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An Epidemic of Whistleblowing?

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Whistleblowing in 2 minutes

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- Workers (not limited to employees) 43K extension to the meaning of "worker" & "employer"
- A "qualifying disclosure", 43A & 43B
- Conversion into *protected* disclosure if made in accordance with respective requirements as to recipient:-
 - Employer/person responsible for relevant failure/ in the course of obtaining legal advice 43C, 43D, 43E (crown employees)
 - Regulator, 43F, rb that information disclosed, and any allegation, are substantially true
 - Anyone else 43G, gateways & reasonableness 43H exceptionally serious & reasonableness requirement
- = Protection for worker against
 - Detriment 47B
 - By the employer, employer's other workers, employer's agents 47B
 - Dismissal 103A

Disclosure of information: ERA 43B (1) LITTLETON

- any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
 - (a) that a criminal offence has been committed, is being committed or is likely to be committed;
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

= "relevant failure"
- "public interest", nb *Ibrahim*: broad approach to showing rb

Legal obligations, criminal offences

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Common law & contractual duties of care owed by employer to employee

Health and Safety at Work Act 1974, s 2 (2) (a), s 33;

Management of Health and Safety at Work Regulations 1999;

COSH 2002 (esp reg.2) – HSE's untested view is that reg. 2 extends to viruses;

PPE Regulations 1992, regs 4, 7;

Implied term of trust and confidence.

“legal obligation”

- Compliance with non statutory guidance is *not* a legal obligation: cf ***Butcher v Salvage Association***
- But failing to comply with guidance *may* be a basis for a (reasonable) belief that duties of care *have* not been or *are* not being complied with
- Or are likely to be not complied with in the future....

“likely to...”

- Was the likely relevant failure reasonably believed to be more probable than not? *Kraus v Penna* [2004] IRLR 260, EAT.

...the information disclosed was only that the company 'could' breach employment legislation and would be vulnerable to claims for unfair dismissal. At its highest, therefore, Mr Kraus's belief was limited at this early stage to the possibility or the risk of a breach of employment legislation, depending on what eventually took place.

...Mr Kraus did not himself believe that the information he disclosed to Mr Bolton tended to show that a failure to comply with a legal obligation was 'likely', in the sense of 'probable' or 'more probable than not'

- *Tarrant and Tarrant v 3L Care Ltd and others* Case No. 1300128/2018, 9th July 2019
- Is *Kraus* correct?

Employer's subjective view as to whether worker made a disclosure

- Subjective: Irrelevant that recipient of disclosure did not *realise* that what the whistleblower had said or written amounted to a protected disclosure: ***Beatt***
- Objective: ***Riley v Belmont Green Finance Ltd t/a Vida Homeloans*** ...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

A disclosure of information?

- ***Kilraine***: No rigid dichotomy between 'information' and 'allegations'
 - Expressions of opinion may contain disclosures (eg ***Western Union***);
 - And so may questions: ***Simpson***
 - A refusal to work?
- Substance not form
- sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1)
- Context
- Aggregation of statements to form disclosures ***Robinson***
- Matter for evaluative judgment by a tribunal in the light of all the facts of the case.

Does the worker have to explain what they think the relevant failure is as well as giving information as to the (apprehended) facts?

- No requirement to make allegations: ***Korashi***.
- ***Fincham*** “must ... be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [employee is] relying.”
- Sometimes signposting is required: general complaint about “working practices and procedures” ***Riley v Belmont***
- But not if it is obvious in the context: ***Western Union/ Bolton School***.
- Distinction is to be made between spelling out the legal obligation within the disclosure and in the subsequent ET proceedings: ***Riley***

Wrong but reasonable belief as to legal obligation/crime? LITTLETON

- ***Babula v Waltham Forest College*** : a worker may have a reasonable belief as to the existence of a legal obligation even if that belief turns out to be wrong.
- ***Kilraine v London Borough of Wandsworth***: absence of anything in K's case or witness statement to suggest that she had a relevant legal obligation *of any kind* in mind when making her 4th disclosure
- ***Elysium Healthcare No 2 Ltd v Ogunlami***: more generous?

Rights and remedies

- S.47B- right not to be subjected to detriment by:–
 - Employer
 - A co-worker
 - The employer's agent
 - NB extended definition of worker & employer for these purposes.
 - ***Osipov***
- S103A, automatically unfair dismissal for reason or principal reason: nb interim relief
- S.105 (2) , (6A), selection for dismissal for redundancy where s.103A reason applies

Health and Safety Cases

- Ss. 44 & 100 ERA 1996: Detriment and Dismissal
- Not mutually exclusive: plead in alternative
- List of scenarios – ss. 44(1) and 100(1)
- Encourage use of H&S Representatives/Committee unless:
 - None exists;
 - Not reasonably practicable;
 - Reasonably believed serious and imminent danger

Trade Union and Employee Reps

- Employee Representatives: ss. 47 & 103 ERA 1996
 - TUPE Transfers
 - Redundancy Consultation
- Trade Union Representatives: ss. 153 & 153 Trade Union and Labour Relations (Consolidation) Act 1992

Interim Relief

- Specific Cases of Automatic Unfair Dismissal – s. 128(1)(a)
- Reinstatement, Re-engagement or (effectively) paid suspension throughout claim
- ETs prioritising

Interim Relief – The Test

- S.129(1) – “Likely to Succeed”
- “Pretty Good Chance” of success: ***Taplin v C Shippam Ltd*** [1978] IRLR 450
- Significantly more than balance of probabilities:
Wollenberg v Global Gaming Ventures (Leeds) Ltd
[2018] UKEAT/0053/18
- All elements of claim
- Broad assessment

Interim Relief – The Procedure

- Time Limit – 7 days of **EDT** – s.128(2)
- Early Conciliation not required
- Certificate from Union if TU case
- PH asap – postponed only in “special circumstances”
- Generally decided on papers + submissions only.

Interim Relief – The Power

- Reinstatement
- Re-engagement on no less-favourable terms
- Continuation of Contract Order:
 - Employer fails to attend;
 - Employer unwilling to reinstate/re-engage
 - Employee reasonably refuses re-engagement
 - N.b. – based on expected earnings, offset for mitigation
 - Parties can seek variation/revocation if relevant change of circumstances
- No order: unreasonable refusal by employee of re-engagement

Interim Relief – Practical Guidance

- Claimant:
 - Costs Risk if inappropriate;
 - Anticipate R's case;
 - Critical engagement with C's case crucial.
- Respondent:
 - Assume no adjournment;
 - Involve Counsel from outset;
 - Clear point of contact at client with suitable authority;
 - Documents, statements and advocacy preparation in parallel not series

Whistleblowing – Reason for Treatment

- Distinct for detriment and dismissal
- “Severable” conduct
- ***Bolton School v Evans* EAT [2006] IRLR 500; EWCA [2007] IRLR 140**
- ***Panatiyou v Chief Constable of Hampshire Police* [2014] IRLR 500**
- Risk of abuse: ***Riley v Belmont Green Finance Ltd t/a Homeloans* [2020] UKEAT/0133/19**

Reason for Treatment - Guidelines

- “Ordinary” unreasonable behavior not sufficient
- Set out basis of distinction;
- Robust and cogent evidence;
- Challenge your client.

Volunteers

- ERA 1996 presumes contractual relationship
- ***Gilham v Ministry of Justice* [2019] UKSC 44** – contractual requirement may be incompatible with ECHR
- Unclear if will extend to volunteers:
 - ***X v Mid Sussex CAB* [2013] 1 All ER 1038**
 - ***Tiplady v City of Bradford MDC* [2020] IRLR 230**



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Practical Steps



Surge in Reports

- Protect indicate huge increase in disclosures to its confidential reporting line post lockdown:
 - Furlough abuse
 - Unsafe working environment
 - Unfair treatment of maternity absent employees.



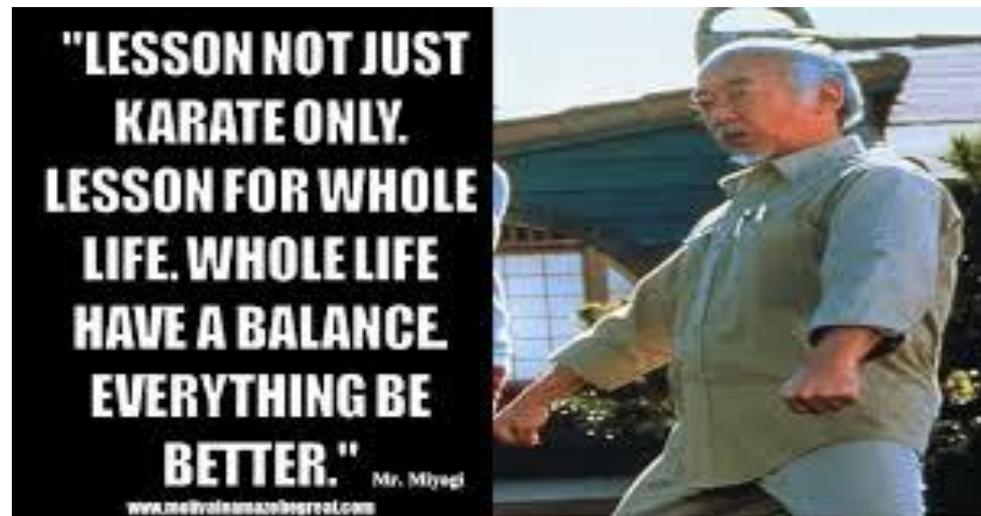
Staff

- Writing
 - Raise or document concerns in writing
 - Identify facts, failure and public interest;
 - Contemporaneous record of rationale;
- Official channels;
- More stringent tests if going outside employer;
- Discuss with trusted colleague, trade union or legal advisor
- Removal/discussion of documents – exercise great caution



The need for balance

- Excessive formalism can be counter-productive
- Yet inadequate detail may defeat the claim to protection



Employers

- Beware “*hidden*” or “*strategic*” disclosure
- Presume protected unless clearly not;
- Open organizational response to disclosures
 - S.43G(3)
 - Clear policy and framework. **Follow** it
 - Investigate and report conclusions
- Issues in remote investigations



Employers - Conduct

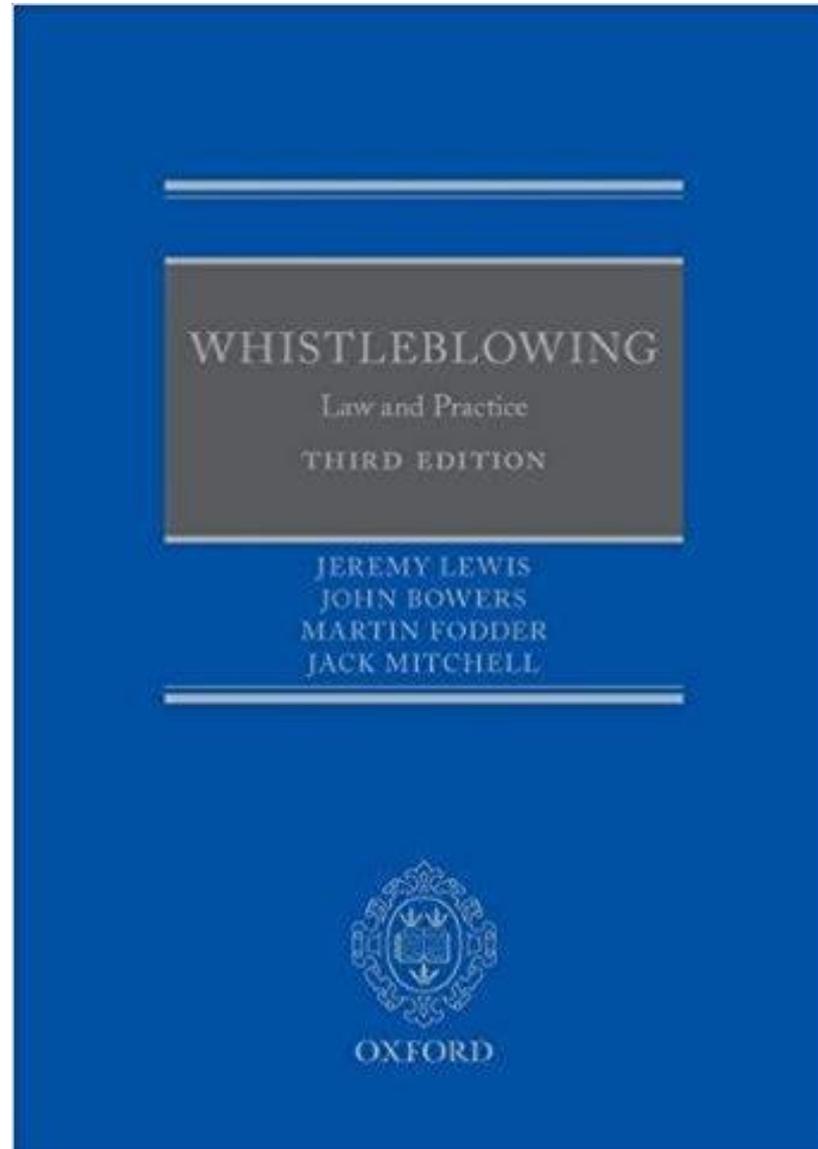
- Consider possibility of *lago* case
- Consider severability
 - Clarity;
 - Cogence;
 - Caution
- Disciplinary/Appeal officer unaffected by disclosure
- Grievance during process: pause, investigate, report.
- Robust disciplinary process for detriment by co-worker



Confidentiality

- S43J ERA 1996 exclusion
- ***Pertemps v Ladak* [2020] EWHC 163 (QB)**: Interim injunction where breach of settlement agreement
- General exception for criminal offence by employee – s.43B(3)
- Breach of confidence relevant, but not decisive, in disclosure outside employer/prescribed person s.43G(3)(d)
- Publicity risks

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Next Webinar

- Flexible Working
- 24th June
- Charlotte Davies & Bianca Balmelli

QUESTIONS



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