upheld the ET's decision that Mr Riley had not made any protected disclosures, but held that the ET had gone wrong in its approach to the reason why question. The EAT accepted that *Panayiotou* established that a tribunal could legitimately draw a distinction between the information disclosed by a claimant and the manner of his doing so. However if the manner in which the worker made the disclosure was unreasonable, e.g. by the use of intemperate language, that might not be sufficient to separate the behaviour of the worker in making the disclosure from the fact of the disclosure itself. The Employment Tribunal had found Mr Riley's tone in the critical meeting was "angry and frustrated" and he had been "generally negative and dismissive" about the respondent and that the decision maker had been told that Mr Riley had been "derogatory about the Respondent". But, said the EAT (at paragraph 31), those factual findings, which were "in the most general of terms", did not indicate that Mr Riley's behaviour at the meeting was found to be anything other than, at worst, "ordinary" unreasonable behaviour of the kind described by the EAT in *Martin v Devonshire Solicitors* [2007] ICR 352. The ET had not made findings to the effect that Mr Riley's behaviour when making his complaints had been "offensive or abusive" (one of the examples given in *Panayiotou* in paragraph 49). Moreover the ET had not explained why the type of behaviour that it found had occurred at the meeting (i.e. being "angry and frustrated" and "generally negative and dismissive about the Respondent") was properly and genuinely separable from the making of Mr Riley's complaints at that meeting. It was important to set out the basis upon which such a distinction was being drawn. In failing to set out why, on the facts of this case, the way in which Mr Riley disclosed information to the respondent was separable from the disclosures themselves, the ET had made an error of law.

### **(c) Decisions further illustrating the approach to separability**

**Supp.303** *Panayiotou* was also distinguished in *Mid Essex Hospital Services NHS Trust v Smith* UKEAT/0239/17/JOJ, 5<sup>th</sup> March 2018 (EAT). There the claimant had been employed by the Trust as a nurse for 28 years and had not been the subject of any patient complaints, disciplinary issues or questions as to his clinical competence. He had also been a trade union representative throughout his employment. The ET found that he was regarded by management as a nuisance because he had been involved in a number of campaigns and had represented union members in disciplinary and grievance proceedings. He had made a series of protected disclosures and the Trust began disciplinary proceedings against him leading to his suspension and dismissal. He brought claims of protected disclosure detriment and dismissal, but did not bring a claim of detriment on the ground of trade union activities. The employment tribunal found that allegations of misconduct made against the claimant in the disciplinary proceedings were without merit and that the real reason for dismissal was the whistleblowing. It rejected the suggestion that the claimant had been dismissed for some other substantial reason, namely because he had become unmanageable, and found that the case was

not one like *Panayiotou* where the fact of the making of protected disclosures could be separated from the way in which he pursued the complaints.

**Supp.304** The EAT held that the ET was entitled to distinguish *Panayiotou* and to reject the respondent's arguments on separability. However the EAT nevertheless proceeded to find that ET had erred in that, having rejected the respondent's positive case that the dismissal was for a reason related to conduct, the ET had not shown in its reasons that it had considered respondent's alternative case that the principal reason was the decision maker's view of C as a nuisance. Although being a nuisance due to union activities was equally unattractive, there had been no complaint of automatically unfair dismissal on that basis.

**Supp.305** See also *Phoenix House Ltd v Stockman* UKEAT/0284/18/OO, 5<sup>th</sup> July 2019, where the EAT concluded that the ET had been entitled on the facts to reject the contention that a hasty decision to bring unfair disciplinary proceedings at short notice had been influenced only by the manner and not the content of the claimant's complaint (relied upon as a protected act and protected disclosure).

**Supp.306** However *Panayiotou* was followed in *Parsons v Airplus International* UKEAT/0111/17/JOJ, 13<sup>th</sup> October 2017. As discussed above (Supp.169-171), Ms Parsons, a qualified non-practising barrister, was employed by the respondent as its Legal and Compliance Officer, subject to a six-month probationary period. From early in her employment she raised numerous concerns. Her managers became increasingly concerned as to the way in which she was raising matters, her inability to work with others and her rudeness. After attempting to reassure Ms Parsons and to remove some of the pressure on her, the respondent was unable to see any improvement and decided she should be dismissed, essentially due to what was described as a "*cultural misfit*". The EAT upheld the ET's finding that, even if Ms Parsons had made protected disclosures, the ET was entitled to find that the reason for dismissal was not her disclosures but her reaction thereafter; her inability to explain her concerns, her failure to listen to others and her rudeness, which were genuinely separable factors.

**Supp.307** Separable reasons for dismissal were again found to have applied in *Gibson v (1) Hounslow LBC and (2) Crane Park Primary School* UKEAT/0033/18/BA, 20<sup>th</sup> December 2018, considered at Supp.178-179, 418. At a time after the claimant teacher, a US citizen, had made what she alleged were a series of protected disclosures and had been off work suffering with stress, the respondent school failed to follow her back to work plan, and the tribunal found there was a "degree of antipathy" to the claimant by that stage. The respondent had also failed to take steps to renew her visa (though the claimant had herself also failed to seek to do so), without which she could not continue to work in the UK. However the EAT concluded (at paragraph 53) that the ET had been entitled to find that the antipathy was caused by the difficulty that the respondent had in managing the claimant and that had been evident long before any protected disclosures. The ET found in effect that the claimant had been extremely difficult to manage from the very beginning and this was quite independent from any protected disclosures. She had refused to be managed or take direction

and would not comply with the respondent's policies or procedures right from the start, and it was her ungovernability, rather the alleged protected disclosures, which led to the antipathy.

**Supp.308** See also *Robinson v His Highness Sheikh Khalid Bin Saqr Al Qasim* [2020] IRLR 345 (EAT), Lewis J. The ET held that Ms Robinson was dismissed for a fair reason, a dispute about liability to pay tax on her remuneration of £34,000 (later £37,000), in particular between the years 2007-2014 when she had paid no tax on the remuneration received. Ms Robinson insisted that the respondent was liable to pay an amount equivalent to tax and national insurance contributions in addition to the agreed remuneration of £34,000. The respondent insisted that the arrangement was that the claimant was responsible for paying the tax from the amount of the agreed remuneration. The ET held that it was not unfair to dismiss by reason of the deadlock over the dispute; the dismissal was held to be unfair only in so far as the respondent should have had a further meeting with her prior to dismissal.

**Supp.309** Dismissing the appeal, the EAT accepted that there was adequate evidence upon which the ET could conclude that the real reason for the dismissal was the dispute about whether Ms Robinson's remuneration was net of tax or gross and included tax. The ET was entitled to draw a distinction between the fact that Ms Robinson was alleging that the respondent was not complying with his obligations in relation to operating a PAYE system for his employees (both the claimant and others) and was allegedly manipulating information to achieve that result, and the attempt by Ms Robinson to make the respondent responsible for any unpaid tax (in addition to the remuneration she had already received). The ET was well-aware of the need for caution in concluding that the reason, or the principal reason, for dismissal was not the making of protected disclosures but some other reason (particularly where there was a close relationship between the two states of affairs). But in the present case, it was entitled to conclude that there was a distinction and that the reason for the dismissal was the dispute about who was liable to pay Ms Robinson's unpaid tax bill (rather than the claims about failure properly to operate a PAYE system for employees). There was no error in its conclusion that the reason for the dismissal was not the making of protected disclosures but a different reason, that is, the dispute about who should provide the money for the unpaid tax.

#### **(d) Separability and refuting whistleblowing allegations**

**Supp.310** Particularly where a worker makes an external disclosure, the employer may be concerned to be able to refute the whistleblowing allegations without thereby incurring liability for whistleblowing detriment. The issue was addressed in *Jesudason v Alder Hey Children's NHS Foundation Trust* UKEAT/0248/16/LA, 29<sup>th</sup> June 2018; [2020] EWCA Civ 73. As discussed at Supp.272-273, the very fact of refuting the whistleblowing allegations, particularly if implicitly thereby conveying that the allegations were made without a reasonable basis and/or for ulterior motives, may constitute detrimental treatment. In one sense it might be said that the reason for the detriment is the very fact of making the disclosure; it is that which required the response. However the analysis in *Jesudason* indicates that a more nuanced analysis may be required. Giving the leading judgment, Sir Patrick Elias noted

first the need to focus on the particular act which caused the detriment. Therefore the issue was not the reason why the *letters* rebutting Mr Jesudason's allegations were written but why the *offending passages which caused the detriment* to him were included in those letters. Further (at para 65):

“Even if the disclosures are protected disclosures, an employer is obviously entitled to respond to them in order to rebut what has been alleged and to put his side of the case, even robustly. If, as in this case, the rebuttal also contains misleading statements which constitute a detriment to the worker, it does not follow that the reason for making those statements is the fact that the worker has made the protected disclosure. Conversely, if the response is to a communication which is not a protected disclosure, it does not follow that offending comments in the letter which give rise to a detriment are necessarily unconnected to a protected disclosure. The reason for making the false or misleading statement may still be earlier protected disclosures made by the claimant, as is alleged here. Having said that, the employer is likely in practice to have a much harder task in showing that the making of the protected disclosure played no, or at most a trivial, part in the decision to include a false statement where the letter in which it is contained is itself a direct response to a protected disclosure.”

**Supp.311** The Court of Appeal's reasoning therefore suggested that even if the rebuttal was in response to a protected disclosure that was not necessarily determinative. A response which is genuinely focussed on rebutting the allegations, perhaps to defend the employer's reputation, may be found to be for a separable reason other than being regarded as on the grounds of the protected disclosure. The Court's reasons in rejecting the appeal provide further support for this, albeit on the facts the ET had found that none of the letters or emails containing the detrimental false statements had been in response to disclosures found to be protected disclosures. That was not necessarily the end of the argument because it was theoretically possible that the offending passages had been *partly* in response to the earlier disclosures that were found to be protected. A fair reading of the ET decision's as a whole showed that it did make an appropriate finding about why the false statements were included in the Trust's various responses. One factor in this assessment was that it was intrinsically unlikely that the authors of the letters would have been reacting to Mr Jesudason's protected disclosures because all but the copy letter to the CQC had been made years earlier; those complaints had been dealt with and Mr Jesudason was no longer employed in the Trust. The Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which Mr Jesudason had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far Mr Jesudason was adversely affected as a consequence, it was not because he was in the direct line of fire.

**Supp.312** Different considerations applied to a statement which one of the consultants (Mr Jones) had written to GMC for the purposes of supporting its investigation against the claimant. This did not contain any of the misleading exaggerations contained in the other letters to which the claimant objected. The claimant's contention was that elements of the statement were false and that this was an unlawful detriment. The ET had found that Mr Jones genuinely believed the statements to be true. The Court noted that this did not prevent there being a detriment. However even if the statement had contained false or misleading elements it could not have been on the grounds of a protected disclosure given the ET's finding that it was made to defend the reputation of Mr Jones and his colleagues. Further, since the ET had

found that he believed it to be true in all respects, unlike the other letters, there was no basis for differentiating between the reason for sending the statement and the reason for including the false information.

**(e) Failure in the investigation of the discloser's concerns: para 7.157**

**Supp.313** The ET case of *Connolly v Tewkesbury (Diamond Chrome) Plating Co Ltd* Case 1401441/2017 2<sup>nd</sup> October 2018, provides a useful practical example of a complaint by a whistleblower that his or her employer has not accepted an allegation contained in a whistleblowing disclosure and alleged that this constitutes a detriment. Mr Connolly claimed that he had been subjected to a detriment by the failure of the employer (acting through a Mr Curry and a Mr Opperman) to accept the truth of what he said had occurred and their denial that there had been a fraud or an attempt to commit fraud within the company. The ET found that a different conclusion had been reached by Mr Curry and Mr Opperman to that urged upon them by Mr Connolly but this had been “after a set of thorough processes”. There was no general failure to accept the truth of what had happened, and processes had been put in place to stop it happening again. It was clear that the employer had taken the issue seriously. In a strict causation sense the disagreement between Mr Connolly and his employer was because of Mr Conolly’s disclosure. But any disagreement between the parties over the truth of what had happened or whether there was a fraud or not was not on the grounds of Mr Conolly’s protected disclosure. Instead it was on the grounds that the respondent genuinely believe that it had dealt appropriately with the issues and had done a sufficient investigation. Mr Conolly genuinely believed they had not done so but that did not mean that he had been subjected to a detriment for raising the issues. That reasoning, we suggest, draws support from the Court of Appeal’s approach in *Jesudason* (see Supp.310 above), that “an employer is obviously entitled to respond to them in order to rebut what has been alleged and to put his side of the case”.

**Supp.314** See also *Quarm v Commissioner of Police of The Metropolis* UKEAT 0200/18/LA, 22<sup>nd</sup> May 2019, HHJ Auerbach. Mr Quarm made a complaint to the IPCC alleging misconduct on the part of fellow officers. This was referred to the Commissioner’s Directorate of Professional Standards (DPS) who decided to take no action in relation to it. He presented an ET claim that this was an act of direct race discrimination, victimisation (for having made previous ET claims under the Equality Act) and whistleblowing detriment. He ticked the box on the claim form requesting that a copy be sent to the regulator. The claim form was then sent to the Independent Police Complaints Commission, which in turn sent it to the Commissioner’s DPS. The DPS decided to take no action upon it pending the outcome of that ET claim. Mr Quarm then presented a fresh ET claim in relation to that decision. The ET held that it did not amount to an act of victimisation because, applying *Derbyshire v St Helens MBC* [2007] ICR 841 (HL) there was no detriment. That decision was upheld. The ET was found to have erred in finding that there was in any event no detriment because the outcome would have been no different (applying *Deer v University of Oxford* [2015] ICR 1213). But the ET's decision was not dependent on that finding, which was made in the alternative. The failure to take further action after the first ET claim had concluded was said

to amount to a further act of victimisation. That claim also failed. That decision was also upheld. The ET had found that the complaint had genuinely slipped off the radar of the case handler. The inaction was not because of the protected act.

**Instructing or procuring a dismissal as a detriment and co-worker liability for dismissals  
Paragraphs 7.06 to 7.08, 7.163 to 7.190 (and 8.06 to 8.08, 8.17, 9.12 to 9.15, 9.27)**

***Unfair dismissal: tainted information and manipulation***

***(a) Royal Mail v Jhuti***

**Supp.315** At paragraphs 7.163 to 7.189 of the Main Work we address the issues that have arisen in several cases which have dealt with the problem of attributing to the decision maker faulty information being provided to him/her (referred to by Underhill LJ in *Reynolds v CLFIS (UK) Limited* [2015] ICR 1010 (CA) as cases of “tainted information”). That may take various forms, including at the extreme end, the decision maker being manipulated by a third party in response to a protected disclosure, or as it was put (again by Underhill LJ) in *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658, an *Iago* case. The leading guidance where such issues arise in relation to protected disclosure unfair dismissal claims is now the Supreme Court’s judgment of 27 November 2019 in *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 reversing (in part) the Court of Appeal’s decision of 20 October 2017 in *Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632, [2018] ICR 982, and thus restoring the decision of Mitting J in the EAT [2016] ICR 1043 (considered at 7.174 to 7.190 in the Main Work). Lord Wilson gave the only substantive judgment.

**Supp.316** The ET had dismissed Ms Jhuti’s s.103A claim on the basis that the reason, or at least the principal reason, for the dismissal had not been her making of the protected disclosures. The disclosures had played no part in the reasoning of dismissing officer, Ms Vickers who, albeit by reference to evidence which was hugely tainted, genuinely believed that the performance of Ms Jhuti had been inadequate and who had dismissed her for that reason. The ET had however made the following finding in relation to the role of Mr Jhuti’s line manager, Mr Widmer:

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

**Supp.317** The question was whether the ET correctly identified “the reason (or, if more than one, the principal reason) for the dismissal” within the meaning of section 103A. Lord Wilson noted that the same words also appear in numerous other sections in Part X of the ERA and in particular in subsection (1) of section 98 providing for a claim of unfair dismissal on the general basis. The court’s answer to the question in relation to section 103A would therefore relate equally to the other sections in Part X in which the same words appeared, including section 98(4) (which requires the tribunal to determine whether the employer acted reasonably in treating the reason for dismissal as sufficient).

**Supp.318** The Court of Appeal had considered itself bound by its earlier decision in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 to uphold the ET's finding that there was no unfair dismissal on the basis that the focus was on the state of mind and actions of the dismissing officer. Underhill LJ had identified limited circumstances in which reference could be made to the state of mind of another person, but concluded that in the light of the decision in *Orr* this did not extend to someone with line management authority but who did not have a role in the disciplinary process.

**Supp.319** At paragraph 59 onward, Underhill LJ set out his analysis of "manipulation" cases by reference to the status and role of the putative "manipulator":-

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

In such a case the manipulator's motivation could not be attributed to the employer for the purpose of the unfair dismissal regime, whether to impugn the reasonableness of the decision to dismiss under s.98 (4), or in relation to the reason for dismissal. An employee in such a situation would have had suffered an injustice at the hands of the manipulator (the "Iago figure") and might have other remedies (as to which see the discussion of *Osipov* below, Supp.339-383) but *the employer* had not acted unfairly.

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

Whilst Underhill LJ could see the force of the argument for attributing the manipulator's motivation to the employer, because it had delegated authority to him or her to manage the employee in question, he concluded that was precisely the argument that had appealed to Sedley LJ in *Orr* but which the majority in that case rejected. Again, therefore, the motivation of the manager (Mr Widmer) could not be attributed to the employer.

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

There might be cases where someone other than the ultimate decision-taker had a formal role in the decision-making process, e.g. where manager 'A' was given responsibility for investigating allegations of misconduct which were then presented to manager 'B' as the factual basis (albeit, typically, challengeable at a hearing) for a disciplinary decision. In such a situation there would be a strong case for attributing to the employer both the motivation and the knowledge of 'A', even if they are not shared by B. That would be consistent with the *ratio* in *Orr*. In such a case, applying the approach in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (HL), the conduct of the investigation was part of the deputed "functions under section 98". However, although Mr Widmer had supplied documents to the HR department which it

in turn passed to Ms Vickers, and responded to her query about the complaint about tailor-made incentives offered to customers, that did not make him an investigator.

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

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

**Supp.320** In the Supreme Court (at paragraph 53) Lord Wilson agreed that Underhill LJ's third bullet point case, that of a manager who (unlike Mr Widmer), alongside the decision-maker, had had some responsibility for the conduct of the disciplinary inquiry, was one where it might well be necessary for the tribunal to attribute to the employer the knowledge of the manipulator. However he concluded that there could also be attribution to the employer in Underhill LJ's second case of manipulation by the line manager, explaining (at para 60) that:

“If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.”

**Supp.321** The Court of Appeal's reliance on the decision in *Orr* was open to question given that Underhill LJ had allowed for the possibility that the mental processes of individuals other than the dismissing officer could be important; whether by reference to someone with responsibility for the investigation or, possibly, someone at or near the top of the management hierarchy who procures the dismissal. The Supreme Court's approach cut through all this and allows a general exception (applicable both to protected disclosure and other unfair dismissal claims) to cover cases where anyone exercising the employer's authority vis a vis the claimant employee, such as the line manager in Ms Jhuti's case, procures the dismissal. The Supreme Court's approach recognises that a manager, acting on behalf of the employer (albeit abusing the employer's authority), may (in exceptional cases) play a key role in the process leading to the dismissal, just as much as would be the case in relation to an investigating officer. The Supreme Court considered that it was wholly consistent with the purposes of the unfair dismissal legislation to focus on the substance of who brought about the dismissal, and where it results from an exercise of managerial authority to attribute that as an act of the employer. That was the “real reason” for the dismissal.

**Supp.322** Further, the considerations which led the Court of Appeal in *Reynolds v CLFIS (UK) Limited* [2015] ICR 1010 (CA), in a discrimination context, to shy away from allowing liability on a composite basis (combining the act of dismissal of a dismissing officer

with the motivation of a third party), do not apply to unfair dismissal complaints. In *Reynolds*, Underhill LJ was concerned that if there could be liability on a composite basis the individual dismissing officer could be liable under the Equality Act despite not having the necessary state of mind. That does not arise in relation to unfair dismissal, where there is no provision for individual liability. Indeed Underhill LJ emphasised that whilst it makes sense to construe language in the whistleblowing provisions consistently with identical language, where it appears, in the Equality Act 2010, it is not always safe to read across from the discrimination legislation because there are some significant differences in terminology. The fact that there is separate provision in the whistleblowing legislation for cases of unfair dismissal of employees, and a boundary with detriment claims, is an instance of one such significant difference from the Equality Act.

**Supp.323** It is right to say that in an unfair dismissal case considerable uncertainty may be engendered by going beyond the mental processes of the dismissing officer. As emphasised in *Orr*, the scheme of the unfair dismissal legislation is to encourage reasonable investigation. That points against focusing on the mental processes of the manager who may bring a complaint rather than the decision maker who may be tasked with considering the evidence including that of the complainant manager. That is less of a concern in cases of automatic unfair dismissal where no issue arises as to adequacy of the investigation. But as emphasised by Underhill LJ and accepted by Lord Wilson, it cannot be the case that there is a different approach to the test of the reason or principal reason in automatic unfair dismissal cases. As we have seen Lord Wilson's response was that instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed, will not be common. But whilst findings that such a thing has occurred may well be uncommon allegations that it has will arise. Employers will have to be all the more astute to scrutinise and challenge a case of dismissal presented by an employee's managers.

#### ***(b) Application of Jhuti***

**Supp.324** As noted above Lord Wilson endorsed the view expressed by Underhill LJ in the Court of Appeal, that liability may be attributed to the employer on the basis of the state of mind of an investigator involved in the disciplinary process. This was applied (prior to the SC) decision in *Chumber v Hestia Healthcare Limited* UKEAT/0229/18/LA, 22<sup>nd</sup> February 2019. In that case Mr Chumber, who was employed at a care home, had made protected disclosures both to the home manager and to the CQC in which he raised concerns as to the treatment of the residents. He was subsequently dismissed purportedly on the basis of his misconduct in relation to a subsequent incident. The tribunal made findings of fact that the dismissing officer was not aware of Mr Chumber's protected disclosures. However it was clear from contemporaneous documents that the ET had erred in finding that the investigating officer (V) was unaware of protected disclosures. Applying the reasoning in *Jhuti*, the EAT accepted that ET had erred in regarding alleged failings in the investigation as process as only relevant to procedural fairness. They were material in relation to the contention that the investigation was unbalanced and evidenced that the investigating officer had been influenced

by Mr Chumber's protected disclosures and that the investigation in turn influenced the decision to dismiss. The appeal was allowed and the case remitted to a differently constituted tribunal.

**Supp.325** The Court of Appeal's decision in *Jhuti* was also applied in *Cadent Gas Ltd v Singh* [2020] IRLR 86 (EAT) in the context of a claim of automatically unfair dismissal by reason of trade union activities. Mr Singh was a gas engineer and an active trade union member. Cadent manages national gas emergency services. Mr Singh was dismissed for gross misconduct for attending a job one minute later than the one hour period provided for under the service level agreement, having stopped for some food en route. The failure was investigated by Cadent's Network Manager, Mr Huckerby. Mr Huckerby was found to have given incorrect information to HR and to the dismissing officer, Mr Wilson, who dismissed Mr Singh for gross misconduct. The ET noted that it was surprising that Mr Huckerby was not called as a witness in the light of the allegation that he had driven the investigation to dismissal. Having regard (amongst other matters) to the lack of explanation for internal emails in which Mr Huckerby stated he wanted to keep Mr Singh's trade union activities "on the radar", and that it was unusual for a manager of Mr Huckerby's seniority to become involved, the ET upheld Mr Singh's claim that, as a result of Mr Huckerby's influence, the reason or principal reason for his dismissal was his trade union activities contrary to s.152 TULR(C)A 1992 neither the dismissing or appeal officers were themselves motivated by prejudice against Mr Singh for his trade union activities.

**Supp.326** The EAT (Choudhury P) dismissed Cadent's appeal. First, even aside from the *Jhuti* line of argument, the finding that the dismissing and appeal officers were not motivated by prejudice did not preclude the ET's conclusion. It did not need to be shown that the employer was motivated by malice or prejudice (applying *Dundon v GPT LTD* [1995] IRLR 403). It was sufficient that the reason, or principal reason, for the dismissal was that the employee was engaged in trade union activities. As a result of the ET's finding that that Mr Singh had established a *prima facie* case that his treatment was because of his trade union activities, the burden to establish the reason for the dismissal then shifted to the employer: *Serco Ltd v Dahou* [2017] IRLR 81 at [30]. Cadent had failed to produce evidence, in particular from Mr Huckerby, to explain aspects of the treatment of Mr Singh throughout the investigatory and disciplinary process and provided unsatisfactory explanations for other matters. The dismissing officer, Mr Wilson, had himself been found to have held Mr Singh to a higher standard because of his trade union activities and he presided over a wholly inadequate investigation. In these circumstances, it was open to the ET to conclude that the burden of showing the reason had not been discharged. Whilst, unlike a discrimination case, that did not entail a requirement then to treat the impugned reason as being the reason for treatment, it had been open to the Tribunal to draw that inference.

**Supp.327** Further, applying *Jhuti* (then at the Court of Appeal level), Mr Huckerby was a manager deputed by the employer to carry out the task of investigating the misconduct. Indeed his role went beyond this; he had taken a leading and directing role in the investigation in circumstances where other employees who were not engaged in trade union activities and

who had committed similar acts of misconduct were dealt with by local management and not investigated in the same way. Moreover, that role had contributed to an imbalanced picture being presented to HR and which resulted in a charge of gross misconduct being laid; a situation that had not arisen for other engineers who were not engaged in trade union activities. This, said the EAT, was a good example of a case where the motivation of the manager(s) deputed to conduct the investigation could be attributed to the employer, even if the eventual dismissing officers did not share that motivation.

**Supp.328** The EAT accepted that some manipulation of the dismissing office must be established in such a case. If a manager did little more than instigate the investigation, leaving the course and outcome of the investigation entirely to others that would be unlikely give rise to attribution of their state of mind to the employer. However, manipulation could take many forms and was not confined to those apparent from direct communication between Mr Huckerby and Mr Wilson. If a manager was as heavily involved in directing the investigation, as Mr Huckerby clearly was, and played the kind of role that he did in steering the investigation towards a disciplinary hearing and dismissal, there was a much stronger case for attribution.

**Supp.329** The EAT acknowledged that the difficult question was where to draw the line between that where attribution is appropriate and that where it is not. That is now substantially overtaken by the decision of the SC in *Jhuti*, as a result of which there is no longer a need to distinguish between manipulation merely in the perpetrator's role as line manager and their involvement in the investigation. Clearly however it will still be necessary to assess not only whether the reason or principal reason of the alleged manipulator was the protected disclosure (or other prohibited reason) but also whether their influence was such that this was also the reason or principal reason for dismissal.

**Supp.330** Whilst the decision in *Cadent* illustrates the dangers of not calling evidence from an individual alleged to have manipulated a dismissal, in *Agarwal v Cardiff University* UKEAT/0115/19/RN, 19<sup>th</sup> March 2020, the EAT (at para 26) rejected a submission that in the light of the Supreme Court's decision in *Jhuti*, each person involved in the dismissal process would need to give evidence so that there could be a subjective assessment of each of their reasoning processes. Here, in rejecting a claim of automatically unfair dismissal, the ET had been entitled to accept the reasoning of the decision making committee as explained in evidence by the Chair of that committee. The ET had given an adequate explanation as to why it did not consider that the involvement in the process of the person whose reasons were impugned (the former Dean) was significant. The ET had been entitled to take into account the realities of the situation in which the participants in the process were senior members of the medical profession at a University, and its assessment and rejection of the claimant's case as involving a "gigantic conspiracy designed for the sole purpose of engineering" the claimant's dismissal.

**Supp.331** The Supreme Court's decision in *Jhuti* was also considered by the EAT in *Uddin v London Borough Of Ealing* [2020] UKEAT 0165/0165/19/RN, 13<sup>th</sup> February 2020,

in the context of a claim of ordinary unfair dismissal. The EAT concluded that the effect of the Supreme Court's decision was that the question of whether the knowledge or conduct of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal, could arise, *both* in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question. In a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision-maker, that *could* be regarded as relevant to the Tribunal's adjudication of the issue under section 98(4) ERA of whether the dismissal was fair in all the circumstances of the case. Here the claimant's dismissal arose from an allegation of inappropriate sexual behaviour towards a colleague in an alleged incident at a bar. The investigating officer knew that the police complaint had been withdrawn but did not pass this on to the dismissing officer. Given the serious gravity of the allegations, that the dismissing officer took into account that the complaint had been made and that her evidence was that if told that the complaint had been withdrawn she would have wanted to know why, the only proper conclusion was that the dismissal was unfair.

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

**Supp.332** The conclusion on the unfair dismissal issue in *Jhuti* at Court of Appeal level necessitated a fresh focus on whether there was an alternative route to recovery under the detriment provisions contained in s.47B ERA. There would have been a serious lacunae in protection if there could be no claim in circumstances such as the tribunal found in *Jhuti*. As we have seen the ET had specifically found (at paragraph 346) that:

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

As we have seen it now turns out that Ms Jhuti could successfully claim that she had been (automatically) unfairly dismissed. However during the period between the Court of Appeal's decision in *Jhuti* and that of the Supreme Court there has been a transformation of the law relating to detriment and dismissal.

**Supp.333** As we describe in the Main Work at 7.175, Mitting J had expressed the view that the ET's apparent belief that Ms Jhuti should in principle be able to claim "career-long" losses as a consequence of the unlawful detriments was wrong because of the effect of s.47B (2) ERA. He considered that since this expressly excluded the detriment of dismissal, of necessity it also entailed that there could be no claim in detriment for the financial and other consequences of dismissal, whatever the causative link. In the Court of Appeal, Royal Mail did not support that position. Instead it argued that there was indeed a route by which Ms Jhuti might have been entitled to compensation for dismissal consequent on detriment notwithstanding s.47B (2) ERA but that no such case had been advanced on her behalf in the ET and that it was too late for it to be advanced now. The hypothetical route was:-

- A claim that on the ground of Ms Jhuti having made protected disclosures Mr Widmer manipulated Ms Vickers by providing a false and misleading impression of Ms Jhuti's performance, leading to Ms Vickers reaching a negative view of Ms Jhuti so that she dismissed Ms Jhuti.
- Such a claim could have been made against Mr Widmer, pursuant to s47B (1A) and, if proven, would then have attached liability vicariously to Royal Mail under s 47B (1B), subject to any reasonable steps defence under s47B (1D). Underhill LJ said that it was clear that Royal Mail did not intend to say that proceedings *had* to be brought against Mr Widmer personally. He added that in his view if the point was otherwise good, the route to recovery would not depend on Mr Widmer being named as a respondent. All that would matter was that Royal Mail's liability arose, vicariously, under s.47B (1B). It was perfectly open to a claimant to advance a claim against an employer under s.47B(1B) without (also) proceeding against the worker who actually did the deed: indeed that was, he said, probably the more usual course.

**Supp.334** Underhill LJ dismissed Royal Mail's contentions:

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

“Being bullied, harassed and intimidated by Mike Widmer, who imposed mandatory weekly one-to-one meetings and targets solely on the Claimant”; and

“Being served with a document entitled ‘Performance Plan Objectives’ by Mike Widmer and informed that it was a condition of her passing her probation to complete this and provide all her key contacts from her previous employments in the travel sector”.

Underhill LJ agreed that Ms Jhuti could have identified that communication as a specific detriment, but he did not regard the failure to do so as fatal to her case. It was still open to her to argue at the remedy stage that her eventual dismissal was a (not too remote) consequence of the detriments actually found. The consequence is that someone who is responsible for starting a process may be liable for its conclusion (or for loss of the chance that this would have been avoided), where they play no part in the process thereafter.

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

**Supp.335** Since no argument was advanced by Royal Mail on the appeal that a detriment claim was barred by s.47B(2) ERA, it followed that there was no obstacle in principle to Ms Jhuti recovering compensation for dismissal consequent on detriment. Underhill LJ went on to say that whether she could do so in practice, or to what extent, was a matter for the ET at the remedy hearing. The view about causation which the ET expressed at para. 346 of the Reasons (see Supp.332 above) could not be conclusive, since formally it did not fall within the scope of the liability hearing and the tribunal heard no submissions specifically directed to the point. The ET was merely putting down what it hoped would be a useful marker. In so far as it involved any findings of fact, it was based on the evidence which the tribunal had heard and might accordingly prove difficult to shift; but the tribunal would nevertheless have to consider carefully any submissions from Royal Mail about all aspects of the issue.

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

**Supp.336** It followed from the approach taken by Royal Mail on the appeal that the broader issue as to the effect of s.47B(2) ERA, and whether it excluded losses consequent on dismissal (as indicated by Mitting J), did not directly arise, and it was left open by the EAT. However whilst declining to decide the issue as to the effect of s.47B(2) ERA, Underhill LJ but made some observations that were broadly supportive of being able to frame a detriment claim for losses consequent on dismissal despite that provision:

- He noted that it was common ground that s.47B(2) bites where the detriment which is the subject of a claim "amounts to a dismissal". But he identified the relevant issue as being whether that language excluded recovery of compensation for dismissal “even if the dismissal is caused by something formulated as a distinct prior detriment”.

- He noted that, in principle, losses occasioned by a claimant's dismissal may be recoverable as compensation for an unlawful detriment which caused the dismissal (para. 39 (5) *CLFIS v Reynolds*) and expressed the view that there was no reason in principle for adopting a different approach in a case of whistleblower discrimination.
- He added that s.47B(2) ERA precluded a claim under the operative parts of the section where the detriment which was the subject of the complaint to the tribunal – what in other contexts would be called the cause of action – "amounts to a dismissal"; and it was "clearly arguable that in this kind of case the relevant detriment is the prior treatment complained of, the dismissal being only a consequence of that detriment".
- However he added that "it may be that that distinction is not as straightforward as it seems" and the decision in *Melia v Magna Kansei Ltd* [2006] ICR 410 (CA) might need "careful consideration".

**Supp.337** We return to this below in the context of the reasoning in *International Petroleum Ltd and others v Osipov and others* [2018] EWCA Civ 2321, [2019] IRLR 52 (CA) which is now the leading authority on the scope to bring detriment claims for dismissal or causing dismissal (and no petition to appeal the Supreme Court is being pursued).

#### *Ms Jhuti's detriment claims revisited in the EAT*

**Supp.338** Ms Jhuti's detriment claims went back to the EAT: [2018] UKEAT/0020/16/RN, 19<sup>th</sup> March 2018 on the issues of:

- whether the detriment claims were in time in circumstances where the grievance detriment claim failed; and
- whether the grievance detriment claim was wrongly rejected on the basis of too narrow an approach to the list of issues agreed in the case.

The appeal and cross-appeal succeeded, and are dealt with below at Supp.390-394.

#### **The proper approach to s.47B(2) ERA: Osipov**

##### *The facts in Osipov*

**Supp.339** Mr Osipov was employed by IPL, an Australian domiciled oil and gas exploration and production company which was listed on the Australian stock exchange (although trading in its shares were suspended). In June 2014 he was appointed as CEO of IPL. He made what were found to be protected disclosures in relation to failure to conduct a competitive tendering process in relation to exploration operations in the Niger. The ET found that he suffered detriments (including being removed from a business trip to Niger), and ultimately was dismissed by reason of his protected disclosures. The ET upheld a claim of automatic unfair dismissal under s.103A. It appears that by that time IPL was insolvent. But Mr Osipov had also made detriment claims under s.47B ERA against two directors, Mr Timis

and Mr Sage. These claims succeeded<sup>42</sup>. Mr Timis was a non-executive director and the majority shareholder. The tribunal also found that he was a de facto executive director who regarded himself as entitled to exercise executive authority in relation to the day-to-day running of the company because of his significant investment in the business. Mr Sage was also a non-executive director but, despite his denial, was found by the tribunal to have exercised managerial functions including having signed the term sheet for Mr Osipov in the position of CEO. The original Details of Claim did not articulate any specific case as to the alleged detriments. Particulars were subsequently provided and these were embodied in an agreed list of issues. This listed, at para. 9, fourteen detriments, labelled (a)-(n). The focus before the appellate courts was on detriment (m), which read:

"Any instructions or recommendations given by the [director respondents] which culminated in the Claimant's dismissal on 27<sup>th</sup> October 2014 ..."

The ET upheld the claim in relation to detriment (m).

**Supp.340** Consistently with the approach subsequently envisaged by Underhill LJ in *Jhuti*, the ET appeared to draw a distinction between dismissal and an instruction or decision to dismiss, which was regarded as distinct from dismissal and could found a detriment claim. Yet despite this, the detriment claim under this head also succeeded against Mr Sage. That was explained by the EAT by reference to the ET's finding that Mr Sage had agreed with the decision to dismiss, and so was not simply the messenger passing on instructions. It may be noted that this does not explain how Mr Sage's actions fell within the pleaded detriment of instructions or recommendations to dismiss, a point which was considered in the Court of Appeal. It was instead the implementation of those instructions, or possibly participating in the decision to dismiss, which constituted the detriment notwithstanding the ET's acceptance that the dismissal itself could not be the basis for a detriment claim.

**Supp.341** The ET then considered which particular respondents had done the acts by which Mr Osipov had been subjected to those detriments. It held that IPL was responsible for all of them, and that Mr Timis and Mr Sage were each responsible for some (more in Mr Timis' case than Mr Sage's): both of them were held responsible for detriment (m). The formal decision as to remedy was that Mr Osipov was entitled to be paid the sum of £843,372.56 as compensation for unfair dismissal and detriment for making protected disclosures. As Underhill LJ put it later the ET's judgment rolled up the award for unfair dismissal and for the unlawful detriments. A break-down was given which identified four elements:-

- a. £563,461.92, described as "the award for unfair dismissal";

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<sup>42</sup> Claims were also made against two other individual directors but they did not succeed. The Court of Appeal was told that Mr Timis and Mr Sage had the benefit of directors' insurance which would cover the full amount of the claim. Underhill LJ pointed out that had they not been insured, and indeed had IPL not been insolvent, an interesting question might have arisen as to the contribution position between the directors and between them and IPL, since it has been decided at EAT level that the Civil Liability (Contribution) Act 1978 does not apply to proceedings in the ET: see *Sunderland City Council v Brennan* [2011] UKEAT 0286/110, [2012] ICR 1183.

- b. £16,500 "in respect of injury to feelings";
- c. £169,702.58 "for unpaid salary"<sup>43</sup>;
- d. £93,708.06 by way of a 12.5% uplift for failure to comply with the ACAS Code

**Supp.342** The Judgment did not specify who was responsible for what element. Issues of apportionment were not addressed and, as noted by the Court of Appeal, any award was to be paid by director's insurance which covered Mr Timis and Mr Sage. Following a further hearing and a further Judgment and Reasons, the final, grossed up, award of "compensation for unfair dismissal and detriment for making protected disclosures" was quantified at £1,744,575.66. The ET acknowledged that Mr Timis and Mr Sage could not be liable for unfair dismissal and that "only [IPL] can be responsible for the losses flowing from the dismissal", but it pointed out that they were individually liable for the detriments for which it had found them to be responsible and thus "for all the losses flowing from the detriments up to the point of dismissal".

**Supp.343** Underhill LJ was later to observe that this formula was ambiguous because if the phrase "up to the point of dismissal" was read as governing "losses", rather than "detriments", it would mean that Mr Timis and Mr Sage were not liable for elements (a) or (c) set out above. It had been argued on behalf of Mr Osipov that the losses occasioned by the dismissal were recoverable against Mr Sage and Mr Timis because the dismissal was itself caused by the earlier unlawful detriments. In any event the parties understood the effect of this further Judgment to be that Mr Timis and Mr Sage were liable for the full £1,744,575.66, and they appealed to the EAT on that basis. As Underhill LJ later put it, the upshot was that although Mr Timis and Mr Sage were not held liable for Mr Osipov's unfair dismissal as such, they were held liable for the losses that he suffered in consequence of the dismissal, on the basis that those losses flowed from the pre-dismissal detriments for which they were liable,

“...and specifically from detriment (m), the instruction or recommendation to dismiss him, which the tribunal clearly regarded as distinct from the dismissal itself.”

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

**Supp.344** The ET's decision was in substance upheld by the Employment Appeal Tribunal, although the amount had to be re-calculated and was agreed as £2,003,972.35.

**Supp.345** The reasoning of Simler P in the EAT differed from that of the employment tribunal. Instead of proceeding on the basis that the decision to dismiss itself could not be the grounds for a s.47B detriment claim, she concluded that a worker could bring a claim of detriment against a co-worker or agent based on the fact that the co-worker or agent had

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<sup>43</sup> The EAT subsequently held that the ET must have been relying on a specific provision in the claimant's contract which entitled him to be paid on termination "any accrued salary and bonuses": see para. 203 of the judgment of Simler P. There was no appeal to the Court of Appeal against that decision.

effected the dismissal of the worker. It was therefore not necessary to distinguish between the dismissal and the procuring of a dismissal.

**Supp.346** In summary Simler P reasoned that:

1. It is appropriate to construe s.47B(2) ERA, so far as possible, to provide protection rather than to deny it, given that the mischief at which it is directed is to provide employees and workers with protection from prohibited acts and deliberate omissions of employers and fellow workers or agents of the employer (para 153).
2. The exclusion provided for by s.47B(2) only covers detriments “amounting to dismissal within Part X” of the ERA. Simler P stated (at para 154) that this meant “detriments amounting to unfair dismissal claims” and therefore referred only to claims of dismissal by an employee against the employer (other than claims based on vicarious liability). She added that the submission that it could cover claims against the individual worker ignored the words in brackets cross-referring to Part X ERA. In Simler P’s view this construction put employees in the same position as workers, since workers are able to bring detriment claims based on early termination of their contracts against their employers. (But as noted below, at Supp.438-439, this needs to be qualified in the light of s.49(6) ERA).
3. There was no principled reason for making fellow-workers personally liable for losses caused by detriments short of dismissal, but relieving them from individual liability for the most serious detriments, such as an instruction to dismiss. There was no rational reason for a different approach to that in discrimination claims where fellow workers or agents were not protected from liability for the consequences of the most serious detriments to which they could subject others.
4. The approach of permitting detriment claims by an employee against a co-worker/employer’s agent based on the detriment of dismissal would avoid unjust consequences that otherwise might arise in a “tainted information case”. In such a case the person who dismisses the employee acts for a potentially fair reason and in good faith but does so on information supplied by another employee (X), and X is influenced by the employee’s protected disclosure. On Simler P’s reasoning, the approach adopted in discrimination cases in *Reynolds v CLFIS (UK) Limited* [2015] ICR 2010 (CA) would apply so that even though a s.103A claim could not succeed there would be a claim against X for losses consequential on X’s victimising conduct. This would avoid the result that the victimising employee (X) escapes liability because the detriment consists of dismissal (or having liability curtailed by excluding the financial consequences of dismissal). Further, if there could not be a claim against X, the potential claimant employee could be left without a remedy if it was found that, although the protected disclosure was a material influence in the dismissal, it was not the reason or at least the principal reason for it.

**Supp.347** As Simler P acknowledged, her approach differed from that of the EAT in *Jhuti* where, as noted above, Mitting J commented (at paragraph 28) that the employment tribunal had erred in apparently taking the view that, despite s.47B(2), it could treat the manager's acts of victimisation as giving rise to a claim for Ms Jhuti's losses flowing from dismissal (subject only to proof of causation). However Simler P noted that little weight could be placed on this since (a) Mitting J acknowledged that he had heard no argument on this point and (b) (as we commented in the Main Work at paragraph 8.74) Mitting J's reasoning was flawed by reason of having overlooked s.48(5) ERA. S.48(5) makes clear that in the context of a claim against a worker or agent, references to the employer in ss.48 and 49 ERA include references to that worker or agent. That error led Mitting J to the clearly erroneous view (at paragraph 27 in *Jhuti*) that the only remedy available against a worker or agent was a declaration. Simler P added (at paragraph 162) that it seemed unlikely that the EAT in *Jhuti* would have reached the same conclusion had consideration been given to the effect of the construction adopted by it, which was that workers and agents would be relieved of the consequences of their own detrimental treatment.

### *The Court of Appeal*

**Supp.348** Mr Sage and Mr Timis appealed to the Court of Appeal. Protect (formerly Public Concern at Work) applied for and was given permission to intervene in the appeal. Underhill LJ gave the substantive judgement of the Court of Appeal with which Rafferty and Sales LJ agreed. As re-cast, Mr Timis and Mr Sage's appeal was formulated as follows:

"(A) By reason of section 47B (2) ERA 1996, neither Mr Timis nor Mr Sage could be liable to [Mr Osipov] in respect of an instruction to dismiss [him], nor under section 47B (2) of ERA1996 could they be liable for losses which flowed from [Mr Osipov's] dismissal."

**Supp.349** Having set out the relevant provisions of the ERA, Underhill LJ said although there were parallels between the amended provisions and those of the 2010 Act it was not possible simply to read across from the one to the other. Underhill LJ referred to what he had said in relation to this issue in *Jhuti* at paragraph 26 which had incorporated paragraph 48 of Mummery LJ's judgment in *Kuzel*: the statutory structure of the unfair dismissal legislation was so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants ran the risk of complicating rather than clarifying the legal concepts.

**Supp.350** Underhill LJ referred to *CLFIS (UK) Ltd* which, as he said, confirmed that in principle, where a prior detriment has caused a worker to be dismissed, he or she can recover in respect of losses caused by the dismissal as compensation for the consequences of the original detriment, subject to any issue about remoteness: "compensation for dismissal consequent on detriment" as Underhill LJ had called it in *Jhuti*. However, the reasoning in *CLFIS* could not be automatically applied in the whistleblower context. As Underhill LJ pointed out earlier in his judgment one particular, peculiar, difference between ERA and EqA was that whereas the whistleblower provisions of ERA provide separately for dismissal and 'detriment', EqA makes no such distinction. Discrimination by dismissal was simply one of a

list of proscribed discriminatory acts alongside 'subjecting [the employee] to any other detriments'.

**Supp.351** Underhill LJ noted that it was contended on behalf of Mr Sage and Mr Timis that their case fell within, and a remedy against them was excluded by, section 47B (2) for two reasons: the detriment “amounted to a dismissal” because:

- (1) either the losses sought to be recovered were losses flowing from the dismissal;  
and/or
- (2) the act said to be the detriment was, in substance, nothing more than the dismissal”.

**Supp.352** Underhill LJ started by considering the second of these two arguments. The contention was that on the ET's findings the reality was that the decision to dismiss was taken by Mr Timis (perhaps jointly with Mr Sage) and Mr Sage's e-mail to Mr Osipov was no more than the communication of that decision. It was argued that section 47B(2) excluded a detriment which "amounts to" dismissal, and this form of words was chosen by the draftsman in order to make clear that an approach based on substance rather than form was required. The complaint was in substance about Mr Osipov’s actual dismissal and so, it was argued, fell within the terms of the sub-section.

**Supp.353** Underhill LJ agreed that whether a detriment "amounts to dismissal" should be treated as one of substance rather than form. He also agreed that (although the ET's findings as to the governance arrangements within IPL were unsatisfactory) it seemed that Mr Timis had by one route or another the authority to dismiss Mr Osipov and that Mr Sage could or would not have done so on his own. Thus it was artificial to treat "detriment (m)" as distinct from the dismissal. Whilst there would be cases where it would not be easy to draw the line between a step taken in the process leading to the dismissal and the dismissal itself this was not one of them. However, as was argued on behalf of Mr Osipov and Protect (and as Simler P had held) section 47B (2) would in any event still not apply to the claim as against Messrs Timis and Sage (as opposed to IPL) because section 47B (2) does not refer simply to "dismissal", but to "dismissal (within the meaning of Part X)". The right conferred by Part X was a right only against the employer. S 94 (1) referred to an employee being dismissed "by his employer", and the same language was used in section 95 (1). Thus what section 47B (2) excluded was a claim against the employer (here IPL) for dismissing Mr Osipov (on whistleblower grounds). A complaint under sub-section (1A) against an individual who was a party to the dismissal decision fell outside its scope. That accorded with the policy behind section 47B (2) and its cognates. Further, the exclusion of individual liability in a case where the detriment amounted to dismissal would produce serious anomalies. That was, as we have seen, essentially the case that Simler P had accepted.

**Supp.354** It was argued on behalf of Mr Sage and Mr Timis that if the intention had been that co-workers should be liable as individuals for the detriment of dismissal, that could easily have been made clear when the 2013 amendments were introduced. More generally it was

argued that the proposed limitation of “dismissal” to “unfair dismissal by the employer” would undermine the careful demarcation between Part V and Part X because in every case of whistleblower dismissal the claimant would proceed against the employer under section 47B (1B) (on the back of the co-worker's liability under sub-section (1A)) as well as, or instead of, under section 103A. They could then:

- recover compensation for injury to feelings, which would not, because of *Dunnachie*, be available in a claim against the employer under section 103A.
- avail themselves of the less restrictive test of causation in section 47B.

**Supp.355** Rejecting this argument, Underhill LJ said that a construction of section 47B(2) which prevented a claimant from bringing a claim against an individual co-worker based on the detriment of dismissal would produce an incoherent and unsatisfactory result. As such it was unlikely to conform to Parliament's intention. Once the decision was taken to make co-workers personally liable for whistleblower detriment it was hard to see any reason in principle why they should, uniquely, not be so liable in a case where the detriment amounts to dismissal. Such a state of affairs would produce the obvious anomalies identified by Simler P:

- co-workers whose unlawfully motivated acts short of dismissal cause the claimant to be dismissed would be liable for those acts and for compensation for the losses caused by the dismissal while an individual with the same motivation who decided on the actual dismissal would escape scot-free.
- there was no such bar to individual liability in the case of a claimant who was a worker rather than an employee and who had their contract of employment terminated, even though the two situations might be thought to be substantially identical.

**Supp.356** Further the scheme of protection for whistleblowers would be less effective than for victims of other kinds of discrimination and victimisation at work. Claims are commonly brought against individuals as well as employers under the Equality Act 2010, and occasionally it is the individual who ends up having to pay, either because the employer is insolvent or because it has established a reasonable steps defence. The situations under the Equality Act and the ERA were essentially similar and, other things being equal, one would expect Parliament to have intended to follow the same substantive approach in each.

**Supp.357** Underhill LJ accepted that Part V and Part X of ERA were distinct and largely self-contained regimes. That reflected the separate and historically prior development of protection against unfair dismissal. As it came to be recognised that treatment on certain proscribed grounds required additional protection, the choice had been made not to disturb the existing unfair dismissal regime but to create a complementary regime covering detriments other than dismissal. The different regimes addressed different aspects of the same mischiefs and they mostly employed substantially the same drafting. There was no reason to believe that they reflected any great conceptual gulf perceived by Parliament between dismissal and other kinds of detriment. That being so, although anti-overlap provisions were required in the interests of good order, the policy behind them was unlikely to have been anything more than

that a claimant should not claim under Part V where the identical right was available under Part X.

**Supp.358** In Underhill LJ's view there was no reason to suppose that this policy changed when in 1998 statutory protection for whistleblowers was incorporated into the then existing structure; and Underhill LJ considered that the preservation in section 47B (2), albeit for a short time, of the exception for fixed-term employees showed that it did not. There was no reason to suppose that the policy was affected by the changes made by the Enterprise and Regulatory Reform Act 2013: there was no basis for thinking that the introduction of individual liability meant that, for the first time, sub-section (2) – the language of which was unchanged – was intended to exclude a liability which would arise under the other provisions of the section but which was not provided for by section 103A.

**Supp.359** Underhill LJ then considered the anomalies that different (and in some respects better) remedies were available via the 103A route to those available to a dismissed employee under s.47B and that a different (and more favourable) test for "causation" applied to a claim under section 47B. He was not persuaded that the existence of either undermined his analysis. They were "particular wrinkles" without any wider significance. Further, whilst it was correct that compensation for injury to feelings was available under s.47B (and not 103A) there was no indication that the draftsman had focused on this question at all. In any event the anomalies, intentional or not, were only of significance if they suggested that there was a positive statutory intention that no claim could be advanced under section 47B where the detriment took the form of dismissal, even if it could not be advanced under section 103A. Underhill LJ did not believe that they did. As regards compensation for injury to feelings, but for the mismatch with *Dunnachie*, there was nothing surprising about such compensation being available in a case where the detriment takes the form of dismissal. It had always been understood to be available for detriments other than dismissal, and was also available in the case of discriminatory dismissals under the Equality Act. Perhaps the real anomaly was that it was not available in a claim under section 103A.

**Supp.360** Underhill LJ did not agree that section 103A became a dead letter: employees would need to rely on section 103A, because it did not give the employer a no "reasonable steps" defence and because orders for reinstatement or re-engagement, and for a basic award, were only available in a claim under Part X.

**Supp.361** The construction of the language of section 47B(2) was to be approached on the basis that it would be expected that Parliament to have intended to exclude liability under the operative provisions of the section only where the identical remedy was available under section 103A; and thus that it would not exclude a co-worker's individual liability for the detriment of dismissal under sub-section (1A) (or, which follows, any vicarious liability of the employer under sub-section (1B)). The statutory language did not compel a different construction.

**Supp.362** Sub-sections 47B(1) and (1A) simply proscribed the doing of a detrimental act: the doing of the act and the suffering of the detriment were, for this purpose at least, two sides of the same coin. On that basis the reference in sub-section (2) to "the detriment in question" connoted the detrimental act of which the claimant complains, and a claimant relying on sub-section (1A) could indeed say "I am not complaining of an act done by the employer but of an act done by my co-worker". Such a construction produced a more rational and coherent statutory scheme and conformed better with the purpose of section 47B (2).

**Supp.363** Underhill LJ reasoned that an additional advantage of this construction was that it eliminated the need to undertake the exercise of drawing a line between those of a co-worker's acts which amounted to dismissal and those that constituted distinct prior acts which would involve tribunals in arid and artificial disputes, with the risk of arbitrary outcomes. Whilst a similar exercise was sometimes required in other contexts as a result of *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518; the state of affairs produced by *Johnson* was widely regarded as, at best, a necessary evil, and Underhill LJ had "no enthusiasm for reproducing it where it can be avoided."

**Supp.364** Thus, concluded Underhill LJ, section 47B (2) did not prevent Mr Osipov proceeding against Mr Sage and Mr Timis under Part V on the basis of their responsibility for the dismissal itself. Underhill LJ accepted it was "clumsy" that an employee dismissed on whistleblower grounds should be able to pursue distinct causes of action, with significant differences as regards the conditions of liability and (perhaps) compensation, against his or her employer. It might well be that Parliament did not really think through the technical challenges of inserting into the framework of the 1996 Act a scheme of individual liability largely borrowed from the discrimination legislation. But the resulting awkwardnesses were insufficient to justify a construction that would produce much more serious anomalies and be contrary to the overall policy of the provisions.

**Supp.365** That left the observation by Chadwick LJ in *Melia* to the effect that the policy behind s.47B(2) was to prevent a claimant recovering under Part V where he had a right under Part X in respect of the same detriment. However those observations were made in the context of the particular issue in that case, namely whether the claimant could recover under Part X for an injury suffered prior to the dismissal. That was a wholly different question from the issue in *Osipov*. Chadwick LJ's reference to the "the same loss or detriment" was entirely appropriate in the context of the pre-2013 legislation when the two phrases necessarily connoted the same thing: a more refined approach is only necessary now because of the possibility of having claims against different respondents arising out of the dismissal. That issue was not before the Court in *Melia* and Chadwick LJ's language could not be treated as having any bearing on the question before the Court in *Osipov*.

#### ***Compensation for dismissal consequent on detriment***

**Supp.366** Underhill LJ's conclusions as to the construction of 47B(2) meant that it was strictly unnecessary to consider whether s.47B(2) excluded compensation for dismissal which

was caused by a prior detriment, because if Mr Osipov could recover against Mr Timis and Mr Sage for the dismissal itself he did not need to rely on any prior detriment. However the point was addressed by Underhill LJ as it would arise in other cases where the dismissal decision was not taken on whistleblower grounds – as was the case in *Jhuti* (subject to the outcome of the pending appeal).

**Supp.367** Underhill LJ started by noting that it had not been argued that *CLFIS* was wrongly decided or, therefore, that compensation for dismissal consequent on detriment was not recoverable *outside* the whistleblower context. But it had been argued that such compensation was excluded in the case of whistleblower detriment by the language of section 47B (2). That corresponded to Mitting J's position in *Jhuti*, where that judge had said that section 47B (2) "necessarily excludes the financial and other consequences of dismissal whatever the causative link". However Underhill LJ considered that it confused (a) the detriment of which the worker complained, with (b) the loss caused by that detriment. The "detriment in question" in sub-section (2) had to be the detriment of which the claimant complains that he or she has been subjected contrary to section 47B(1) or (1A); in other words, his or her cause of action. In a "dismissal consequent on detriment" case that was not the dismissal but the distinct prior act which caused it. Section 47B(2) excluded the operation of sub-sections (1) and (1A) where the cause of action "amounts to" dismissal. Whatever the precise scope of that phrase it could not be read as referring to losses caused by the detriment in question.

**Supp.368** Underhill LJ noted that there would also be strong policy reasons for the conclusion. It was not difficult to conceive of cases where conduct which was unlawful under section 47B resulted in the victim's (fair) dismissal but where it would be plainly unjust if he or she were not able to recover for the losses caused by that dismissal as compensation for the original detriment. *Jhuti* was such a case. A different example was of an employee who develops a serious long-term mental illness as a result of being victimised by his or her colleagues for having made a protected disclosure, with the result that the employer has eventually to dismiss them on ill-health grounds. Assuming that the decision-maker has no improper motivation, the dismissal is likely to be fair, but it would be extraordinary if the claimant were not entitled to claim against the individuals who victimised him or her (and thus, potentially, against the employer under sub-section (1B)) for the full financial loss suffered as a result of the loss of their job, subject to any issue as to remoteness).

**Supp.369** Accordingly section 47B(2) placed no barrier to recovery of compensation for losses flowing from a dismissal which was itself caused by a prior act of whistleblower detriment. Such compensation would be subject to the usual rules about remoteness and discounting for contingencies (including the contingency that the employment might have terminated in any event).

## *Analysis*

**Supp.370** Whilst the decision in *Jhuti* proceeded to the Supreme Court, no further appeal was pursued in *Osipov*. The reasoning adopted in *Osipov* may be regarded as heavily policy driven, but it serves to avoid or reduce some significant anomalies, and gaps in protection, that would otherwise arise. As Underhill LJ noted (at para 27 in *Jhuti*), whistleblowing claims are unique in the dichotomy between detriment and unfair dismissal claims. Whilst there are other categories of detriment claim contained in Part V of the ERA, it is only in relation to whistleblowing claims that there is the distinction between detriment claims as giving rise to individual co-worker or agency liability and vicarious liability, whereas this is not available unfair dismissal claims. As reflected in the policy considerations underlying the approach in *Osipov*, that dichotomy would result in a series of anomalies if, contrary to the conclusion in *Osipov*, the scope to frame a claim in detriment was confined so as to exclude employee dismissal cases. In addition to the anomalous difference in relation to personal and vicarious liability, for detriment claims it is sufficient that the detriment is a significant influence rather than there being a need to show the principal reason. Detriment claims can also include claims for non-pecuniary loss such as injury to feelings, whereas in unfair dismissal claims the only element of non-pecuniary loss is the basic award (though there are other remedies – interim relief, reinstatement and re-engagement – that only apply to unfair dismissal claims). In addition, the provisions relating to burden of proof are also more generous in a claim under s.47B/s.48. For an employee who lacks the qualifying service to bring a claim for ordinary unfair dismissal under Part X of the ERA, the burden of proof is on the employee to establish the reason for dismissal: see 9.46 to 9.48 in the Main Work. Under s.48(2) ERA it is for the employer to show the reason (but see Supp.386-388 below).

**Supp.371** Whilst the policy considerations adopted by Simler P and the Court of Appeal are persuasive, aspects of the reasoning as to statutory construction are problematic. Both Simler P and the Court of Appeal read s.47B(2) as if it provided that s.47B does not apply where “the detriment in question amounts to **unfair** dismissal (within the meaning of Part X)”. Simler P and Underhill LJ regarded this as being required by the reference to Part X. Simler P commented (at paragraph 154) that the consequence of contending that s.47B(2) could apply to claims against the worker or agent was to ignore the words in brackets (ie “within the meaning of Part X”). That may be viewed as a highly strained construction. Section 95(1) ERA sets out the circumstances in which an employee is taken as being dismissed by the employer for the purposes of Part X ie (a) termination by the employer, (b) non-renewal of a limited-term contract or (c) constructive dismissal. Whether the dismissal is *fair or unfair* is dealt with separately in other provisions within Part X. Applied to the facts of *Osipov*, the acts of Mr Timis and Mr Sage indeed constituted the dismissal by the employer as defined in s.95(1), and indeed were treated as such for the unfair dismissal claim.

**Supp.372** Further s.49(6) ERA provides that on a complaint under s.47B ERA of a detriment consisting of the termination of a worker’s contract which is *not* a contract of employment, the compensation must not exceed that which would have been payable on a claim of unfair dismissal if the worker had been an employee and the dismissal was (at least)

principally by reason of a protected disclosure and therefore contrary to s.103A. As explained in the Main Work at paragraphs 10.104 to 10.107, the effect in relation to dismissal claims by workers other than employees is to limit any award for non-pecuniary loss (eg injury to feelings) so that it cannot exceed the amount of the basic award. The reference to compensation payable under s.103A appears to contemplate that the remedy for a dismissal claim brought by an employee would lie under the unfair dismissal provisions rather than in a claim for dismissal as detriment. If it was contemplated that there could be a “dismissal as detriment” claim brought by an employee, then either there would be no need for s.49(6) or, if such a provision was considered necessary, it would equally have extended to “dismissal as detriment” claims by employees against co-workers or agents. Instead, on the basis of the approach approved in *Osipov* that claims against a co-worker by an employee can be made in respect of a detriment consisting of dismissal, there would seem nothing to limit the compensation available in those claims to the total of a putative unfair dismissal award such as applies to claims by a worker who is not an employee. Even in a dismissal case an employee, but not other workers, could then claim compensation for injury to feelings or personal injury without his being confined to the amount of the basic award. Indeed in *Osipov* an award of some £16,500 was made in relation to injury to feelings which took into account the dismissal (as well as pre-dismissal detriment). This asymmetry suggests that Parliament assumed that in the case of an employee no claim could be made where the detriment consists of dismissal, albeit that the Court of Appeal in *Osipov* clearly regarded this as a matter of oversight rather than intention.

**Supp.373** As noted above, in *Jhuti*, Underhill LJ identified the key question as being whether s.47B(2) stood in the way of a claim for losses resulting from dismissal but ultimately flowing from a pre-dismissal detriment (which in turn causes the dismissal). Both that approach, and the approach of Simler J and the Court of Appeal in *Osipov*, may be said to elide the distinct concepts of (a) the act or deliberate failure to act and (b) detriment. That is a significant distinction, as has been emphasised in the context of time limits, which run from the date of the act or deliberate failure to act rather than date on which the detriment is suffered: see *Vivian v Bournemouth BC* (UKEAT/0254/10, 6<sup>th</sup> May 2011); *Flynn v Warrior Square Recoveries Ltd* [2014] EWCA Civ 68, and 7.210 to 7.215 in the Main Work. Whilst a dismissal can only be carried out by the employer, it may be caused by the act or failure to act of another person, as instanced by the scenario in *Jhuti* where it was said that Mr Widmer set up “a paper trail which set her to fail” (though there was no finding that Mr Widmer caused the dismissal, an issue for the remedy hearing). S.47B(2) is framed so as to apply where the detriment consists of dismissal. The detriment which results in an employee being unemployed in this scenario is dismissal, and accordingly so far as concerns those losses, the key detriment is surely the dismissal. That approach was however rejected by Simler P and Underhill LJ.

**Supp.374** However, notwithstanding some tension with the statutory language, the policy considerations advanced by Simler P and Underhill LJ in *Osipov* point strongly in favour of their approach. That is further reinforced by the approach to unfair dismissal claims in *Jhuti*. It cannot have been the legislative intention for serious acts of whistleblowing victimisation

to go unpunished or without an adequate remedy, merely because they culminate in dismissal. That would suggest at least that s.47B(2), as a demarcation provision, should not bite where no claim could be framed in unfair dismissal, as would be the case in an *Iago* situation where the dismissal was caused by someone not involved in the dismissal process. Indeed aspects of the Court of Appeal's decision in *Melia* may be regarded as supporting that approach in emphasising that s.47B(2) only excludes detriments that can be compensated under the unfair dismissal regime (see per Chadwick LJ at para 34).

**Supp.375** However merely to treat s.47B(2) as a demarcation provision so as to bite where there could be no unfair dismissal claim would not address the anomalies arising from the different regimes for unfair dismissal and detriment. Indeed in *Osipov* there was no difficulty in that case in attributing to the employer the relevant acts or motivation of the directors, Mr Timis and Mr Sage, for the purposes of the unfair dismissal legislation. As such the claim under s.103A succeeded. The issue was therefore not that the loss consequential on dismissal was incapable of being compensated under the unfair dismissal regime, but instead that it was not capable of being recovered from the individual respondents under the unfair dismissal regime. Further on different facts a claim could have failed against the employer under s.103A, which would have succeeded under s.47B against a worker's employer due to the different causation test. Such anomalies provided strong justification for what may be regarded as a highly purposive approach to construction. Again, as noted by Simler J, there would be the anomaly that less serious detriments could lead to individual liability, but the most serious detriments, which cause dismissal, lead to exclusion of personal liability.

#### ***Vicarious liability for dismissal: Implications for identification of parties***

**Supp.376** It is now clear, given the reasoning in *Osipov*, that a detriment claim based on dismissal can be brought against the co-worker/agent and can also be pursued against the employer on the basis of vicarious liability for the co-worker/agent who dismissed (or instructed or procured the dismissal) whether or not the co-worker/agent is also herself or himself made a party to the proceedings. The employment tribunal in *Osipov* proceeded (at paragraph 133) on the basis that there could be vicarious liability for the detriment claims which it upheld, since it concluded that the employer was responsible for all of the detriments found. The issue was not specifically addressed in the EAT's reasoning; nothing turned on this on the facts of that case given that the claim of unfair dismissal also succeeded. However, as we have seen, the Court of Appeal has now confirmed that there can be a vicarious liability claim against the employer based on the detriment of dismissal.

**Supp.377** The effect of the approach adopted in *Osipov* is substantially to deprive s.47B(2) of any meaningful content. Where the act complained of consists of the very act of dismissal, and the claim is against the employer, that would seem to be precisely the conduct which s.47B(2) was intended to cover. Whether or not the claim arises via the vicarious liability provisions, it is a claim where the detriment amounts to dismissal by the employer. Again however there are powerful policy considerations underpinning the approach adopted in *Osipov*. Permitting vicarious liability of an employer for the detriment of dismissal avoids

the significant anomalies which would apply if only the individual could be liable. There would then be a major incentive to join individual claimants since there would be the prospect of dismissal liability being established against the individuals, but not against the company given the more difficult test of whether dismissal was the reason or principal reason for dismissal.

**Supp.378** These considerations in turn have some practical implications in relation to how protected disclosure claims are framed and who should be parties to them. Simler P suggested (at para 156) that it is likely to be an unusual case where an employee will wish to pursue a claim and seek a remedy against a fellow worker for a whistleblowing detriment amounting to dismissal rather than pursuing a claim against the employer. We respectfully disagree. If, contrary to the Court of Appeal's conclusion, there could not be vicarious liability for dismissal as detriment, there would be ample incentive to include a claim against the individual(s) behind the decision to dismiss, on the basis of (a) the lower threshold for causation ("significant influence"), (b) for workers with less than two years' service, the different burden of proof, (c) the availability of compensation for non-pecuniary loss. These factors, taken together with the short time limit for bringing claims, could have led to a proliferation of parties, as the worker seeks to include all those who it is believed had or may have had a role in the decision to dismiss. The risk of this is lessened by permitting vicarious liability for dismissal as detriment. But the incentive to join the individual remains since:

- there may be concern as to solvency of the employer;
- in some cases there may be a wish to hold those responsible for acts of victimisation personally liable; and
- it may be that the employer can satisfy the statutory defence, in which case the claim would fail if it had only been brought against the employer.

**Supp.379** Equally, irrespective of whether the individual respondent is joined as well as the employer, the potential advantages of a detriment claim entails the need to keep in mind the potentially different time limits that apply. In a detriment claims time begins to run from the date of the act or deliberate failure to act, rather than the date of detriment taking effect. In practice the act or deliberate failure to act which ultimately causes the dismissal may have occurred quite some time earlier, leading to a potential trap for the unwary, particularly given the difficulty that may arise in satisfying the reasonable practicability test for an extension of time.

**Supp.380** Taking a step back, many of these difficulties arise from the unfortunate consequence of the different regimes applicable to unfair dismissal and the detriment provisions, with its associated similarities to the discrimination regime including vicarious and personal liability. Added into the mix there is yet a further level of complexity that now arises in introducing a further different regime in relation to NHS applicants for employment where the discrimination regime applies (see Supp.445-451, 456-458 below). In *NHS Manchester v Fecitt and others* [2012] ICR 372 the Court of Appeal recognised the anomalies that were liable to arise from the differing regimes for detriment and unfair dismissal but considered that it was a matter for the legislature to address. The construction adopted in

*Osipov* serves to overcome much of these anomalies without the need for the legislative form that may otherwise have been required.

***No scope for Iago arguments in detriment claims: the need to identify the relevant perpetrator***

**Supp.381** Whilst in *Jhuti* the Court of Appeal allowed the possibility in identifying the principal reason for dismissal that the thought processes of an investigator involved in the disciplinary process could be relevant, such as were that person manipulates the decision. As the EAT confirmed in *Malik v Cenkos Securities Plc* UKEAT/0100/17/RN, 17<sup>th</sup> January 2018, this cannot be carried across to detriment claims. The key difference is that for unfair dismissal claims it is only the employer that is liable. By contrast s.47B ERA claims can give rise to personal liability and it is therefore necessary to avoid the potential consequence of an individual (such as a dismissing officer) including personal liability on the basis of the mental processes of a third party. That in turn makes it particularly important if bringing a detriment claim against an individual to properly identify the individual responsible for the relevant treatment. Equally in so far as relying on vicarious liability it will be necessary properly to plead the basis on which this arises, and if necessary to react to developments in the disclosure or evidence by seeking to amend the pleading accordingly.

**Supp.382** The potential case management difficulties that may arise are illustrated by sex discrimination case of *The Commissioner of Police of the Metropolis v Denby* UKEAT/0314/16/RN, 24<sup>th</sup> October 2017. Chief Inspector Denby was in charge of one of the five arms of the Territorial Support Group, “TSG1”, based at Paddington. His female comparator, Chief Inspector (CI) Edwards, was in charge of TSG3, in Ilford. Both reported up the same chain of command and had identical roles. Similar complaints were made against both CI Denby and CI Edwards, that overtime had been booked irregularly by officers at their respective TSGs. CI Denby’s complaint compared the more rigorous action taken against himself with that taken against CI Edwards. The ET upheld his complaint. During the hearing and against the opposition of the respondent, the MPS, the ET allowed CI Denby to add claims (which went on to succeed) that an officer in his chain of command had made or been party to two decisions adverse to him: CI Denby’s pleaded case had not alleged that the officer was responsible for those decisions. The ET noted that the added claims had arisen from the oral evidence of the officer concerned owning up that the two decisions had been his. It decided that it would be “wholly inequitable not to allow an amendment to reflect the case which the respondents were themselves putting forward”.

**Supp.383** In the EAT the MPS contended that the ET had misapplied *CLFIS* because the amended case that succeeded had not been put (or adequately put) in the cross examination of the relevant witnesses. Ultimately that contention was rejected on the facts<sup>44</sup>. The EAT acknowledged that the *CLFIS* principle needed “careful handling” but, with that caveat,

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<sup>44</sup> The EAT’s detailed consideration as to the principles to be applied in determining whether the case was adequately put are not addressed here. See now also *Jesudason* [2020] EWCA Civ 73 at paras 92 to 93 where the relevant principles were considered.

considered that Tribunal's case avoid fairness where the relevant decision maker emerges only in the course of the proceedings by permitting appropriate amendments and allowing employees to target alternative decision makers, both of which had occurred in *Denby*.

### **Paragraph 7.160: Failure in the investigation of the discloser's concerns**

**Supp.384** *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN, 22<sup>nd</sup> March 2017 is not a whistleblowing case but it contains an interesting and useful analysis of the extent to which it is permissible to shift the burden of proof in a discrimination case because of findings that the respondent had failed properly to investigate the claimant's grievance. That provides a parallel to a case where the whistleblower complains that his or her disclosure has not been investigated properly. The provision for the statutory reversal of the burden of proof under the s.136 of the Equality Act 2010 of course has no similarly worded equivalent in a claim under the ERA: the operation of the burden of proof provisions and the role of inference drawing is considered in the Main Work at paragraphs 7.191 to 7.209. In the context of a claim under the Equality Act it is an error of law for a tribunal to find less favourable treatment because of a protected characteristic where there is no evidence or material from which it can properly draw such an inference: *Effa v Alexandra Health Care NHS Trust* (unreported CA, 5 Nov 1999 Mummery LJ at page 7 citing *North West Thames RHA v Noone* [1988] ICR 813 at 824.):

**Supp.385** It was contended on behalf of the claimant in *Chief Constable of Kent Constabulary v Bowler* that the totality of the failings by the officer who conducted the investigation and the sheer extent of the incompetency shown in the grievance investigation by that officer justified the shifting of the burden of proof. That contention had succeeded in the ET. But Simler P disagreed with it. There was no obvious link between having a lackadaisical approach and having a stereotypical view about race discrimination complainants. The tribunal provided no explanation for why a lackadaisical approach indicated the holding of a stereotypical view. Whilst there was no doubt that unlawful direct discrimination can occur when assumptions are made that an individual has characteristics associated with a group to which he belongs, tribunals were not entitled to rely on unproven assertions of stereotyping. There had to be evidence from which a tribunal can properly infer that a stereotypical assumption was made and that the assumption operated on the mind of the putative discriminator consciously or subconsciously when treating a complainant in the way alleged. The tribunal had not rejected the officer's explanations for failings in the grievance process, such as his failure to correct details, as dishonestly given, but had regarded them, in general, as unreasonable. It had found that the officer was out of his depth and ill-equipped to deal with the claimant's grievance which were both possible explanations for his incompetent handling of the grievance. The tribunal made a leap from a finding that the officer handled the grievance process incompetently and had a lackadaisical attitude (both unreasonable but not in themselves less favourable treatment) to a conclusion that this by itself (without any other apparent basis for it) indicated a stereotypical view of race complainants, and did so based on unproven and unsupported assumption. In the absence of adequate material from which this

inference could be drawn, the tribunal was not entitled to conclude that a prima facie case of less favourable treatment on race grounds had been established by the claimant.

### **Paragraphs 7.191 to 201: The burden of proof in relation to the ‘reason why’ question**

**Supp.386** See now *International Petroleum Ltd v Osipov* UKEAT/0229/16/DA, 19<sup>th</sup> July 2017 considered at Supp.339-383 above. Simler P said this (at paragraph 115):

“Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

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

**Supp.387** The proposition in sub-paragraph (a) is controversial. S.48(2) states that ‘on [a complaint of victimisation to a tribunal by a worker] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.’ Further, the view expressed by the Court of Appeal in *Dahou v Serco Limited* [2017] IRLR 81 (CA) indicated that, rather than the burden of proof being on the claimant, there was only an initial evidential burden to adduce some evidence to show a prima facie case or at least issues requiring explanation. There would then be a need for the employer to show the detriment was not on the ground of a protected disclosure. On that view, the effect would be closely similar to that applied under the approach in *Kuzel v Roche Products Ltd* [2008] ICR 799 (CA) in dismissal cases.

**Supp.388** The approach in *Osipov*, by contrast, was that the burden throughout rests on the worker to establish the reason for the detriment. On this view s.48(2) ERA is explained on the basis that it applies only an evidential burden. That approach explains the view, originally expressed in *Harrow v Knight*, that the effect of failure by the employer (or a respondent worker/agent) to show the reason for the treatment, is that an adverse inference may be drawn, but it does not necessarily follow that the claim would succeed. See to similar effect the approach of Choudhury P in *Cadent Gas Ltd v Singh* [2020] IRLR 86 (EAT) at para 49 (see Supp.325-329 above). That said, the thrust of the line of recent cases referred to at paragraphs 7.192 to 7.201 of the Main Work (*Ibekwe, Phoenix House Limited* and *Dahou*) is to emphasise that a tribunal must not abstain from grappling with the evidence and reaching positive findings of fact in relation to the “reason why” the worker has been subjected to a detriment. But significantly and controversially, on the view expressed by Simler P, s.48(2) ERA would not act as a tie breaker of last resort in favour of the claimant. In that respect it contrasts with the position for unfair dismissal where, provided that there is sufficient qualifying service, the burden of proof rests firmly on the employer: see eg *Marshall v Game Retail Ltd* UKEAT/0276/13/DA, 13<sup>th</sup> February 2015. See also the approach taken on the remitted hearing in *Jhuti*, discussed at Supp.394 below where, in finding that an instruction

to delay a grievance and appeal hearing was influenced by Ms Jhuti's protected disclosure, the ET placed emphasis on the fact that the employer had not called a witness to explain the reasons for the instruction.

### **Paragraph 7.208: Drawing inferences**

**Supp.389** In relation to the extent to which unreasonable behaviour might give rise to adverse inferences see *Chief Constable of Kent Constabulary v Bowler* above (in the context of the statutory reversal of the burden of proof under the Equality Act).

### **Paragraphs 7.220-223: Time limits for claims of victimisation; Paras 11.10,11: Case management and list of issues**

**Supp.390** See now *Royal Mail Group Limited v Jhuti* [2018] UKEAT/ 0020/16, 19<sup>th</sup> March 2018. The Court of Appeal's judgment left unresolved two particular grounds of challenge originally raised before Mitting J in May 2016, but not addressed on the footing that it was unnecessary to deal with them in light of the conclusions he reached. The case returned to the EAT for determination of those remaining grounds. The two challenges concerned (i) whether the detriment claims were in time in circumstances where the grievance detriment claim, the only claim which was within the primary limitation period, failed; (Royal Mail's appeal) and (ii) whether the grievance detriment claim was wrongly rejected on the basis of too narrow an approach to the list of issues agreed in the case (Ms Jhuti's appeal).

**Supp.391** The EAT held that the ET had indeed erred in relying on a detriment claim, concerning failure to investigate and provide a grievance outcome in a timely manner, as the basis for finding that claim was in time. S.48(3) ERA is concerned only with *proven* acts and not those acts that had been dismissed as unfounded on the facts or not done on grounds of a protected disclosure. On the basis that Ms Jhuti had failed to prove that there were any acts or detriments beyond 30 March 2014 because she failed to establish that the grievance was a proscribed act, there was no ongoing series of similar acts or failures beyond that date. The proven acts that occurred no later than 30 March 2014 may have had continuing consequences in terms of the detriment experienced by her but there were no further proven acts after that date.

**Supp.392** However the EAT also allowed Ms Jhuti's cross appeal against the rejection of her claim in respect of failure to deal with her grievance. The EAT accepted that the ET must determine only those issues advanced by the parties and no other and that where there is an agreed list of issues, then as a general rule, that will limit the issues at the substantive hearing to those set out in the agreed list (even where one party to the agreement is a litigant in person). However Simler J stated (at para 38) that it is also well established that ETs are not required to stick slavishly to an agreed list of issues in circumstances where to do so would prevent them from hearing and determining the case in accordance with the law and the evidence permitted to be adduced. ETs can be expected to expand on the agreed list, provided that there is no enlargement of the issues beyond those raised by the pleadings. The reasoning

however indicated limits to the circumstances in which the ET could be regarded as having erred in sticking to the list of issues, even where wider matters were pleaded. Simler J emphasised that here there were some “unusual circumstances” (para 62) which required a departure from the general rule that the ET could work to the agreed list of issues as “a useful management tool”. First, the issue as identified in the list of issues - that there had been a failure to investigate and provide an outcome to Ms Jhuti’s grievance - was fairly to be read as referring to the point at which the ET1 was presented. There had been a significant change of circumstances in the fortnight before the substantive hearing, in that a grievance (and appeal) outcome was provided. Although the list of issues had not then been amended, both parties had then proceeded, and been permitted to proceed, on that basis that this issue was not to be read literally (as referring only to no grievance outcome); the parties had led evidence and made submissions on the issues of the nature and quality of the investigation outcome and the delay. In those particular circumstances the EAT concluded that the ET had taken too narrow an approach. The cross appeal was allowed and the issue remitted to the (same) ET to consider whether there was a protected disclosure detriment in relation to the quality of the investigation and the delay, and whether if so the claim was in time.

**Supp.393** At the remitted hearing (on 16 November 2018) the ET rejected the contention that the failings in the quality of the investigation (which it accepted) were influenced by Ms Jhuti’s protected disclosures. However it upheld the detriment claim in relation to Royal Mail’s deliberate failure to provide an outcome to her grievance/appeal in a timely manner. Although the first part of the delay was explained, matters had then been put on hold from early May 2015 until 5 August 2015 as a result of the investigating officer, Ms Madden, being advised to do so by her line manager because the respondent was considering an issue in related to TMIs. Ms Madden had not been able to provide any further explanation for the delay, and not had any other witness been called by Royal Mail to do so. In those circumstances the ET concluded that, although Ms Madden was not herself influenced by the protected disclosures, Royal Mail had not discharged the burden upon it under s.48(2) ERA to show that the protected disclosures were not the reason for dismissal. This differed from the approach in *Osipov* and *Cadent Gas Ltd v Singh* [2020] IRLR 86 (EAT) discussed at Supp.387-389 above, in placing the legal rather than merely the evidential burden on *Royal Mail*. However nothing turned on that because the ET also found that on the information available it would in any event have found that the decision was by reason of Ms Jhuti’s protected disclosures, taking together the limited information given as to the reason for putting the investigation on hold that it was connected with the TMIs, the lack of further explanation and the fact that all Ms Jhuti’s proven protected disclosures were about TMIs.

**Supp.394** The ET proceeded to find that this detriment was formed part of a series of similar acts or failures with the previously found detriments. The ET referred to dicta of Mummery LJ in *Arthur v London Eastern Railway Ltd (trading as One Stansted Express)* [2006] EWCA Civ 1358, [2007] IRLR 58 (CA) that, depending on the circumstances, he would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure (see 7.223 in the Main Work). Here, although the

detriments were imposed by different individuals, the ET relied on the fact that they had all been found to be on the grounds of Ms Jhuti's protected disclosures related to the abuse of TMIs, and nor had it found that the detriments were "apparently disparate" (presumably referring to the linkage by being part of a chain leading to dismissal and ultimately the conduct of the investigation into the appeal/ grievance). On the basis of this linkage the Tribunal was satisfied that the final detriment (the delay in the process) formed part of a series of detrimental acts or deliberate failures to act notwithstanding the gap from the last other proven detriment (on 30 March 2014) to the advice to delay the grievance over a year later (in early May 2015). That conclusion was upheld by HHJ Eady QC on 10 August 2019 (UKEAT/0131/19/00). The complaint under section 47B ERA was therefore in time and succeeded. Unusually for tribunal proceedings, in advance of the substantive remedy hearing an interim award of compensation was made, by way of a Consent Judgment, consisting of £40,000 for injury to feelings and £30,000 for future loss of earnings.

## **CHAPTER 8: VICARIOUS AND INDIVIDUAL LIABILITY**

### **Paragraphs 8.48 to 8.50: Agency relationship**

**Supp.395** The decision in *Ministry of Defence v Kemeh* [2014] ICR 625 was considered and applied in *International Petroleum Ltd v Osipov* [2017] UKEAT/0229/16/DA, 19<sup>th</sup> July 2017. As summarised above (Supp.339-343), the claim was upheld against the employer (IPL) and two non-executive directors, Mr Timis (who was also the majority shareholder and also found to be a de facto executive director) and Mr Sage (who was also found in fact to have carried out executive activities). However at first instance the claim against two other individual respondents, Dr Lake and Mr Matveev, was dismissed. Mr Matveev provided consultancy and advisory services in West Africa to companies owned by Mr Timis pursuant to a consultancy agreement to do so in relation to IPL. Dr Lake, a geologist with experience in the oil and gas sector, was the CEO of another company, APCL. Prior to 31 July 2014 he had assisted IPL as a favour to Mr Timis and because IPL owed money to APCL. After 31 July 2014 APCL provided services to IPL under an Advisory Agreement.

**Supp.396** In the EAT (at paragraph 179) Simler P summarised the effect of the decision in *Kemeh* in the following terms:

"(a) whatever the precise scope of the legal concept of agency, and whatever difficulties there might be of applying it in marginal cases "...it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents." (paragraph 40).

(b) It would be unusual for a person who was the employee of one company to be an agent of another company. There would "need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed" (paragraph 43).

(c) Whatever concept of agency was adopted, the putative agent needed to be acting on behalf of the putative principal with the authority of the putative principal in relation to independent third parties (paragraphs 39 to 44).”

**Supp.397** Simler P also noted that although the Court of Appeal in *Kemeh* considered the EAT’s approach to the concept of agency in *Yearwood*, it had not decided whether it was correctly decided (and nor did she consider it was necessary to do so). Simler P did not spell out which aspect of the decision in *Yearwood* had been left open. In fact to the extent that the decision in *Kemeh* left open any issues as to the correctness of the decision in *Yearwood*, these were very narrow.

**Supp.398** The leading judgment in *Kemeh* was given by Elias LJ. Lewison LJ agreed with that judgment and added some further comments. Kitchin LJ agreed with both judgments. As noted in *Kemeh* (at paragraph 178) the decision in *Yearwood* was to the effect that the references to agency in the discrimination legislation referred to the common law concept of agency rather than having any different statutory meaning. Elias LJ concluded (at paragraph 46) that whatever the precise scope of the concept of agency used in s.32 of the Race Relations Act 1976 (“RRA”) (the forerunner of s.109(2) of the Equality Act 2010) “it must at least reflect the essence of the legal concept”. He noted (at paragraph 37) that s.32(2) (like s.47B ERA) uses terms which the law employs when defining the scope of common law agency and that there was no consistently understood broader meaning which Parliament can reasonably be taken to have intended. Lewison LJ’s judgment was to like effect. He expressly rejected the argument that developments in the common law of vicarious liability could bear on the correct interpretation of s.32 RRA. He stated that in referring to established legal concepts, Parliament must be taken to have intended that those legal concepts would be interpreted in accordance with ordinary legal parlance (paras 69 to 70). He did note that the EAT in *Yearwood* was not correct in saying that it was a feature of common law agency that when an agent acts on behalf of a disclosed principal the agent is not liable to a third party and nor could the third party sue the agent on it. That could, he said, only be correct if referring to liability in contract rather than tort. But in Lewison LJ’s view this only strengthened the argument that s.32(2) RRA used terminology in the same way as it would be understood in the common law of agency.

**Supp.399** As noted in the Main Work (at paragraph 8.49) Elias LJ (at paragraph 38) identified one respect in which the decision in *Yearwood* misstated the common law test. He noted that the EAT appeared to consider that it was an essential part of the test that the agent must have power to affect the principal’s legal relations with a third party (ie to enter into a contract on their behalf), whereas he considered that there could be an agency relationship if that feature was missing. Elias LJ noted that in *Yearwood* the alternative formulation put forward was that agency should have an “everyday meaning” of “a person who acts on behalf of another person with their authority” (see *Kemeh* at para 31). However he added that once it was recognised that authority to affect relations with a third party was not a necessary feature of an agency relationship, he doubted whether there was any material difference between the two alternative formulations argued in *Yearwood*. Subsequently, in *Unite the Union v*

*Nailard* [2017] ICR 121 (at para 46), the EAT treated the reasoning of Elias LJ as meaning that there was no necessary requirement of agency that the agent be able to bind the principal contractually (rather than the agent being able to impact relations with third parties more generally). In the Court of Appeal in *Nailard* ([2019] ICR 28), Underhill LJ, giving the leading judgment, declined to endorse the definition of agency in *Bowstead and Reynolds on Agency*, which includes the criterion that the agent be able to affect relations with third parties. Underhill LJ expressed the view, at paragraph 23, that the definition is not definitive and noted the view of the authors themselves that “*there are many acceptable uses of the term [agency] which do not always coincide with each other*”. These comments were *obiter* as the issue before the Court of Appeal concerned the consequences of an agency relationship (in relation to liability of the principal for acts directed to third parties) rather than whether an agency relationship existed.

**Supp.400** Applying the guidance in *Kemeh*, the EAT in *Osipov* concluded that there had been no error of law in the conclusion reached by the tribunal that Mr Lake was not an agent, and nor was he a worker. As to worker status there was no express or implied direct contractual relationship between Dr Lake and IPL. The work he undertook was explained by his position as CEO of APCL. His desire for APCL to recover the money owed to it by IPL provided a clear basis for the work he undertook going beyond the scope of the Advisory Agreement. For the same reasons there was no basis for finding that he acted as an agent for IPL. In effect this applied the approach in *Kemeh* that cogent evidence would be needed to show that duties carried out as an employee of one employer were also being performed as agent of another. Far from there being such cogent evidence here, Dr Lake’s actions were explicable without need to find an agency relationship with IPL.

**Supp.401** So far as concerned Mr Matveev the EAT concluded that there was no basis for finding that he was in an agency relationship with IPL. Simler P noted (at paragraph 186) that the employment tribunal found expressly that he was not authorised to execute agreements or transactions with third parties in the absence of a specific power of attorney authorising him to do so. As to the latter element, as noted above, in *Kemeh* Elias LJ noted that the requirement to enter into contracts on behalf of the employer was not a necessary element of an agency relationship. However here not only was there no authority to bind IPL contractually but more generally, as Simler P also noted (paragraph 186), there was no finding or evidence that he was authorised to act on its behalf in relation to its dealings with third parties. Nor had any case been advanced at first instance that Mr Matveev was an agent of IPL. The issue of whether he was a worker was remitted to the tribunal as its conclusion on that issue was not adequately reasoned and did not address the considerations relied upon by Mr Osipov as pointing to worker status.

### **Paragraphs 8.61 to 8.66: Requirement of agent acting with the authority of the principal**

**Supp.402** In *Unite the Union v Nailard* [2019] ICR 28 (CA), Underhill LJ (giving the leading judgment) noted (at [16]) that the phrase “with the authority of the principal” could not connote specific authority to do the act complained of, because this was negated by

s.109(3) Equality Act 2010 which makes clear that an act may be done with the principal's authority even though he or she had no prior knowledge of it. The Court followed the approach in *Kemeh*, that the principal will be liable wherever the agent discriminates in the course of carrying out the functions that he or she is authorized to do. As Underhill LJ noted (at [42]), this “*effectively equates the circumstances in which a principal may be liable for the acts of an agent with the ‘course of employment’ test governing the liability of employers for the acts of their employees.*” He added that whilst this may extend the scope of liability beyond that which would apply at common law, there was no reason why Parliament should not have chosen to effect such an extension in discrimination cases (and the same would apply in whistleblowing cases). In this respect he drew a distinction between the issue of whether there was an agency relationship at all, which it had been decided in *Kemeh* was to be decided in accordance with “ordinary legal parlance”, and the scope of liability of the principal for the acts of an agent, where the statutory approach may be wider. The Court therefore rejected an argument that the principal was not liable for the acts of an agent directed to third parties, and upheld the finding of the tribunal that the principal could be liable for the sexual harassment (if established) of a union employee by union officials who were its agent. Underhill LJ noted that this conclusion also made sense in policy terms; an employee would be liable for such conduct and it would be surprising and unsatisfactory if the position were different where the discriminator was acting on behalf of the principal as agent but still in the course of the principal's business.

#### **Paragraph 8.67 to 8.79: No statutory defence**

**Supp.403** As noted above, the EAT's decision in *Naillard* was upheld by the Court of Appeal ([2019] ICR 28). Underhill LJ acknowledged (at [45]) an apparent anomaly that the reasonable steps defence only applies to employees rather than agents. However he concluded that it could not be right in principle to adopt what would otherwise be the wrong construction simply so that the anomaly would arise in fewer cases.

### **CHAPTER 9: DISMISSAL FOR MAKING A PROTECTED DISCLOSURE**

#### **Paragraphs 9.9 to 9.11: Amendment to add a protected disclosure dismissal claim to an ordinary unfair dismissal claim**

**Supp.404** See also *Prushanskaya v International Trade & Exhibitions (JV) Ltd* UKEAT/0046/18/LA, 17<sup>th</sup> July 2018: an application to amend an existing in time unfair dismissal claim to allege a new reason for dismissal (by reason of protected disclosure) did not involve bringing a new complaint outside the time limit. The EJ had not given sufficient reasons for refusing the application to amend as it was not possible to see how, in applying the *Selkent* test, he had weighted in the balance the time limit issue, given that the EJ had stated that the amendment would add a significant new issue out of time.

## **Paragraph 9.11**

**Supp.405** *Kuznetsov v The Royal Bank of Scotland Plc* [2017] EWCA Civ 43 (31<sup>st</sup> January 2017) is now reported at [2017] IRLR 350.

## **Paragraphs 9.09 to 9.11 (amendment)**

**Supp.406** In *Gillett v Bridge 86 Limited* UKEAT/005/17/DM, 6<sup>th</sup> June 2017, an appeal was allowed against refusal to allow amendment to add an (in-time) whistleblowing unfair dismissal claim to a claim of unfair dismissal by reason of disability and disability discrimination. Although the claim was not mere re-labelling, given that the claim was in time the balance of prejudice was clearly in favour of permitting the amendment given that the employer would have been in the same position if there had instead been a new claim presented. It was difficult to conceive of a case where a pessimistic view of the merits falling short of no reasonable prospect of success could provide support for refusal of an amendment application made in time.

## **Paragraphs 7.86 to 7.156 and 9.19: *Beatt*: no defence that employer did not believe disclosure amounted to a protected disclosure**

**Supp.407** In paragraphs 7.86 to 7.156 of the text, we considered issues that may arise where an employer seeks to contend that detrimental action was taken by reason of something which is related to a disclosure but is said to be separable from it. As we noted (at para 7.156), conceptually the greatest difficulty arises where the distinction which is sought to be drawn is based on something to do with the disclosure itself, such as the manner of the disclosure or that it is alleged to involve a breach of confidentiality. A closely related argument was addressed in *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748, where the Court rejected an argument that a dismissal could be said to be not due to protected disclosures but instead due to a genuine (but incorrect) belief that the dismissals were not made in good faith.<sup>45</sup>

**Supp.408** Dr Beatt, a consultant cardiologist, had been employed by Croydon University Hospital working in the ‘Cath Lab’. On 9 June 2011 Sister Jones, a senior nurse in the cardiology department, was called to a meeting regarding allegations she had been rude and abusive towards colleagues. Dr Beatt attended with Sister Jones, but during a break was called to take over a medical procedure. When the meeting resumed in Dr Beatt’s absence, Sister Jones was suspended. Complications developed in the procedure being conducted by Dr Beatt and the patient, “GS”, died. Dr Beatt’s strongly-held view (which he expressed both internally and, latterly, externally) was that it was irresponsible of the Trust to have suspended Sister Jones in the middle of a working day when she might be expected to have had clinical responsibilities. The Coroner expressed the view that the absence of Sister Jones might have contributed to GS’s death. Dr Beatt was subsequently dismissed by the Trust (the charges are referred to below but they strongly referenced Dr Beatt’s view as to the circumstances surrounding GS’s death).

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<sup>45</sup> Permission to appeal was refused by the Supreme Court.

**Supp.409** Dr Beatt’s claim for automatically unfair dismissal contrary to s.103A ERA was upheld by the ET, but the Trust successfully appealed to the EAT. HHJ Peter Clark held (paragraph 9.45) that the ET’s decision was not properly reasoned because there was no analysis leading to the conclusion that the evidence of the dismissing officer (Mr Parker) and the chair of the appeal panel (Mr Goulston), was false and a deliberate attempt to mislead the Employment Tribunal as to the true reason for dismissal. Judge Clark said that “*separately*” he could:

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

**Supp.410** The EAT appears to have concluded that the ET had in effect misapplied *Kuzel*: it had concluded the dismissal was unfair, if it was for conduct related to the disclosure as opposed to the disclosure being the reason for the conduct. The EAT remitted the claim to a fresh tribunal. Dr Beatt appealed to the Court of Appeal. His appeal was successful and the decision of the ET was restored.

**Supp.411** In the Court of Appeal Underhill LJ (with whom King LJ and Sir Terence Etherton agreed) noted (paragraph 48) that the ET had declined to make any distinction of the kind discussed in *Panayiotou* between the fact of the disclosures and the manner in which they were made. There was no challenge to that aspect of their decision, nor was there any challenge to the ET’s conclusions that:

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

**Supp.412** Underhill LJ observed that therefore the only question was whether the ET was right, or in any event entitled, to find that the protected disclosures was the principal reason why Dr Beatt was dismissed. For Dr Beatt it was submitted, successfully, that this was answered unequivocally by the terms of the dismissal letter itself. Of the six charges which were found proved<sup>46</sup>, four consisted explicitly of the making of the disclosures which the ET had held to be protected:

- that Dr Beatt made "various unsubstantiated and unproven allegations of an unsafe service within the interventional cardiology service at Croydon Health Services NHS Trust".
- that he "made unsubstantiated and unproven allegations of an unsafe service and unsafe staffing levels within the interventional cardiology service" in his initial report to the Coroner.

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<sup>46</sup> There were two others but one was regarded as being inextricably entwined with the making of the disclosures and the other was not at the core of the case as to why Dr Beatt had been dismissed.

- that he made the same "unsubstantiated and unproven allegations" to Dr Fernandes (a GP from a local commissioning group).
- that he made "persistent claims that the Cath Lab is unsafe due to [Ms Riddle's] (Service Manager for Cardiology) presence/management".

**Supp.413** It was therefore submitted on behalf of Dr Beatt that the Trust, through the letter of dismissal, was straightforwardly saying "we are dismissing you because you made these disclosures". Underhill LJ said that this submission was entirely consonant with the reasoning of the ET. Stating that Dr Beatt was being dismissed for making the disclosures did not mean that the Trust was automatically rendering itself liable for unfair dismissal. But the substance of the letter was that the disclosures were not protected (principally, though not only, because they were made in pursuit of personal antagonism and so not in good faith). The consequence of that was that if the Trust lost on that issue (as it did) it was condemned 'out of its own mouth' on the "reason" issue. Whilst the ET appeared not to have fully appreciated this point and had taken a long way round to reach its conclusion, that had not prevented it from eventually asking and answering the right question. Underhill LJ accepted that in the circumstances of Dr Beatt's case it was not very useful to deal sequentially with the issues of whether the Trust had shown that it had dismissed the Appellant for misconduct and whether it had shown that he was dismissed for making protected disclosures because those issues overlapped to too great an extent. Whilst the ET had wished to follow what it understood to be the course mapped by *Kuzel*, sometimes a straightforward application of the words of the statute was all that is needed. But the ET got to the right question in the end and answered it explicitly.

**Supp.414** On behalf of the Trust it was contended that the decisive issue was not whether the ET found the disclosures to be protected, but whether the dismissing officer (Mr Parker) believed that they were "or, to put the same thing another way, whether they would have been protected if the facts were as he believed them to be". It had been the Trust's case throughout, and his own evidence, that the dismissing officer, Mr Parker, genuinely believed that Dr Beatt made the disclosures in question in pursuit of his personal antagonism in which case the disclosures would plainly have been made in bad faith and would not be protected. Rejecting that submission, Underhill LJ emphasised that in the context of s.103A it was necessary to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. The first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. However, the second question was of a different character and the beliefs of the decision-taker were irrelevant to it. If the Trust's contention was correct, the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that the requirements for a protected disclosure were satisfied, which would "enormously reduce the scope of the protection" (para 80), which could not have been the legislative intention.

**Supp.415** As to the EAT’s decision, Underhill LJ accepted that Dr Beatt had accused Mr Parker and Mr Goulston of consciously participating in a sham which would indeed necessarily mean that their evidence had been dishonest and the ET had made a finding to this effect. However the Trust’s liability did not depend on that being established. On the contrary the Trust’s dismissing and appeal officers might perfectly honestly (or indeed reasonably) have believed that Dr Beatt’s disclosures had been made in bad faith but none of that mattered if the ET, as it did, disagreed with the assessment of the Trust’s decision-makers and found that the disclosures were in fact made in good faith and were protected.

**Supp.416** *Beatt* therefore makes clear that the employer’s subjective belief that a disclosure is not protected is immaterial when assessing the reason for dismissal (or detriment). It is not possible for an employer to assert that a dismissal was not by reason of the protected disclosure itself but instead by reason of the belief that in some respect the disclosure was not protected; whether that be that the worker did not hold the requisite reasonable belief (either that the disclosure tended to show a relevant failure or was made in the public interest) or that there was no disclosure of information or the absent of any element required for a qualifying disclosure to be protected. Those issues fall to be determined at the stage of determining whether there was a protected disclosure at all. That approach was firmly underpinned by policy considerations. As Underhill LJ explained (at para 94):

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

## **Tainted information and tainted decisions to dismiss**

### **Paragraph 9.27**

See the notes to Chapter 7, paragraphs 7.163- 7.190 and the commentary on the Supreme Court’s judgment in *Jhuti*.

### **Paragraph 9.43**

**Supp.417** As noted above, in *Beatt* the Court of Appeal considered that there had been no need to apply the *Kuzel* approach. However that was in a context where it was clear from

the respondent's own reasons for dismissal, that the dismissal was by reason of the disclosure and the real issue was as to whether the disclosures were protected disclosures. The position would be otherwise where the issue is whether the disclosure is the reason or principal reason for dismissal. It would be for the employer to show that the disclosure was not the reason for the dismissal.

## **CHAPTER 10: REMEDIES IN DISMISSAL AND DETRIMENT CLAIMS**

### **Paragraph 10.22: causation and respondent's reliance on own wrongdoing**

**Supp.418** In relation to the restriction on a respondent relying on their own wrongdoing to seek to break the chain of causation in relation to loss, see also *Gibson v (1) Hounslow LBC and (2) Crane Park Primary School* UKEAT/0033/18/BA, 20<sup>th</sup> December 2018, considered at Supp.178-179, 307 above. Here the claimant, a US citizen, was employed as a teacher under a three-year fixed term contract which was to run alongside her general work tier 2 visa, which licenced her to work in the UK. The normal process for a tier 2 visa would be for the School or Local Authority to discuss with the employee whether they would like the Local Authority to apply for an extension for the visa and remain as a sponsored employee. An extension would only be granted if the School or Local Authority supported the application and could state that the employee was required. The School did not raise the matter with the claimant because it had decided that it did not want to continue employing her after the expiry of her contract or to assist her if she asked them to renew her visa. For her part, the claimant also decided not to ask the School or Local Authority about the possibility of their applying on her behalf for an extension. She applied for an extension herself and informed the respondents that it had been extended. As she did not provide any evidence of the extension, the respondents did not believe her. In fact it was only extended for a short period whilst the application was considered, and it was then refused on 19 November 2015 with no right of appeal. As the respondents knew, without their support the application was bound to fail. On 30 September 2015, the claimant's employment was terminated on the basis of expiry of the tier 2 visa without apparent renewal. It was conceded that the claimant was unfairly dismissed under s.98 ERA given that the visa had been temporarily extended. However, the ET limited compensation to the period up until 19 November 2015 when the claimant was entitled to continue working in the UK. That conclusion was upheld by the EAT. It rejected an argument that this entailed the respondent relying on its own wrongdoing in not supporting the renewal application on the basis that the claimant had not only not asked the respondents to renew her visa but had consciously chosen not to ask them.

### **Paragraph 10.23: stigma damages and handicap on the labour market**

**Supp.419** See now *Small v The Shrewsbury and Telford NHS Trust* [2017] IRLR 889 (CA), where an appeal was allowed and the case was remitted to the employment tribunal to consider the issue of continuing loss after the claimant's employment would have ended with the respondent. The claim was brought by way of a detriment claim under s.47B ERA for termination of the contract of a (non-employee) worker. The claimant's contract terminated on 23 July 2012 and the employment tribunal found that he would in any event not have been

retained beyond 14 November 2013. The ET awarded compensation up to that date but not beyond. However the ET had made a finding that in his field of work the claimant was dependent on a reference from his last employer (which it had not supplied) and that the dismissal appeared to have been career ending for the claimant. He had applied for over 600 suitable positions without success, and his evidence was to the effect that interviewers appeared to be uncomfortable when he explained the reason for his dismissal.

**Supp.420** The Court of Appeal accepted that given the evidence advanced, and the tribunal's finding that it was career ending, even though no claim based on ongoing damage to employment prospects was argued before the ET (where the claimant was unrepresented), it ought of its own initiative to have dealt with the "*Chagger* point" (referring to the decision in *Chagger v Abbey National plc* [2010] ICR 37). As Underhill LJ explained (at paragraph 9), *Chagger* established that the period which the employee would have worked for the respondent employer but for the dismissal does not represent an automatic cut-off in assessing compensation. A claimant can still recover for the consequences of any disadvantage suffered on the labour market not only by reason of having been dismissed by the previous employer but also of having brought proceedings against that employer. The principle is of particular significance in the context of protected disclosure dismissals, given the potential stigmatising effect of such dismissals.<sup>47</sup>

#### **Paragraph 10.26: unfair dismissal and contributory fault**

**Supp.421** In *Beatt* the ET held that there should be no reduction to Dr Beatt's compensatory award on the basis either of *Polkey* or of any contributory fault on his part. An appeal against these findings failed on the basis that Dr Beatt was found not to have acted culpably and that, on a broad brush assessment, Dr Beatt's conduct could not have led to his fair dismissal. Of more general interest was the submission on behalf of Dr Beatt in the Court of Appeal that the ET would not in any event be entitled as a matter of law to make a finding of contributory fault in a case under s.103A. Dr Beatt's Counsel referred to s.123(6A) as permitting a tribunal to reduce the award by no more than 25% where there was a finding of bad faith on the part of the successful claimant (see paragraphs 10.141 of the main text). It was submitted that the existence of a right to reduce compensation under s.123 (6) in a whistleblower case would be inconsistent with that provision. Underhill LJ said that he could see no such inconsistency (and we agree), though he declined to express a final view since s.123 (6A) was not in force at the material time. He also noted that the EAT had held that a reduction for contributory fault could be made in *Audere Medical Services Ltd v Sanderson* [2013] UKEAT/0409/12 (as referred to in the main text).

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<sup>47</sup> See also the observation by Kerr J in *Rihan v Ernst & Young Global Ltd* [2020] EWHC 901 (QB), at para 590, that: "It is generally known to professional persons such as accountants that to become a whistleblower often involves a major risk of financial loss through subsequent 'unemployability'."

## Paragraphs 10.42 to 10.45 and 10.56

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

**Supp.422** As noted above (Supp.339-383), in *Osipov* the EAT concluded that, on a claim of detriment under s.47B ERA, a worker or agent could be liable for a detriment consisting of dismissal or an instruction to dismiss. At first instance, the employment tribunal determined that there should be an uplift of 12.5% for failure to comply with the ACAS code in relation to the dismissal, taking into account that there was a peremptory dismissal with no procedure followed at all, that the total award was substantial and that the employer had a very small workforce. This uplift was then applied to the total award of £749,664.50 consisting of (a) £563,461.92 for unfair dismissal, (b) £16,500 for injury to feelings and (c) £169,702.58 being a provisional netted down sum for unpaid salary. There was therefore a total award of £843,372.56 which was said to be damages for the claims of detriment and unfair dismissal for making a protected disclosure. At the remedies hearing, it was then decided that there should be joint and several liability for this award, with the individual directors as well as the employer being liable for the full award.

**Supp.423** It was argued on behalf of Mr Timis and Mr Sage that it was wrong of the ET to have made them liable for all the elements of the awards referred to because awards for unfair dismissal were payable only by the employer (see s.112(4) ERA 1996); and the same is true in respect of wages claims (see s.24 ERA 1996). Although a s.207A TULCRA uplift can be awarded on a joint and several basis as between different respondents in a discrimination claim (*Catanzano v. Studio London Limited* UKEAT/0487/11), that could only occur where findings were made as to the extent to which a person was responsible for the failure to follow the particular statutory procedure, and then only where the uplift relates to an underlying claim which can be advanced against that individual.

**Supp.424** Simler P accepted that the basic award was a sum payable under s.119 ERA and only by the employer, and accordingly a co-worker could not be made liable for the basic award. However she rejected the other points made in relation to remedy. The compensation awarded to Mr Osipov apart from the basic award related to losses which flowed directly from his dismissal and the detriments to which he was subjected by Mr Sage and Mr Timis. It was therefore recoverable from IPL and/or from Messrs Sage and/or Timis. The tests for determining an award based on detriment under s.49 and an award based on dismissal under s.123 were materially the same: in a detriment case it is compensation which is just and equitable having regard to the loss attributable to the act complained of (s.49(2) ERA) and in a dismissal case, loss sustained in consequence of the dismissal (s.123(1) ERA). Both exercises would, in a case such as that of the claimant, produce the same level of award, this being:

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

**Supp.425** Under s.207A(2) TULCRA the tribunal has power to increase "any award it makes to an employee" subject to the just and equitable principle contained in the same subsection. Schedule A2 includes detriment claims under s.48 ERA 1996 within the scope of claims covered by the uplift provisions. Thus the EAT held that there was no statutory basis for contending that they should not be liable for the ACAS uplift bearing in mind that it was they who were responsible for the preemptory dismissal. The position would be otherwise in a case where they had not been responsible for the failure to follow a fair procedure (*Catanzano*). Therefore in a tainted information case such as *Jhuti*, where the manager had victimised the employee in providing the information which was relied upon by the dismissing officer, but the manager was not responsible for the procedure followed, it would not be appropriate for the victimising manager to be liable for the uplift. But that was not the situation in *Osipov*. On the findings of the ET the decision to dismiss was taken by Mr Timis and implemented by Mr Sage. The respondents did not seek to argue that the ACAS Code had been complied with and the only persons with responsibility for this were Mr Sage and Mr Timis.

## **(7) Interim Relief**

### **Paragraphs 10.50**

**Supp.426** In *Hancock v Ter-Berg & Anor* [2019] UKEAT 0138\_19\_2507 (25<sup>th</sup> July 2019) it was argued on behalf of the respondents that the ET (which had held that the claimant was "likely to succeed" under s.129) should have first determined on the ordinary balance of probability test whether the claimant was indeed an employee. The EAT rejected this argument and dismissed the appeal. The "likely to succeed" test applied to all elements of the claim and its basis.

**Supp.427** As explained in *London City Airport Ltd v Chacko* [2013] IRLR 610 (EAT), the tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party.

**Supp.428** One factor which explains the high hurdle for interim relief is that if the claim ultimately fails, there is no provision for recovering the payments made pursuant to a successful interim relief application. However in *Sheikh Khalid Bin Saqr Al Qasimi v Robinson* UKEAT/0283/17/JOJ, 22<sup>nd</sup> December 2017; [2020] IRLR 345 the EAT was faced with unusual situation that an in-time application for reconsideration of an interim relief application had been made at a time when the substantive claim had been dismissed. That arose because the initial decision upholding interim relief had been remitted following a successful appeal. The EAT had found that it was not possible to see that it had asked itself the question as to whether the claimant had believed, at the relevant time, that her disclosures were in the public interest and had also erred in failing to address the illegality point expressly raised by the Respondent and dealt with in submissions.

**Supp.429** At the remitted interim relief hearing the application again succeeded. However the reserved decision of EJ Stewart was not given to the parties until during the hearing of the substantive claim on 13 November 2018. In the light of the substantive decision rejecting Ms Robinson’s protected disclosure detriment and dismissal claims, the respondent sought reconsideration of the decision, which was rejected.

**Supp.430** A further appeal against the interim relief decision, and the refusal to reconsider it, was heard alongside an appeal against the substantive decision rejecting Ms Robinson’s protected disclosure dismissal and detriment claims (UKEAT/0106/19/RN, 4<sup>th</sup> February 2020). Lewis J concluded that the EJ Stewart had erred in his interim relief decision in the approach to illegality. An employee may be unable to enforce a contract of employment, or rights arising under it, if he or she knowingly participates in that illegality. The issue for the employment judge to consider had been whether the respondent (the burden being on him on this issue) had established a pretty good case that that was so. That issue had not been properly addressed. The interim relief order therefore had to be set aside.

**Supp.431** Lewis J further concluded that in the light of the decision rejecting the substantive claim, there was no need to remit as the interim relief application would inevitably fail. He noted that an application for interim relief is intended to preserve matters pending the outcome of the complaint by the claimant that (in this case) the reason for dismissal was the making of protected disclosures. The provisions governing the making of the order presuppose that the tribunal has not yet dealt with the substantive complaint and the employment tribunal, at the interim stage, is necessarily seeking to evaluate as best it can whether the claimant has established the likelihood to the requisite degree of succeeding at the hearing of the complaint. The whole structure of the statutory provisions, and their wording, presuppose that the application will be dealt with quickly and any order made before the decision on the substantive complaint. Given that it had been found that the substantive protected disclosure claim failed, there could be no proper justification for making an order now for the continuation of the contract of employment in the period between the dismissal in May 2017 and the determination of the tribunal in November 2018. An employment judge on the remitted hearing was not obliged to consider the matter as of the time the application had originally been heard, and to ignore the finding on the substantive claim.

**Supp.432** See also *Wollenberg v Global Gaming Ventures (Leeds) Ltd and Herd* UKEAT/0053/18/DA, 4<sup>th</sup> April 2018, where the ET was held to have failed adequately to explain the refusal of an application for interim relief. The claimant was the Executive Chairman of the respondent, a company formed to open and run a casino in Leeds. Mr Herd was the CEO. After the casino opened in January 2017 it began to have cash flow difficulties. There was a breakdown of relations between the claimant and Mr Herd. The claimant made serious allegations against him, and purported to remove him as an employee and director. This caused concern to the respondent’s debenture holder, which caused receivers to be appointed who removed the claimant as a director, though at that stage he remained an employee of the respondent. The respondent caused an investigation to be instituted in

relation to the claimant's conduct. The claimant stated in a letter of 26 September 2017 that he regarded himself as having made, and that he was continuing to make, a series of protected disclosures. The respondent's solicitors appointed a human resources professional, Mr Beck, to deal with the disciplinary proceedings and to treat the letter of 26 September as a grievance. The claimant objected to Mr Beck's appointment on the basis that the solicitors had a conflict of interest, and declined to meet with Mr Beck, though he made written submissions. Mr Beck produced a report upholding 2 out of five charges of gross misconduct, on the basis of which the claimant was dismissed. He did not deal with the letter of 26 September on the basis that the claimant had refused to meet or engage with him. He emphasised that his decision had been made on the basis of misconduct and not by reason of any protected disclosures. The claimant then brought proceedings including for automatic unfair dismissal by reason of protected disclosures under s.103A ERA. He applied for interim relief.

**Supp.433** In allowing the appeal, the EAT noted that (following *Taplin v C Shippam Ltd* [1978] ICR 1068 and *Ministry of Justice v Sarfraz* [2011] IRLR 562) the EJ must make a broad assessment of whether the claimant is likely to succeed, which connotes a significantly higher degree of likelihood than being more likely than not to succeed; the tribunal should ask itself whether the claimant has a "pretty good chance" of succeeding at the final hearing. However, it was not sufficient for the tribunal merely to state its conclusion on that issue. It must explain, albeit this may be done succinctly, why the conclusion was reached. Here the EJ had failed adequately to do so. The EJ had said the claimant's challenge to Mr Beck's appointment was not premised on the claimant having made protected disclosures. But it was not clear what point the EJ was making as to that, given that the claimant was complaining of the appointment of Mr Beck by the solicitors when he had made protected disclosures and complaints which he said clearly showed that they should not be acting and that this was important in establishing what the drivers were for his dismissal. The EJ had also wrongly said that the protected disclosures were not before Mr Beck. Further, the EJ had said that the allegations determined were not premised on the claimant having made protected disclosures, and whilst that was what Mr Beck said in his report, the claimant was entitled to point out that underlying key findings relating to the claimant's purported dismissal of Mr Herd and appointment of an administrator were his allegations that Mr Herd was incompetent and had acted in breach of fiduciary duty. The EAT therefore concluded that the EJ had not sufficiently explained his reasoning. The EAT concluded that it would not be permissible to carry out its own assessment of the issue, and having regard to the deficiencies in the reasoning, it was remitted to a different employment tribunal to determine afresh.

## **(2) Whether loss is attributable to the act or failure to act**

### **Paragraphs 10.61 and 10.62: The correct approach to attributing loss**

**Supp.434** See now *Wilson's Solicitors LLP & Others v Roberts* [2018] EWCA Civ 52, [2018] ICR 1092, Singh LJ giving a judgment dismissing the appeal with which Hallett and Longmore LJ agreed. The ET had wrongly struck out the claimant's claim for losses flowing

from the termination of his membership of the respondent LLP. If it was right (as was common ground between the parties on the appeal) there was no concept of "constructive termination" in the context of LLP law, it did not follow that the claimant was barred from pursuing his claim for post-termination losses sustained as a detriment by treatment on the ground of his protected disclosures. Nor was it necessarily a bar to his claim if there was a lawful termination of his membership of the LLP and if as a matter of common law causation, this broke the chain of causation. His case was that the underlying cause of the post-termination losses could be traced back to the pre-termination detriments which he alleged he suffered and which he alleged were done because of his protected disclosures. In relation to this the ET was not bound to apply common law principles of causation. The legislation required that in arriving at its decision about whether compensation is just and equitable, the ET must have regard to a number of factors. One of those factors was whether the loss claimed is "attributable to" the breach. That phrase imports the common law concept of "but for" causation. However the ET also has a discretion to determine what is just and equitable in all the circumstances, with the effect that the ET was not bound to apply common law principles of causation.

**Supp.435** Here, whilst the claimant's purported resignation may have been legally ineffective to bring his membership of the LLP to an end, nevertheless his case was that his position as a member became untenable and he withdrew his labour because of the grave and unlawful detriments on which he relied, and this led inevitably to his expulsion. If he could show that the detriments were so serious as to make his position as a member untenable, then he could claim for the losses flowing from termination of his membership without the need to contend that these were attributable to any acceptance of a repudiatory breach. For the purpose of exercising the power to strike out, the ET correctly appreciated that the facts had to be assumed to be true in the claimant's favour. Once that was done it was inevitable that the claim should not have been struck out. There clearly were matters of fact which need to be explored and that could only be done after the evidence has been heard by the ET at a substantive hearing. The EAT had therefore been correct to allow the appeal from the ET.

### **(3) Injury to feelings**

#### **Paragraph 10.63 to 10.76**

*(a) Are injury to feelings recoverable in principle?*

**Supp.436** In *Osipov* in the Court of Appeal Underhill LJ noted (at paragraph 73) that it has always been understood that compensation for injury to feelings is available for detriments other than dismissal. The anomaly was that it was not available in cases of unfair dismissal, and as such the effect of the decision was to mitigate that anomaly by permitting dismissal as detriment claims (for which, subject to the issue as to s.49(6) ERA addressed below, there could be an injury to feelings award). However the Court did not address the reasoning of the Court of Appeal in *Santos Gomes v Higher Level Care Limited* [2018] ICR 1571 (CA), which raises a question as to whether the practice of awarding injury to feelings awards is correct.

**Supp.437** The relevant provision of the ERA (s.49(2) ERA) provides that the amount of compensation to be paid in a detriment claim is such as the tribunal considers just and equitable in all the circumstances having regard to (a) the infringement to which the complaint relates and (b) the loss which is attributable to the act or deliberate failure to act. In *Santos Gomes* the Court of Appeal was concerned with precisely the same wording in regulation 30(4) of the Working Time Regulations 1998. The CA concluded that this did not permit an injury to feelings award. It reasoned that there was no reason to give the reference to “loss” any different meaning to that attributed to it in unfair dismissal claims. Nor, in the view of the CA, did the reference to the infringement to which the complaint relates give a power to award injury to feelings. It refers to the nature and extent of the unlawful action, but injury to feelings awards are compensatory rather than punitive. Equally, the CA concluded that the phrase “just and equitable” provided no basis for tribunals “to award what they think ought to be awarded in a form of ‘palm tree justice’”, and in any event provided no basis to award injury to feelings (paragraph 64). The CA did however decline to decide whether the same result would apply in other cases. That leaves open the argument that there should be a different approach in victimisation cases which are akin to a form of discrimination (where such awards are permitted under the EqA 2010), rather than claims under the WTR that were regarded as akin to contract claims.

*(b) Effect of section 49(6) ERA on quantum of non-pecuniary loss awards for non-employee workers*

**Supp.438** If injury to feelings awards are permissible, the issue arises as to the potential impact of s.49(6) ERA. This provides in that in detriment claims made by a worker where the detriment consists of termination of the worker’s contract, any compensation may not exceed the compensation payable on an unfair dismissal claim if the protected disclosure was the reason or principal reason for the dismissal. The effect, if this provision bites, would be that the injury to feelings award could not then exceed the amount of the basic award (being the excess over the financial loss which can be recovered in an unfair dismissal claim). It would not appear to be possible simply to circumvent this on the basis of a narrow construction of “dismissal”, such as that adopted in *Osipov*, as meaning unfair dismissal by the employer. Section 49(6) expressly applies where the detriment to which the worker is subjected is termination of the worker’s contract. Nor is it an answer that in addition to unfair dismissal compensation, an employee would be able to claim additional injury to feelings compensation by claiming dismissal as detriment on the basis of vicarious liability in accordance with the decision in *Osipov*. Section 49(6) specifically limits the worker’s compensation to that which would be payable under the unfair dismissal remedy provisions. As such there is the potential anomaly that a worker would be limited to an injury to feelings award that does not exceed the basic award even though in substance that limit does not apply to employees because of their alternative s.47B(1A) claim.

**Supp.439** To some extent the anomaly may be limited by applying the reasoning of Underhill LJ in *Jhuti*, and followed in *Osipov*, of distinguishing between claims based on the

dismissal itself and other detrimental acts or deliberate failures to act which are not the dismissal itself, even though they may cause the dismissal. Of course on that basis, however, it is not wholly correct, as Underhill LJ reasoned, that the Court of Appeal's approach does away with the need to make sometimes difficult distinctions between the dismissal and other detriments which may cause or contribute to the dismissal.

(c) *Paragraphs 10.77 to 10.83: Injury to feelings – the appropriate amount*

**Supp.440** In *International Petroleum Ltd v Osipov* [2017] UKEAT/0229/16/DA, 19<sup>th</sup> July 2017 (see above), the EAT rejected a cross-appeal against the award by the tribunal of £16,500 for injury to feelings. This was at the top of the middle *Vento* band (as uplifted by 10% in accordance with *Simmons v Castle* [2012] EWCA Civ 1288). It was argued on the cross-appeal that the award should have been in the top band given that there had been a sustained campaign of victimisation and exclusion of the claimant, Mr Osipov, from early June 2014 until his dismissal in October 2014. The employment tribunal had expressly found that he had been undermined over a long period, being cut out of meetings and his professionalism impugned. The EAT commented (at paragraph 207) that the *Vento* guidance was indeed only guidance. It was not to be read or applied like a statute. Here the tribunal's assessment was open to it, and there was no error of law. Although the tribunal had in its assessment not expressly mentioned the final detriment, namely two directors (Mr Timis and Mr Sage) acting together to bring the job to an end, the EAT (Simler P) was satisfied that this had not been overlooked.

**Supp.441** Note that in *Eurides Pereira De Souza v Vinci Construction (UK) Limited* [2017] EWCA Civ 879 the Court of Appeal confirmed that, for claims under the EqA 2010, injury to feelings awards should be subject to the 10% *Simmons v Castle* uplift. That followed from the terms of s.124(6) EqA 2010 which provides that the amount awarded should correspond to the amount of the County Court. Although there is no equivalent provision under the ERA, the same uplift would no doubt be applied, as the tribunal did in *Osipov*. As noted above, in *Osipov* this was effected by simply uplifting the *Vento* bands by 10%. However, giving the leading judgment in *Pereira De Souza*, Underhill LJ noted (at para 34) that there was the complication that the *Vento* bands themselves also require updating for inflation, as had been done in *Da'Bell* several years ago. Underhill LJ suggested that this could be dealt with by guidance from the President of the Employment Tribunals, but that in the meantime tribunals can make their own adjustments, which need not be mathematically precise.

**Supp.442** In the event Presidential Guidance has now been issued, initially on 5 September 2017. In its most recent iteration, published on 27 March 2020 in relation to claims presented on or after 6 April 2020, the revised *Vento* bands are to be as follows:

- (a) a lower band of £9,000 to £9,000 (less serious cases);
- (b) a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and

(c) an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.

## **CHAPTER 11: EMPLOYMENT TRIBUNAL PROCEDURE AND ALTERNATIVE DISPUTE RESOLUTION**

### **Paras 11.02 to 11.06: Claim forms**

**Supp.443** As to whether a claim form is to be regarded as containing a protected disclosure claim, see the guidance set out in *Mechkarov v Citibank NA* UKEAT/0119/17/DM, 15<sup>th</sup> June 2017 (at paras 26 to 28):

“26. When deciding whether an ET1 claim form contains a claim of a particular kind, the correct approach is to look at the claim form as a whole, giving it a generous construction to see whether it identifies an act complained of and the nature of the complaint made about that act. If that is the case, there will have been an effective complaint. ...

27. It is of course not necessary that the claim form should identify the complaint with the label that a lawyer would apply. If the act is identified and the nature of the complaint is identified, the fact that there is no label or the label is wrong or only one label is given where two would be applicable will not be determinative against the Claimant.

28. A complaint of public interest disclosure must to my mind state, so that it can be discerned on a generous reading, that the worker concerned made one or more public interest disclosures and that he was subject to detriment for doing so. An essential element of a complaint of public interest disclosure detriment is that the Claimant should be complaining that he has suffered detriment on the grounds of the public interest disclosure. The claim form, read generously, must therefore identify the detriment complained of, the public interest disclosure alleged and the linkage between the two. If it does this, even in very broad terms, further detail may be given by Particulars; if it does not, amendment will be required.”

**Supp.444** Applying that approach, the EAT upheld the EJ’s finding that a claim form (presented some 15 months after the termination of employment), which contained complaints of post-termination of employment discrimination, did not also contain protected disclosure claims, and further upheld a refusal to permit amendment.

## **CHAPTER 12: WHISTLEBLOWING IN THE HEALTH AND FINANCIAL SERVICES SECTORS**

### **Paragraph 12.32: Applicants to a children’s social care position**

**Supp.445** The model adopted in relation to NHS applicants has been followed in s.32 of the Children and Social Work Act 2017 (not yet in force). This provides for a new s.49C to be inserted in the Employment Rights Act 1996 providing protection to applicants for a children’s social care position. A position is a “children’s social care position” if the work done in it relates to the children’s social care function of a “relevant employer” (s.49C(3)). A “position” is defined as where a person works under a contract of employment, a contract to do work personally or the terms of an appointment to an office or post (s.49C(2) ERA). A relevant employer includes a local authority in England or Wales or a body corporate that, under arrangements made by a local authority in England under s.1 of the Children and Young

Persons Act 2008, exercises children’s social care functions. As with s.49B ERA a discrimination model is adopted based on whether “it appears to the employer that the applicant has made a protected disclosure” (s.49C(1) ERA).

### **Paragraphs 12.32 to 12.46 (NHS applicants for employment)**

**Supp.446** On 20 March 2017 the Department of Health published draft Regulations with a view to providing whistleblowing protection to applicants for NHS employment<sup>48</sup>. A consultation was launched, and ran to 12 May 2017. Some two years after the publication of the report by Sir Robert Francis QC into whistleblowing in NHS, *Freedom to Speak Up*, the draft Regulations aimed to implement the recommendation that consideration be given to outlawing discrimination against whistleblowers in recruitment by NHS employers. Legislation giving power to make these regulations - s.49B of the Employment Rights Act 1996 - had been on the statute book since 6 May 2015). The Employment Rights Act 1996 (NHS Recruitment—Protected Disclosure) Regulations 2018, 2018 No.579. The Regulations were made on 2<sup>nd</sup> May 2018 and came into force 21 days later (see Reg 2(1)).

**Supp.447** The Regulations may be seen, in some important respects, as pointing to how whistleblowing protection may be strengthened not only for NHS applicants but more generally. They beg some important questions as to why protection and remedies provided for NHS applicants is not also appropriate outside the NHS context, or indeed to workers already in employment within the NHS, as opposed to applicants for employment. But they are also in significant respects too narrow and add unnecessary complexity.

### ***Appearance of a protected disclosure***

**Supp.448** The Regulations provide that an NHS employer must not discriminate against an applicant “because it appears to the NHS employer that the applicant has made a protected disclosure.” Applying protection to those who are believed to have made a protected disclosure is a significant departure from the current position, under which establishing that the worker made such a disclosure is central to the scheme of the legislation. The stated intention was to extend the ambit to cover cases where the worker was believed, wrongly, to have made a protected disclosure. But it may also in some cases have a narrower ambit than that applicable to workers (other than applicants for employment). See the text at paras 12-44 to 12-46.

**Supp.449** The difference of approach compared to that applicable for other protected disclosures is highlighted by the Court of Appeal’s decision in *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748. As discussed above, in that case the employer had taken the view that disclosures did not meet the test for being protected disclosures, principally on the basis that they were not made in good faith (and were mostly

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<sup>48</sup> See <https://www.gov.uk/government/consultations/protecting-whistleblowers-seeking-jobs-in-the-nhs>

made when the pre-amendment law applied). The ET concluded that the disclosures were protected disclosures, and there was no appeal against the ET's decision that a distinction was not to be drawn in that case between the disclosure and the manner in which it was made. In that context the Court concluded that where the claimant was dismissed by reason of the disclosures, it was no answer to the claim for the employer to assert that it sincerely believed that the disclosures were not protected. Indeed Underhill LJ commented (at para 80) that it would be "very odd" and "unacceptable in policy terms" if, having established that a protected disclosure was made, the claim could then be defeated on the basis that the employer did not believe that they were satisfied. Yet precisely that argument would seem to be opened up by the test for protecting applicants on the basis of whether it "appears to the NHS employer that the applicant has made a protected disclosure."

**Supp.450** There are also further difficulties in basing protection on an apparent protected disclosure. The structure of the protected disclosure legislation is framed around a careful balance as to when disclosures are protected. The reasonable belief of the worker plays a crucial part in this. At minimum, even for internal disclosures to the employer, this requires a reasonable belief (a) that the information tended to show a relevant failure and (b) that the disclosure was made in the public interest. That need not be an insurmountable barrier to extending protection. In principle protection might also be provided based on the employer's view that the applicant made the disclosures and that those conditions are likely to have been satisfied. It does though beg several questions as to the threshold that is to be applied. The employer may have no actual knowledge of the worker's state of belief, though it may still be possible to form a view as to whether the worker was in a position where s/he ought to have appreciated the true position (see *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT)). But a series of possibilities still arise. Is it an answer if the employer has given no thought to whether the disclosure was a protected disclosure? Is the test one of the employer's genuine belief? Must the employer have given consideration to each of the elements for a protected disclosure? Is it sufficient that the employer believes that there is a change that what was disclosed may amount to a protected disclosure? Does this line of argument allow a worker who fails to meet the criteria for having made a protected disclosure (eg because of lack of a reasonable or genuine belief in the relevant failure) to get round this on the basis that it appeared to the employer (or prospective employer) that s/he had made a relevant failure? That might be said to undermine the structure of the legislation, though to some extent anomalies could be reduced by the approach to remedy.

**Supp.451** In any event, if it is accepted that protection for applicants should cover apparent disclosures, it would be anomalous for the same not also to apply in the case of detriments (or dismissals) of workers and employees. Indeed, once it is accepted that protection should apply where the worker did not in fact make the protected disclosure, it becomes all the more difficult to justify the failure to offer protection to those who are associated with a protected disclosure despite not making it themselves. At present, unlike in relation to discrimination protection under the Equality Act 2010, the legislation provides no whistleblowing protection for a worker who is victimised for supporting another worker who made a protected disclosure. It may be for example that two workers (A and B) are known

to have together been investigating the concern, and one of them (B) then makes the disclosure. If the employer dismisses A because s/he was associated with or known to have supported B in making the disclosure, there would be no protection unless on the facts it could be found that B had acted in effect as A's agent in making the disclosure.

### *Injunctive relief*

**Supp.452** One of the major weaknesses in the protected disclosure legislation identified in *Freedom to Speak Up* (at para 2.2.9) was the absence of any power to restrain employers from imposing a detriment or requiring it to be brought to an end. We discuss this at 12.59 to 12.86 of the text. The Regulations tackle that concern, again in relation only to NHS applicants, by treating discrimination against NHS applicants as giving rise to a claim of breach of statutory duty actionable in the ordinary courts. Although generally it is provided in the Regulations that there cannot be duplication of claims in the ordinary courts and in the employment tribunal, there is a specific exception to permit an action for an injunction in the ordinary courts to be combined with a claim in the employment tribunal. That is a potentially important addition.

**Supp.453** At least at first blush this might seem to run counter to the usual reluctance to grant specific performance of an employment contract, particularly where trust and confidence is lacking. However the Order made need not necessarily go as far as expressly to require the employer to employ the applicant. So as not to usurp the role of the employer as to the choice of recruit, it might be framed merely in terms of restraining the employer from holding against the applicant the fact of making the apparent protected disclosure. There may well then remain a risk that an employer required to reconsider a decision would reach the same decision not to recruit the applicant. But there would then be the significant added risk for the employer in doing so that this would be found to be in contempt of court. Further, interim relief associated with this remedy may also be valuable, for example to require that a vacancy remain open pending a speedy trial of the issue, or to restrain the employer from taking into account an alleged protected disclosure in recruitment decisions pending trial.

**Supp.454** However a significant drawback of this remedy lies in the substantial costs risk in pursuing such a claim in the ordinary courts by comparison with the costs regime in the tribunal. One possible means of improving access to the remedy might be to provide that in such cases the costs regime in the employment tribunal applies. An alternative, or additional, approach (albeit a radical departure from the current interim relief regime in the tribunal) might be to afford the tribunals the power to grant such relief (even if enforcement powers, including an application for contempt, remained with the ordinary courts).

**Supp.455** In any event, again this begs the question of why injunctive relief should not similarly be available for other whistleblowing claims, for example to challenge an ongoing suspension from work or to challenge a dismissal. To some extent that might be answered on the basis that for workers and employees, similar relief could be obtained on the basis of an implied contractual term limiting the proper exercise of discretion: see by analogy *Lew v*

*Board of Trustees of United Synagogue* [2011] IRLR 664 (where it was noted that it was established that a capability procedure had been trumped up as means of supporting a dismissal, there would be a plain breach of contract). But the scope for such an implied term is limited in relation to dismissal claims (due to the exclusion set out in *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL)), and in any event there would be a benefit of certainty in being able to pursue a breach of statutory duty claim.

### *Anomalies as a result of adopting a discrimination model*

**Supp.456** As we argue in the text (at 12.37 to 12.41), given the existing protected disclosure legislation, the most straightforward approach would have been to amend the definition of worker so as to cover applicants for employment. That could have been accompanied by any other extensions to protection or remedies considered to be appropriate. Instead, as foreshadowed in s.49B ERA, the Government has grafted a discrimination model onto the existing protected disclosure provisions. That gives rise to unnecessary complexity and to anomalies as between applicants and workers/employees, added to the discrepancy in the difference in treatment between NHS applicants and applicants for employment in other sectors.

**Supp.457** In addition to the new and distinct approach to apparent protected disclosures and to injunctive relief, there are several other aspects of the new legislation that will give rise to anomalous differences as between applicants for NHS employment and other workers or applicants:

1. The discrimination approach imports a comparison by expressly introducing a test of whether the applicant has been treated “less favourably” (s.49B(3) ERA). That seems unnecessary. There would seem to be no good reason why the same test as in s.47B ERA cannot be applied; whether the worker has been subject to a detriment by any act or deliberate failure to act on the ground that the worker made a protected disclosure. The tests may usually lead to the same result, but then why use different tests at all?
2. Time limits. For workers and employees, if a claim is not brought within the primary three month time limit, it is necessary to show that it was not reasonably practicable to do so (s.48(3) ERA). Yet for applicants (adopting the discrimination model) there is the less stringent test that the tribunal can consider the complaint if it is just and equitable to do so. There may be good arguments for applying that looser test. But there seems no sensible reason for differentiating between the test to be applied for applicants for NHS employment and that for workers/employees.
3. Recommendations: the provisions introduce the power to make recommendations that, within a specified period, the NHS employer should take steps for the purposes of obviating or reducing the adverse effect on the applicant of the discrimination to which the proceedings relate. This is a welcome proposed improvement on the range of remedies available. But although it emulates the protection provided in the Employment

Relations 1999 (Blacklists) Regs 1999, reg 8, there again seems no good reason for that remedy to be restricted to applicants, let alone NHS applicants for employment. Within the Equality Act 2010 (s.124) the power to make recommendations is not limited to applicants. Equally, given the public policy underlying protection of whistleblowers, there is a strong argument for a wider power (of the type now removed from the Equality Act) to make recommendations.

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

### ***Conclusion on the 2018 Regulations***

**Supp.458** Although the Regulations are intended to apply narrowly to NHS applicants, they should serve to bring into focus broader questions as to the adequacy of whistleblower protection. There is no convincing reason for limiting protection for applicants for employment to the NHS field. The provisions point the way to important respects in which protection may be improved more generally. But by declining to follow a more straightforward model of extending protection against detriment more widely, the draft Regulations introduce avoidable complexity. That is particularly regrettable given that in “Freedom to Speak Up” (see para 2.7.2), one of the criticisms made of the current whistleblowing provisions was their complexity.

## **CHAPTER 13: OBLIGATIONS TO BLOW THE WHISTLE**

### **Paragraphs 13.10 to 13.35: Reporting wrongdoing of others**

**Supp.459** See also *Marathon Asset Management LLP & Anor v Seddon & Ors* [2017] ICR 791, [2017] EWHC 300 (Comm), [2017] IRLR 503 where Mr Justice Leggatt held that one of the employee defendants, Mr Seddon, was not under a contractual duty (it was not argued that he was under any fiduciary duty) to report the misconduct of his fellow defendant employee, Mr Bridgman. Leggatt J found that Mr Seddon learnt that Mr Bridgeman had already copied files containing Marathon’s confidential information to a USB drive which he intended to take with him when he left Marathon’s employment, albeit that Mr Seddon did not learn which files (or how many files) Mr Bridgeman had copied. Marathon contended that, on acquiring this knowledge, Mr Seddon had a contractual duty to report Mr Bridgeman's conduct to Marathon.

**Supp.460** There was no express term of Mr Seddon's employment contract which required him to report misconduct of a fellow employee. Leggatt J said that whether a duty to report misconduct was to be implied as an aspect of the duty of fidelity and good faith depended on the circumstances, including the nature and terms of the employment, the nature

of the misconduct, and how the employee has become aware of it. He referred to *Sybron* and to what Fox LJ had said (at p 129):

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

**Supp.461** Leggatt J said that Mr Seddon did not occupy an executive or managerial position at Marathon and did not have any responsibility for supervising Mr Bridgeman (or anyone else at Marathon). The relationship of the two men within the firm was one of professional colleagues, of equal standing. Nor was there any express term of Mr Seddon's employment contract from which any duty to report misconduct could be inferred. Unlike the contract in issue in *Swain* Mr Seddon's contract did not include an obligation to protect or promote the firm's interest. It was possible to conceive of circumstances – for example, discovering that another employee was embezzling large sums of money from Marathon—where it could nevertheless be said that any reasonable employee in Mr Seddon's position would have been bound to report the discovery and could not in good faith have stayed quiet. But Leggatt J did not consider that the facts of the case before him came into this category. It was not suggested that the conduct of which Mr Seddon became aware involved any criminal offence. Nor did Mr Seddon have any evidence that Mr Bridgeman had done anything or was about to do anything which had caused or was about to cause financial loss to Marathon. All he knew was that Mr Bridgeman had, in breach of his employment contract, copied files (with unknown content) to a USB drive with the intention of retaining them after he left Marathon. That by itself was not enough to trigger an implied contractual duty to report.

### **Specific requests for information from employees**

#### **Paras 13.38 to 13.40**

**Supp.462** See also *MPT Group Ltd v Peel & Ors* [2017] EWHC 1222 (Ch). On an interim relief application Mr Edward Pepperall QC (sitting as a Deputy High Court Judge), inclined to the view that there was no breach of the duty of fidelity where senior employees were alleged to have given false or misleading answers in relation to their plans to enter into competition together after the termination of their employment and expiry of their post-termination covenants. MPT is a leading producer and supplier of mattress machinery, equipment and parts to the mattress manufacturing industry and was, until March 2017, the only company manufacturing such machines in the UK. Until 1 September 2016, the first and second defendants, Shaun Peel and Michael Birtwistle, were employed by MPT in senior positions. Mr Peel was the company's Technical Manager responsible for producing drawings for machinery. He was described by Andrew Trickett, MPT's Managing Director, as the company's most senior and experienced draftsman. Mr Birtwistle was the Technical Sales Manager. He was responsible for business development and maintaining key relationships with the company's customers and suppliers.

**Supp.463** Both men gave notice of their resignations on 4 August 2016 and their respective employments ended on 1 September 2016. Following the expiry of restrictive covenants they, together with business associates, incorporated the third defendant, MattressTek Limited, on 3 March 2017 in direct competition with MPT. Mr Peel was the new company's Technical Director and Mr Birtwistle its Sales Director. Amongst other allegations MPT alleged that the defendants had failed to answer questions truthfully as to their future intentions. MPT sought injunctive relief, an account of the defendants' profits, damages and/or equitable compensation and a springboard injunction to prevent the defendants from unfairly exploiting the competitive advantage said to have been obtained through their alleged wrongful conduct. MPT alleged that untruthful answers were given by Mr Peel on 4 August 2016 when Mr Peel told Mr Trickett that he wished to work from home and spend more time with his child by working as a freelance CAD designer, while Mr Birtwistle said that he had been offered a position doing panel wiring. On further questioning, both defendants allegedly denied any intention of going into partnership together. A few days after that Mr Peel allegedly declined to say where he was going. Subsequently, it was said, Mr Peel told Mr Rodgers, MPT's Technical Director, that he was not planning to work in MPT's industry because he had too much respect for him. He allegedly repeated that he intended to spend more time at home and work on a freelance basis. At some later point during his notice period, Mr Birtwistle allegedly told Mr Rodgers that his new job would be building electrical control panels.

**Supp.464** It was submitted on behalf of MPT that one incident of the duty of good faith was to answer questions truthfully. The Deputy High Court Judge noted that this duty was subject to a number of exceptions, one of which related to questions about an employee's private lives, and he was inclined to regard information about future competitive activity as also falling within the sphere of employees' own private information which they are entitled to keep confidential. To that end he said (at paragraph 86) that:

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

**Supp.465** On the facts, the Deputy High Court Judge concluded that even if he was wrong as to this, the alleged breach did not assist MPT since any springboard advantage arose not from a failure to have been candid in answering questions but because the defendants were said to have misused MPT's confidential information in designing and bringing to market their own suite of machines. The dicta in *MPT* need to be treated with some care. The issue is fact-sensitive. Whilst an employee acting alone may not be under an obligation to reveal future plans where asked, the more surprising feature of *MPT* was that it applied to two senior

employees acting together (compare *Kynixa Limited v Hynes* [2008] EWHC 1495). Other relevant factors may be whether the employee obtains some specific advantage in providing the misleading answer beyond protecting future competitive activity, such as securing a loyalty or bonus payment from the current employer.

## **CHAPTER 14 CONFIDENTIAL OR PRIVATE INFORMATION**

### **Non-disclosure and non-disparagement agreements and interim relief**

#### **Paragraphs 14.43 and 14.59**

##### *Regulatory guidance as to NDAs*

**Supp.466** Non-disclosure agreements and the problems they raise in balancing what the competing public interests of upholding legal agreements that have been entered into with a view to curtailing or avoiding litigation on the one hand and freedom of expression on the other hand have been a particular feature of recent case law as a result of the #MeToo movement. Illustrative of the concerns that NDAs raise is the recent Report of the House of Commons Women and Equalities Select Committee entitled *Sexual harassment in the workplace (HC725)* ("the WESC Report"), which contains a discussion of the legitimacy of the use of NDAs

**Supp.467** A Warning Notice in respect of the "Use of non-disclosure agreements (NDAs)" was issued by the Solicitors' Regulation Authority (SRA) on 12 March 2018 which articulated the SRA's concern that solicitors should not use NDAs in circumstances in which the subject of the NDA may, as a result of the use of the NDA feel unable to notify the SRA or other regulators or law enforcement agencies of conduct which might otherwise be reportable

- fail to notify the SRA of misconduct, or a serious breach of our regulatory requirements, by any person or firm: including wrongdoing by the firm, or harassment or other misconduct towards others such as employees or clients
- use NDAs as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies.

**Supp.468** The SRA said that it considered that NDAs would be improperly used if a solicitor sought to:

- use an NDA as a means of preventing, or seeking to impede or deter, a person from:
  - reporting misconduct, or a serious breach of the SRA's regulatory requirements to it, or making an equivalent report to any other body responsible for supervising or regulating the matters in question

- making a protected disclosure under the Public Interest Disclosure Act 1998
- reporting an offence to a law enforcement agency
- co-operating with a criminal investigation or prosecution.
- use an NDA to influence the substance of such a report, disclosure or co-operation
- use an NDA as a means of improperly threatening litigation against, or otherwise seeking improperly to influence, an individual in order to prevent or deter or influence a proper disclosure
- prevent someone who has entered into an NDA from keeping or receiving a copy.

**Supp.469** The Warning Notice goes on to stipulate that NDAs or other settlement terms must not stipulate, and the person expected to agree the NDA must not be given the impression, that reporting or disclosure as set out above is prohibited. It may be appropriate for the NDA itself to be clear about what disclosures are not prohibited by the NDA.

**Supp.470** Where a solicitor finds, or has grounds to believe, that a member of their firm has or may have committed a serious breach of the SRA's requirements, the SRA expected the solicitor to report such findings or concerns. Any attempt to prevent a person from complaining or providing information to the SRA would put the solicitor concerned at risk of disciplinary action. That could cover entering into an agreement which would attempt to preclude the SRA from investigating any actual or potential complaint or allegation of professional misconduct. Further:-

- A solicitor might also be at risk if they used improper threats of litigation or improperly influence a party by reference to other adverse consequences of making such report or disclosure.
- Inappropriate or disproportionate threats, including a threat of defamation proceedings where such a claim was known to be unsustainable might well involve serious breaches of the Principles or Code.
- Taking unfair advantage of an opposing party's lack of legal knowledge where they have not instructed a lawyer) is an aggravating feature of such conduct and where the employee is not represented, a solicitor's obligations will be heightened, to ensure that there is no abuse of position, or unfair advantage taken.
- If the agreement was or formed part of a settlement agreement under the Employment Rights Act 1996, the solicitor should ensure that they were aware of the requirements governing those agreements, including for the employee to be in receipt of independent advice. The solicitor would also need to ensure that the NDA does not include clauses known to be unenforceable.

**Supp.471** On 7 January 2019 the Law Society issued a Practice Note to the profession entitled “Non-disclosure agreements and confidentiality clauses in an employment. It is concerned with the use of confidentiality provisions drafted as part of an agreement to end a workplace relationship and focuses on “situations in which confidentiality provisions are aimed at preventing disclosure of conduct or other circumstances which, for example, may have led to a dispute or to the breakdown of the relationship between an individual and the business for which they work”, available [here](#).

**Supp.472** Of particular relevance to the issues with which this book is concerned the Practice Note says that

1. It is good practice to give anyone signing an NDA clause time to consider the implications of the proposed agreement, including giving them sufficient time and opportunity to obtain independent legal advice.
2. It will not normally be appropriate to fail to provide a copy of relevant terms to parties who are obliged to comply with them. If a client requests that a confidentiality arrangement be operated in such a way the solicitor should have regard to their regulatory duties before giving advice.
3. It would also not be normal to prohibit disclosure to any professionals for legal or tax advisory, medical or therapeutic reasons. If a client was keen to include such restrictions, then solicitors must consider their regulatory duties in the Code and have regard to the Notice during drafting. It might be reasonable to expect the employee to take steps to ensure that a third party would respect the confidential nature of the information, though the drafter might want to consider whether any expectations may unnecessarily restrict the party from obtaining support.

*Interim relief: application of the Cream Holdings v Banerjee<sup>49</sup> principles to NDAs*

*(1) ABC & Ors v Telegraph Media*

**Supp.473** In *ABC & Ors v Telegraph Media Group Ltd* [2018] EWCA Civ 2329, [2019] 2 All E.R. 684, the Master of the Rolls giving the single judgment of the Court, referred to *HRH the Prince of Wales v Associated Newspapers* [2007] 3 WLR 222 as the leading modern authority on how the balance should be struck in cases where the media wish to publish information which is alleged to have been obtained in breach of confidence and reliance is placed on the public interest to justify such publication. In *ABC* the Court said (at paragraph 22) that the passage from *HRH* set out at in paragraph 14.43 of the Main Work emphasised the importance of the public interest in the observance of duties of confidence. The test was ultimately one of proportionality. Where (as in the Settlement Agreements in the case before the Court in *ABC*) there was an express contractual obligation of confidence which might have been broken, it was arguable that the express duty carried more weight than a duty of

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<sup>49</sup> [2005] 1 AC 253

confidentiality that was not buttressed by express agreement but the extent to which it did so would depend upon the facts of the individual case.

**Supp.474** The claimants in *ABC* had sought an interim injunction to prevent the Telegraph from publishing what they said was confidential information about them and which was disclosed in breach of confidence. Haddon-Cave J refused the application. However the Court of Appeal judgment allowed the appeal and granted an interim injunction preserving the confidentiality of the information pending an (expedited) full trial. As will be generally known, subsequently, on 25<sup>th</sup> October 2018 in the House of Lords Lord Hain named Sir Philip Green as one of the persons who had brought the proceedings. The other two claimants were two companies in the same group. Sir Philip was a senior executive (now known, as a result of Lord Hain's statement, to be Sir Philip Green) of that group.

**Supp.475** Five employees of group companies ("the complainants") had made allegations of discreditable conduct by that executive. Three of them did so through the companies' confidential internal grievance procedures. Two of those employees, when their grievance was not upheld, brought (separate) proceedings in the Employment Tribunal, as did another who had not employed the grievance procedure. In all five cases the complaints were compromised by settlement agreements under which substantial payments were made to the complainants. In each case the complainants had independent legal advice in entering into their respective Settlement Agreement. There were terms in each of the Agreements under which both sides undertook to keep confidential the subject matter of the complaints themselves and various associated matters, including the amounts paid by way of settlement. The Settlement Agreements safeguarded the complainants' rights to make legitimate disclosures (including reporting any criminal offences) if they chose. In the case of the complainants who had brought ET proceedings the settlements were made at an early stage and before any details of the claims had gone on the public record. The Telegraph journalist was aware of the non-disclosure agreements.

**Supp.476** Nicklin J directed that attempts be made to ascertain the attitudes of the five complainants to whether information about their complaints should be published, even if they were not named:

- One complainant said that they were happy for their complaint, and the settlement, to be disclosed, provided they were not named.
- Two said that they supported the claimants' application for an injunction.
- One said they did not support the application.

**Supp.477** The Court of Appeal referred to *Cream Holdings Ltd* and stated that the case showed that although the general approach should be that applicants must satisfy the court that they will probably succeed at the trial, and the court should be "exceedingly slow" to depart from this approach, there would nevertheless be cases where it is necessary for the court to do so, and where "a lesser degree of likelihood will suffice as a prerequisite". Further, it was apparent from Lord Nicholls' comments that one type of case where a lower degree of likelihood might suffice was where the adverse consequences of disclosure would be

extremely serious, and where the interests of justice would be best served by a restraint on publication until a disputed issue of fact could be resolved at trial.

**Supp.478** As set out above the Court of Appeal then referred *HRH* and the emphasis on the importance of the public interest in the observance of duties of confidence: the relevant principle being "whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached." The weight which should be attached to an obligation of confidence might be enhanced if the obligation is contained in an express contractual agreement and one type of situation where this consideration was likely to have a significant influence on the balancing exercise was where the obligation in question was contained in an agreement to compromise, or avoid the need for, litigation, whether actual or threatened. The Court said this:-

"Provided that the agreement is freely entered into, without improper pressure or any other vitiating factor, and with the benefit (where appropriate) of independent legal advice, and (again, where appropriate) with due allowance for disclosure of any wrongdoing to the police or appropriate regulatory or statutory body, the public policy reasons in favour of upholding the obligation are likely to tell with particular force, and may well outweigh the article 10 rights of the party who wishes to publish the confidential information." (our emphasis)

**Supp.479** The italicised wording above highlights the potential significance of including the usual wording in settlement agreements which confirms that confidentiality provisions do not prevent the making of a protected disclosure. Whilst that may follow in any event from s.43J ERA, there is value in terms of the balancing exercise to be conducted in seeking to uphold the provision, in specifically evidencing an appreciation of the point. Further if it is necessary to rely on s.43J that leads to the risk that its effect may be said to be that the whole confidentiality provision is void in so far as it purports to prevent the making a protected disclosure, rather than only that the provision can be narrowed down so as to apply other than in circumstances where there is a protected disclosure.

## **(2) *Mionis v Democratic Press***

**Supp.480** The Court in *ABC* referred to *Mionis v Democratic Press SA* [2017] EWCA Civ 1194, [2018] QB 662, where the media defendants had entered into a confidential settlement agreement with the claimant which prohibited the defendants from making any reference at all to the claimant and his immediate family, in print or online, in any jurisdiction, subject to certain specified exceptions. Following the publication of further articles in alleged breach of this provision, the claimant applied for an injunction to enforce it and for an inquiry into damages caused by the alleged breach. The judge at first instance had refused to grant any relief, on the basis that the relevant clause was too vague and uncertain to be enforced by an injunction. However, on the claimant's appeal to the Court of Appeal the defendants conceded that the clause was valid and enforceable, and that they were in breach of its terms, but argued that its enforcement would amount to a disproportionate interference with their right to freedom of expression. The Court of Appeal allowed the appeal holding that the settlement agreement formed an important part of the analysis which section 12(4) of the HRA

required the court to undertake, and that since the agreement had been made with the benefit of expert legal advice on both sides, it would require a strong case for the court to conclude that the bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles. On the facts, the relevant restrictions in the agreement did not constitute a disproportionate interference with the defendants' Article 10 rights, so the claimant was entitled to the injunction and inquiry as to damages which he sought.

**Supp.481** In *Mionis* Sharp LJ said that the fact that the parties have entered into an agreement voluntarily restricting their article 10 rights could be an important part of the analysis which section 12 then required the court to undertake. Where the relevant contract is one in settlement of litigation, with the benefit of expert legal advice on both sides, particularly where article 10 issues are in play in that litigation it would require a strong case for the court to conclude that such a bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles. There were obvious advantages to both sides to the litigation in reaching a settlement (which not only served the private interests of the litigants, but also the administration of justice and the public interest more generally, by freeing court resources for other cases). Parties were generally free to determine for themselves what primary obligations they accepted and legal certainty required that they did so in the knowledge that if something happened for which the contract had made express provision, then other things being equal, the contract would be enforced. This is rule of public policy was of considerable importance. The principled reasons for upholding a bargain freely entered into obviously applied to one that finally disposed of litigation with particular force. Article 10.2 permits restrictions on rights of freedom of expression for the protection of the reputation *and rights of others*, which included, in this case, the private rights of the parties under an otherwise validly constituted contract of settlement. This was something to which the law attached considerable importance and save in well-defined circumstances, such contracts would normally be enforced. The issue thus resolved itself into one of proportionality, and in particular, whether the restrictions in clause 3.2 are a disproportionate interference with the defendants' article 10 rights.

**Supp.482** In *ABC* the primary question was whether the claimants' case was "likely" to succeed at a full trial, in the sense explained in *Cream Holdings v Banerjee* [2005] 1 AC 253 (HL). Haddon-Cave J had decided that was not the case. The Court of Appeal disagreed.

- Firstly it concluded that it was likely that substantial and important parts of the information which the Telegraph wished to publish were passed to it in breach of a duty of confidence to the claimants and that it was aware of the breach, or the likelihood of breach, of confidence.
- Secondly the Court had reservations as to the Judge's conclusion that the information intended to be published was reasonably credible.
  - Some of the allegations had been addressed and rejected in detail by the claimant companies;
  - The most serious allegations made by the complainants had been denied and that the settlement of the ET claims meant that the opportunity to have their truth determined by an independent tribunal had been lost; and

- The NDAs created a difficulty for the claimants in rebutting the Telegraph's allegations given that they are equally bound by them.
- The Judge had said that there could be no reasonable expectation of privacy or confidentiality in some of the particular misconduct alleged: the Court of Appeal accepted that as a general proposition, but it did not meet the point that the complainants had entered into particular obligations of confidence including in the NDAs: the real issue was whether, in the light of all the relevant facts, breach of that confidentiality is justified as a matter of public interest.
- Such of the information as was in the public domain did not include the most serious elements in the complainants' allegations.

**Supp.483** Finally the Judge had emphasised the importance both under the common law and Strasbourg jurisprudence of political debate in a democratic society, especially when exercised by the media, and the essential role played by the press in a democratic society. He had referred to the recent controversies about misconduct in the workplace and the recent Report of the House of Commons Women and Equalities Select Committee, "*Sexual harassment in the workplace (HC725)* ("the WESC Report")", which contained a discussion of the legitimacy of the use of NDAs. However Haddon Cave J had left entirely out of account the important and legitimate role played by non-disclosure agreements in the consensual settlement of disputes, both generally but in particular in the employment field. That role had been acknowledged in the WESC Report albeit that it had called for the Government to clean up the use of non-disclosure agreements (NDAs), including by requiring the use of standard, plain English confidentiality clauses, which set out the meaning, limit and effect the clause, and making it an offence to misuse such clauses; and extending whistleblowing protections so that disclosures to the police and regulators such as the Equality and Human Rights Commission are protected. The WESC had noted that employment lawyers had said that in many cases no settlement would be agreed without a non-disclosure agreement. There was a place for NDAs in settlement agreements; there might be times when a victim makes the judgement that signing an NDA was genuinely in their own best interests, perhaps because it provides a route to resolution that they feel would entail less trauma than going to court, or because they value the guarantee of privacy.

**Supp.484** It was also noted that there was no evidence before the Court of Appeal that any of the Settlement Agreements were procured by bullying, harassment or undue pressure by the claimants. Each agreement recorded that the employee was independently advised by a named legal adviser and contained provisions authorising disclosure to third parties in a range of cases, including to regulatory and statutory bodies. They did not on the face of the evidence at the interlocutory stage, have any of the unethical vices criticised by the WESC Report. Further, two of the complainants had confirmed through their solicitors that they supported the claimants' application and this was a factor not apparently taken into account by the Judge. One of the complainants had given the express reason that the complainant would like to protect their privacy.

**Supp.485** The Court of Appeal exercised afresh the discretion as to whether or not there shall be an interim injunction and made an order for an interim injunction and an order for a speedy trial for the following reasons:

- Publication might well cause immediate, substantial and possibly irreversible harm to all of the claimants. In the case of the claimant companies, this may have implications for their employees.
- The respondents relied on the decision of Mann J in *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch) (see paragraphs 14.07 – 14.08 of the Main Work) and the principle in *Bonnard v Perryman*: however that was very different from the *ABC* case because of the likelihood of breach of confidentiality and the centrality of the contractual NDAs both in relation to confidentiality and in assessing the likelihood of a defence of public interest.
- On the material currently before the Court of Appeal it was likely that the claimants would establish at trial that a substantial part of the information was obtained through breach of duty of confidentiality to the claimants, either in breach of the NDAs, or by those with knowledge of the NDAs, and that the Telegraph acquired the information with knowledge both of the NDAs and the breach of confidence.
- It was likely that the claimants will establish at trial that the confidentiality attaching to a substantial part of the information has not been lost through being released into the public domain.
- The most serious allegations of specific and particularised incidents were denied by the claimants: their occurrence was a matter of fact, which could not be finally resolved prior to trial. There was before the court no corroboration of those incidents but only the allegations of the employees.
- The claimants had lost the opportunity of contesting those serious particularised allegations in an independent judicial adjudication. The claimants would be left to challenge the allegations through the media while being themselves bound by, and so hamstrung by, the NDAs.

All in all it was unlikely that the claimants' enforcement of their right to confidentiality would be defeated at trial by a defence of public interest.

### **(3) *Saab v Dangate Consulting***

**Supp.486** Further guidance on the approach to the balance of competing public interests, as between confidentiality on the one hand and disclosure of wrongdoing on the other, was provided in *Saab v Dangate Consulting Ltd and others* [2019] PNLR 29 (Cockerill J). The defendants were two investigation companies, and the individuals who controlled them (former police detectives). The defendants had been retained by the claimants. The claimants were the ultimate owners of FBME Bank (“the Bank”). The Bank had, by the time of the litigation, entered into liquidation, after its Cyprus branch had been taken under the administration of the Central Bank of Cyprus (“CBC”) in the wake of money laundering

concerns set out in a notice by the US regulator, FinCEN. The defendants had been appointed to carry out an investigation so as to enable the claimants to understand more about the actions and concerns of CBC and FinCEN and to enable a robust response to be provided. The defendants discovered matters which they regarded as indicating criminality within the Bank. They reported their concerns to the claimants and proposed a detailed further investigation. The defendants' retainer was then terminated. There followed a dispute as to their entitlement to be paid. The defendants then made a series of disclosures.

- Initially some details of the investigation were provided to their Cyprus lawyers (ID law) in connection with their claim for fees.
- Disclosures were also made to the Cyprus money-laundering authority (MOKAS), the Attorney-General of Cyprus, CBC and the Cyprus Police.
- Subsequently, outline details of the investigation were made available to FinCEN and some details were provided to the FBI and UK law enforcement authorities.
- Later there were disclosures to an investigative journalist.

The claimants applied for injunctive relief, relying on the express confidentiality and related obligations contained in the retainer that had been entered into by the defendants. The application was heard by Cockerill J.

*(a) Application of public interest defence to obligations ancillary to confidentiality?*

**Supp.487** In addition to confidentiality obligations, the defendants' retainers contained express obligations to notify the claimants' solicitors before making any disclosure of confidential information to third parties (referred to as "Obligation 2"); to notify to the claimants of any such disclosures which were made to a third party without the claimants' consent ("Obligation 3"); to decline to produce confidential information in response to a request from a third party ("Obligation 4") and to deliver up confidential documents in their possession, custody or control on demand to the solicitors or to the claimants ("Obligation 5"). Cockerill J noted that the public interest defence which was relied upon in relation to breach of confidentiality had not been asserted in relation to any of these distinct obligations. However she accepted that the conclusion on the public interest defence was likely to carry over to Obligation 4, as that was the mirror image of the confidentiality obligation. But it could not provide an answer in respect of Obligations 2, 3 or 5. Nor was the breach of them answered by public policy considerations; in that Obligations 2 and 3 were not a complete bar to the matters being disclosed by the defendants.

*(b) Threshold test of public interest in disclosure*

**Supp.488** Turning to the public interest defence in relation to breach of confidentiality, Cockerill J (at para 138), drew from the authorities that:

"A disclosure which attracts a public interest defence must have a focus, and a utility. There must be an answer to the question of why it is in the public interest to make the disclosure. Countervailing factors may still mean the defence is not available, but even before proceeding

to the balancing exercise it may be possible to discern that it could not be available in any event if that key question cannot be satisfactorily answered, by an answer which falls within the ambit delineated by the authorities.”

**Supp.489** On this basis, Cockerill J concluded that, even before proceeding to the balancing of competing public interests, the public interest defence could not extend to the disclosures to the investigative journalist or to the media. The disclosures to ID Law were placed in the same category, as were the disclosures to law enforcement agencies in the US and UK, given that the relevant branch of the Bank operated in Cyprus. That approach would appear controversial in so far as it turned on finding that there was no public interest at all which was to be weighed into the balance in relation to disclosure of wrongdoing. So far as concerned the disclosure to ID Law, this was found to be at least in part prompted by concern as to the defendants’ own exposure on the basis of their knowledge of what they believed to be wrongdoing. We would suggest that there would be a public interest in being able to obtain legal advice in such circumstances.

**Supp.490** Unsurprisingly Cockerill J accepted that the disclosures to the regulators in Cyprus, where the relevant branch of the Bank was based, and going to the legality or proper conduct of the Bank’s operations (e.g. as to money laundering), could in principle, engage the public interest defence. As to the disclosures to regulators in the US and UK, Cockerill J commented that she could see no obvious ground of public interest in those jurisdictions but, on the basis of the broad influence of the regulators in those jurisdictions, she was prepared to proceed on the basis that the initial hurdle, as to why it was in the public interest to make the disclosures, was cleared.

*(c) Impact of express confidentiality obligation (Main Work, paras 14.119 to 14.121)*

**Supp.491** Turning to the balancing exercise, Cockerill J first addressed the impact of there being an express obligation. She concluded (at para 152) that:

“where one is dealing with information which would otherwise not be confidential there is no good reason for an obligation assumed expressly to attract any greater protection than would be available under common law in relation to information which is by its very nature confidential. However when dealing with information which would, in any event, attract confidentiality at common law, and there exists also an express obligation of confidentiality, the better view is that some greater weight should be given to that obligation of confidentiality.”

The conclusion to the effect that information which is not otherwise confidential does not gain greater protection from the inclusion an express provision is to be read subject to the approach to non-disparagement provisions which are discussed below (at Supp.500-509).

*(d) Approach to substantial truth in relation to regulatory disclosures (Main Work paras 14.91 to 14.98)*

**Supp.492** In the context of the disclosures to the regulatory bodies in Cyprus (CBC and FinCen), Cockerill J addressed the evidential basis required for the public interest defence to

apply. She concluded that, as with disclosures other than to regulatory bodies, the position to be applied was best summarised by Lord Goff (albeit this was not in the context of disclosure to a regulator) in *Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109 at 283:

“... a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source.”

**Supp.493** Cockerill J noted that in *In Re A Company's Application* [1989] Ch 477, in the context of a threatened disclosure to FIMBRA (the precursor to the FCA), Scott J had said that where the threatened disclosure is to “a recipient with a duty to investigate matters within its remit” it was not for the Court to investigate the substance of the proposed disclosure unless there were grounds for believing the disclosure was outside the remit of the recipient. Cockerill J (at [167]) regarded this approach as confined to disclosures to investigative bodies. She commented that it was dubious whether it applied to CBC or FinCen. However she also rejected it as being contrary to the tenor of wider authorities which she considered indicated that “some merits basis” for what has been disclosed had to be established. She concluded that Lord Goff’s test applied even to disclosure to a regulator [169]. An honestly held but unreasonable belief that disclosure was justified would not suffice [171], subject to a limited exception that a professional person exercising an “objective and considered judgment” when deciding whether to make a disclosure will generally have that judgment respected [172]. Otherwise, as was the case here, the subjective view of the person making the disclosure was not relevant [174].

**Supp.494** Whilst the approach of requiring *some* objective evidential basis, even in the case of a disclosure to a regulator, was consistent with the approach in s.43F ERA (requiring a belief that the information and any allegation contained within it was substantially true), we suggest it was going too far to suggest that the same standard is required for a disclosure to a regulator and for a wider disclosure.<sup>50</sup> The fact that a disclosure is made to a regulator who might be expected to be able to investigate, and whose role it is to do so, would seem to be a highly relevant factor in the balance when considering whether there is a sufficient evidential basis.

**Supp.495** In this case Cockerill J concluded that the disclosures did not meet the threshold, as set out in Lord Goff’s dictum, of being “a credible allegation from an apparently reliable source”. In relation to this Cockerill J emphasised that the public interest defence must be related to the particular material disclosed and involve a determination as to whether as a whole the disclosure was necessary in the public interest. Here the disclosure had involved what the Judge described (at [158]) as a “document dump” of the material which the defendants had acquired in the course of their retainer, together with the products of their work. The public interest defence had to be established in relation to the entirety of the

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<sup>50</sup> It was accepted that the protected disclosure provisions of PIDA were inapplicable (due to extra-territoriality).

disclosure. Cockerill J commented that the situations in which such a document dump would be justified in the public interest would be “vanishingly rare” [160]. Had there been a narrower disclosure it was possible that some part of it would have been capable of being justified. However because of the breadth of the disclosure, the defendants had been driven to advance the case on the basis of contending that there was “widespread and serious criminality”. The Judge concluded that in relation to most of the material, the conclusions reached by the defendants as to the validity of the allegations were “premature and speculative” [163] and that they therefore did not meet the test set by Lord Goff.

**Supp.496** Further, whilst there was a core of material which might have enabled the defendants to say that there was reason based on credible evidence to consider that there had been some criminality, Cockerill J placed emphasis on the fact that this material related only to issues that had already been highlighted by FinCen and matters that had already been remediated. The public interest did not merit disclosure because this merely added “granularity not substance” to what FinCEN already knew [181]. The fact that the matters related to matters which were no longer ongoing and had been remediated were further factors which weighed against the defence.

#### ***(4) Pharmagona Ltd v Taheri***

**Supp.497** Disclosures to a regulatory body in breach of confidentiality obligations were also in issue in *Pharmagona v Taheri and Mohammadi* [2020] EWHC 312 (QB). The Court refused to grant interim injunctive relief which would have prevented former employees cooperating with requests for information or documents from a regulator (the Civil Aviation Authority) or delivery up of the documents pending trial, even though the documents were alleged to have been obtained unlawfully. This was against the context of there being some evidence from the CAA which indicated that there was some substance in the allegations.

**Supp.498** The defendants (who were husband and wife) were former employees of the claimant pharmaceutical company. They were dismissed for allegedly stealing money from the claimant. It was alleged that the first defendant, Mr Taheri, had then hacked into the claimant’s computer system and down-loaded a mass of the claimant’s electronically stored records. The claimant brought an application for an interim confidentiality and delivery up injunction. The defendants alleged that the claimant had engaged in various unlawful and criminal activities, including relating to exports to Iran, and that they had been threatened with dismissal when they had raised their concerns internally; that the allegations had been made against them to discredit them, and that they had downloaded relevant evidence because they feared that they would not be believed.

**Supp.499** It was argued on behalf of the claimants that s.12(3) of the Human Rights Act 1998 had no application to the claim on the basis that reliance was being placed on a proprietary right to the confidential information. Unsurprisingly Nicol J rejected that contention. Turning to the substance of the public interest defence, Nicol J noted that there was correspondence from the CAA which indicated that the defendants’ allegations were not

fanciful. He noted that there could be occasions when the public interest in disclosure is so great that the public interest in disclosure would trump the interest in preserving confidentiality even if there was disclosure to the world at large, whereas in other situations only a more limited disclosure would be justified. Here he concluded the evidence produced was not sufficient to allow confidentiality to be overridden so as to permit disclosure to the world at large. However he held that the claimants should be free to continue to co-operate with the CAA or any other public authority investigating the claimant's activities, and required a proviso to this effect in the injunction order. He specifically rejected an argument to the effect that this was not necessary in the light of the wide powers available to the CAA, stating that it would be "naïve" to consider that such powers provide authorities with all the information they need for their duties, and that whistleblowers continue to play a valuable role (para 57). As to the requirement in *Saab* that for a disclosure to attract a public interest defence it must relate to particular documents or disclosures and "have a focus and a utility", he considered that this would be catered for by limiting the proviso in the order to permission to cooperate with the CAA or other regulator. The application for delivery up of documents was also refused, taking into account that there was an ongoing investigation by at least the CAA and possibly other authorities, and that this was consistent with the proviso which allowed the defendants to respond to requests from those authorities.

#### ***Application to non-disparagement clauses***

**Supp.500** The principles applies in *ABC* and *Minios* (see Supp.480-485) were applied to a non-disparagement provision in *Pertemps Medical Group Ltd v Ladak* [2020] EWHC 163 (QB) (6<sup>th</sup> February 2020), Pepperall J<sup>51</sup>. PMG, a recruitment company specialising in medical recruitment, acquired Mr Ladak's own medical recruitment business and appointed him as its CEO. By 2018 other directors and shareholders determined that Mr Ladak's position had become untenable. Mr Ladak resigned as a director and, by a settlement agreement dated 4 December 2018, PMG agreed to pay Mr Ladak £129,211.27 upon the termination of his employment.

**Supp.501** Mr Ladak agreed to transfer all of his shares in PMG to PMG's parent for £383,466.67. Mr Ladak confirmed that he had received independent legal advice and the waiver of rights was supported by the usual certificate from Mr Ladak's solicitor. By clause 14 of the settlement agreement, the parties entered into various agreements in respect of confidentiality and their future conduct towards each other. Clauses 14.4 and 14.5 provided:

"14.4 The Employee shall not make any adverse or derogatory comment about the Company, its directors or employees and the Company shall use reasonable endeavours to ensure that its employees and officers shall not make any adverse or derogatory comment about the Employee. The Employee

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<sup>51</sup> Peperall J referred to two previous decisions where non-disparagement clauses entered into with a former employee had been upheld: *Cumberland and others v Bogle* [2019] EWHC 524 (QB) (involving a an interim without notice injunction enforcing a non-disparagement agreement by way of settlement of litigation, contained in a Tomlin Order), and *RSM International Ltd v Harrison* [2015] EWHC 2252 (QB) (granting summary judgment on a non-disparagement provision contained in a settlement agreement). However neither involved specific consideration of the inter-relation with the usual clause permitting a protected disclosure.

shall not do anything which shall, or may, bring the Company, its directors or employees into disrepute and the Company shall use reasonable endeavours to ensure that its employees and officers shall not do anything that shall, or may, bring the Employee into disrepute.

14.5 Nothing in this clause 14 shall prevent the Employee from making a protected disclosure under section 43A of the *Employment Rights Act 1996* ...."

By clause 15.1, the parties agreed that the settlement agreement comprised the entire agreement between the parties and any group company.

**Supp.502** In March and April 2019 Mr Ladak asserted that he was owed an additional £20,000 that had been omitted from his termination payment. Subsequently, as well as pressing his financial claim, Mr Ladak made various allegations of wrongdoing, against PMG directors and referred in terms to their having the choice of "peace and war". Ultimately on 5 July 2019 he sent a mass email from the address [counterpertempsfraud@gmail.com](mailto:counterpertempsfraud@gmail.com) which was set up so as to show the sender as "Pertemps Medical" in recipients' inboxes. At the hearing of PMG's application Mr Ladak accepted that he had sent the email, although he maintained that he sent it as representative of eleven members of staff. The email was sent to a substantial number of NHS trusts and other PMG customers. The email explained that it was being sent to make readers aware of "several significant, deliberate, fraudulent and criminal breaches" of locum framework agreements. The frauds had been "instigated, controlled and overseen by the ultimate decision makers of the main Pertemps holding company." It was alleged that Pertemps had covertly diverted vacancies received under the framework agreements to a new company called Health People. The email asserted that Health People had been deliberately incorporated to show no connection to Pertemps and that it was being used as a vehicle for fraud. The fraud was said to involve charging the NHS five times the agency fee which was then split with a Pertemps group company. It was, the writer asserted, a "deliberate criminal fraud." Various other emails followed.

**Supp.503** PMG obtained an interim injunction preventing Mr Ladak from making adverse or derogatory comments about PMG, its directors or shareholders; doing anything that might bring PMG, its directors or employees into disrepute and from harassing any individual for the purpose of persuading PMG to provide money, assets or any other benefit to Mr Ladak. It was also ordered that in the event that Mr Ladak intended to exercise his rights under the ERA to make a protected disclosure, he should first give PMG's solicitors 14 days' notice of his intended disclosure stating the purpose and intended form of the disclosure, and to whom it would be made. If PMG objected to such disclosure Mr Ladak should not make it save with the permission of the court.

**Supp.504** On the return date before Pepperall J Mr Ladak accepted that he sent the emails of 5 July. However he insisted that his allegations were true, that he was working with others to pursue the matter and that his only interest is in exposing and stopping a significant fraud on the NHS. He said that he had no interest in seeking to damage Pertemps, that his life had been threatened and that staff had been threatened that they would lose their homes.

**Supp.505** Pepperall J started his discussion of the law by referring to Article 10 and s.12 HRA which (as set out above) requires the court to apply an enhanced merits test before granting interim relief that might affect the exercise of a respondent's freedom of expression. He noted that the case against Mr Ladak turned not on confidentiality but rather on Mr Ladak's contractual obligations not to make adverse or derogatory comment or bring PMG, its directors or employees into disrepute. However, for the reasons explained in *Mionis* and *ABC*, the court was required to accord particular weight to the fact that the action was brought to enforce obligations contained in a settlement agreement that was freely entered into, albeit that the weight to accord to this was not as strong as a case such as *Mionis* where the agreement was entered into to settle pending litigation. Further, it was relevant that here the settlement agreement involved the payment of a six-figure sum in full and final settlement of all disputes arising from the employment and in respect of which Mr Ladak had the benefit of independent legal advice.

**Supp.506** It was not an answer to the application if the allegations were true. As a matter of ordinary language, a comment could be both adverse and derogatory, and therefore in breach of the non-disparagement clause, but also true. Here Pepperall J was satisfied that Mr Ladak had persistently made adverse and derogatory comments about PMG, its directors and employees and had acted in a way that might bring the company, its directors and employees into disrepute. He had alleged that the company, its senior management team had acted criminally. He had also made comments about the controlling shareholder of PMG's ultimate parent company which were likely to bring PMG into disrepute. Subject to any defence under clause 14.5 (in relation to protected disclosures), PMG was likely to succeed in establishing a breach of clause 14.4.

**Supp.507** For the purpose of this interim application, Pepperall J proceeded on the basis that the disclosures made to PMG and to its senior management were protected disclosures to Mr Ladak's former employer pursuant to s.43C. Any disclosure to the NHS Counter Fraud Authority was to be similarly regarded as a protected disclosure pursuant to s.43F. However the email of 5 July was neither restricted to an internal Pertemps audience nor directed to the prescribed person. Accordingly any disclosures within it could only be protected under ss. 43G or 43H. The allegation of widespread fraud on the NHS might conceivably be a disclosure of exceptionally serious conduct such as potentially to bring the disclosure within s.43H but that did not have to be decided at the interim stage. Pepperall J assumed in Mr Ladak's favour that all of the requirements of ss.43G and 43H were satisfied in this case, save for the matter of reasonableness.

**Supp.508** However Pepperall J concluded that Mr Ladak was not likely to succeed on the issue of whether the external disclosures of 5 July was reasonable in all the circumstances. Mr Ladak had said in his defence that he had chosen "to increase the pressure on [PMG] ... in a final attempt to convince [PMG] to resolve matters internally, whilst delaying the provision of requested evidence to the authorities." The audience for the 5 July email appeared to have been "picked for effect." The court at trial was likely to find that the disclosure of 5 July was deliberately targeted to cause damage to PMG's business and to the reputations of

both the company and its senior management team. In circumstances where, on Mr Ladak's own case, he had already made disclosures to the NHS Counter Fraud Authority Pepperall J was satisfied that the trial judge was likely to find that these further disclosures were not reasonably made. Further, it was not reasonable to withhold proper co-operation with the authorities and instead to act so as to increase the pressure on PMG, as Mr Ladak had pleaded that he did. It was clear from Mr Ladak's submissions that he remains focused on his campaign to expose fraud and other wrongdoing within the Pertemps group. He had told the Court that he was working with other substantial backers to expose such criminality and, at the end of the hearing on 29 January, he specifically gave notice of his intention to make further public statements shortly. He insisted that such statements would not name PMG or its personnel but rather be generic statements about the fraud that, he says, is rife in this sector. Nevertheless, it was, said Pepperall J, clear that, unless restrained by the court, Mr Ladak would threaten and intend making further adverse and derogatory comments about PMG, its directors and employees and act so as to bring such persons into disrepute. Accordingly PMG was likely to succeed at trial in its claim for injunctive relief pending trial to prevent further breaches of clause 14.4.

**Supp.509** In making the order, Pepperall J stressed that his judgment made no findings as to the truth or otherwise of the serious allegations made by Mr Ladak. He also acknowledged that it was important that no fetter should be placed on Mr Ladak's right to raise his concerns with the NHS Counter Fraud Authority and that the order would there not apply to disclosures made to that body. The Order also continued the mechanism put in place on the first interim order permitting Mr Ladak to seek prior approval of the Court in the event he wished to make any wider disclosure.

## **E. Criminal Law**

### *The defence of necessity*

**Supp.510** See the useful survey of the Official Secrets Act in a Briefing Paper by the House of Commons Library dated 2 May 2017 "The Official Secrets Acts and Official Secrecy". The Briefing Paper includes a more detailed commentary on the Law Commission's Consultation Paper to which we refer in paragraph 14.143 and also a commentary on notable cases involving the Official Secrets Act or leaks of Government Information from 1938 (Duncan Sandys MP) to Thomas Lund-Lack in 2007 including the prosecution of Katherine Gunn – an employee of GCHQ – in 2004. That prosecution was the subject of the film "Official Secrets", 2019.

## CHAPTER 15: PROTECTION OF THE IDENTITY OF INFORMANTS

### Paragraphs 15.10 to 15.15: *Norwich Pharmacal* Orders

**Supp.511** See also *DSM SFG Group Holdings Ltd v Kelly* [2019] EWHC 2082 (QB)<sup>52</sup> where a *Norwich Pharmacal* order was made requiring disclosure of the identity of employees who were alleged to have disclosed confidential information to the defendant (who had sold his interests in the various businesses to the claimant for around £23m). On the basis of the information disclosed, it appears that the defendant had made an allegation about the claimant's alleged involvement in a cartel. In granting the Order, Murray J took into account (at para 26) the interest in protecting the rights of the employees concerned and not disincentivising legitimate whistleblowing. However he placed emphasis (at paras 24-27) on the finding that, even if there had been a disclosure of wrongdoing, any disclosure made by the employees to the defendant would not be a protected disclosure as it was not made to the employer or other relevant person (though there appears to have been no specific consideration as to whether s.43G ERA could apply to afford protection). Whether or not the employees had made protected disclosures to others, which it was not possible to ascertain on the evidence available, was not a sufficient reason to refuse the order. It would not unmask them as whistleblowers as such (in the sense of employees who had made protected disclosures) given judge's conclusion that the disclosures to the defendant were not protected. Nor was the fact that the employees might be exposed to a claim by their employer for breach of confidence or breach of contract a sufficient reason to refuse disclosure.

## CHAPTER 17 DEFAMATION

### Paragraphs 17.05 to 17.13, Serious Harm

**Supp.512** In *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, the SC, differing from the view of the Court of Appeal ([2017] EWCA Civ 1334), held that s.1 of the Defamation Act 2013 had affected a number of common law principles and presumptions. In particular a statement which would previously have been regarded as defamatory because of its inherent tendency to cause some harm to reputation is no longer to be so regarded unless it had caused or was likely to cause harm which was serious. As a consequence, the defamatory character of a statement no longer depend only on the meaning of the words used, and their inherent tendency to damage the claimant's reputation.

### Paragraphs 17.34 to 17.66: Public interest defence

**Supp.513** In *Serafin v Malkiewicz* [2019] EMLR 21, the Court of Appeal considered the approach to the public interest defence in s.4 of the Defamation Act 2013. The case is currently subject to a further appeal to the Supreme Court, which was heard on 17 and 18 March 2020.

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<sup>52</sup> An appeal in relation to a different part of the decision was allowed ([2020] EMLR 10), but this did not concern the *Norwich Pharmacal* decision.

**Supp.514** Section 4 of the 2013 Act provides:

“(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the *Reynolds* defence is abolished.”

**Supp.515** The defence is relevant in those cases where it has not been possible to establish that what was written was true (in which case it would not be necessary to rely on the defence). The defendants had published an article about Mr Serafin alleging that (1) he had abused his position as a member of the Polish Social Cultural Association (POSK) in London to award himself or his company profitable contracts for maintenance work, (2) that he had made a fraudulent profit from alcohol sales by not putting sales through the cash register at the POSK Jazz cafe, (3) that he had conned a number of women into investing their life savings into his food business (Polfood) and then stolen their money and defrauded his creditors and (4) that he had sold unfit food to another charity with which he had become involved (Kolbe House), which was a care home for elderly Polish people, and had treated the care home as his personal property by exploiting his sway over the female manager and concealed his bankrupt status from her and had also failed to disclose his bankrupt status when required to Ealing Council. The trial Judge (Jay J) found that most of the allegations were true, but that all but one of the allegations about Kolbe House were untrue. The Judge also concluded that the public interest defence applied to all the allegations.

**Supp.516** The Court of Appeal allowed the appeal in relation to the public interest defence. It held that when determining whether the alleged defamatory material was published in the public interest, it was necessary to balance the public interest in publication with the breach of the claimant’s article 8 right to reputation arising from the publication of unproven allegations without a remedy. In carrying out that balance, the Court had to consider not only the subject matter of the defamatory material, but also the context, timing, tone, seriousness and all other relevant factors, as to which the Lord Nicholls’ checklist in *Reynolds*

*v Times Newspapers Ltd* [2001] 2 AC 127 (HL) remained relevant in relation to the existence of public interest in the article (see below).

**Supp.517** Here the CA concluded that the limb (a) of the defence was not satisfied in that, the Court held, that the statements of which complaint were made were not on matters of public interest. Whether there was a public interest in publication had to be assessed balanced with the breach of the claimant's article 8 right to reputation arising from the publication of unproven allegations without a remedy. The Judge's finding to the contrary was on the basis that the article related to the Mr Serafin's alleged misconduct in relation to two charities (POSK and Kolbe House), and that taking into account the similarity of allegations that he was "cheating" Kolbe House and had "profited" from POSK it was also in the public interest to include the allegations as to his "brazenly unethical conduct" in relation to Polfood even though it was a privately owned company. However the CA held that the statements concerning POSK and Kolbe House were not about how they were run as charities, but were aimed at Mr Serafin's "personal life, *mores* and conduct as a contractor, supplier and volunteer" of the two charities. In all, "the gravamen" of Mr Serafin's complaint was about what the article said about him personally in these capacities. The allegations concerning Polfood also related to the claimant's private life and to the honesty of his management of the business and its funds on bankruptcy. The Court also stated that it was telling that the defendants did not contact anyone involved in the management at Kolbe House and POSK to discuss the allegations which would have been the obvious and natural step to take if the article had been about the management of those charities. Further, Mr Serafin was not an appointed officer at Kolbe House and never exercised any public, executive or charitable function there; he was a paid contractor. The Court also considered that the Judge had given insufficient consideration to Mr Serafin's Article 8 right to reputation and the irreparable reputational damage that would inevitably be caused by publication of the article, and whether the public needed to know the information at the time the article was published so that it could be said to be necessary that his rights should be breached without remedy.

**Supp.518** As to limb (b) of the defence, the Court emphasised that for a belief that publication was in the public interest to be reasonable, there needed to have been consideration of the relevant factors and the making of such enquiries and checks as it was reasonable to expect of the defendant in all the circumstances. As to this, the Court highlighted that it was a basic requirement of fairness and responsible journalism in all but exceptional cases that those who intended to publish a story without being required to prove its truth should give the subject of the story the opportunity to put his side of it. Here the defendants had failed to contact Mr Serafin before publication. The reasons given for this was that he had not complained of previous articles, that they did not believe that he would respond and that they had been warned that he was a liar. The Court stated that these excuses lacked substance. Further there were other respects in which the defendants had taken inadequate steps to verify the information. The defendants had failed to contact others who may might be expected to have knowledge of the truth or falsity of the allegations, including contacting anyone involved in the management of POSK or Kolbe House to discuss the claimant's role and the activities in their organisations.

**Supp.519** Turning to the *Reynolds* factors, the Court addressed each of these in turn by way of a checklist (at para 82)

- Seriousness of the allegations: here they were indeed serious and reputationally damaging.
- Nature of the information and the extent to which they were matters of public interest: The information was of no or limited public interest.
- (a) The sources of the published allegations and (b) the status of the information: here they included those with axes to grind, those who wished to remain anonymous and others with limited direct knowledge of the facts.
- Steps taken to verify the allegations: As above the steps taken were inadequate.
- Urgency: There was no urgency about publication.
- Whether the article set out the claimant’s side of the story: here it did not.
- The tone of the article: it was “snide and disparaging” of Mr Serafin. It portrayed him as “a despicable and reprehensible character” and “presented the allegations as hard fact”. (para 83)
- The circumstances of the publication, including the timing – this was covered by the above points.

**Supp.520** A controversial aspect of the Court of Appeal’s reasoning is that it appears to proceed on the basis that both limbs of the defence are framed as being concerned with the whether the disclosure was in, or reasonably believed to be in, the public interest. One of the issues raised in the further appeal to the Supreme Court is that this fails to take into account of the different wording of limb (a) which, it is argued, in referring to the requirement for the statement to be “on” a matter of public interest, is concerned only with the subject matter of the disclosure, being consistent with the common law meaning of being on a matter of public interest in the former fair comment defence. It is also argued that the Court of Appeal erred in effectively re-introducing the *Reynolds* test, and continuing to place emphasis on the element of whether there has been responsible journalism (albeit that it was argued that it remained a potentially relevant but not necessarily determinative factor), rather than focussing on the new statutory language. Reliance was also placed on (1) *Chesterton Global Limited and (2) Verman v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ 979; [2018] ICR 731 in support of how the reasonable belief test should be approached, subject the limits in subparagraphs (3) and (4).