WHISTLEBLOWING AND VICTIMISATION

Daphne Romney KC

GENERAL PRINCIPLES

- ERA 1996 s. 43B(1)(a)-(f) – information tending to show
  - (a) A criminal offence
  - (b) Breach of a legal obligation
  - (c) Miscarriage of justice
  - (d) Health and safety of an individual
  - (e) Damage to the environment
  - (f) Concealment of any of the above

REASONABLE BELIEF

- The worker must believe the information in the disclosure – *Babula v Waltham Forest*
- The belief must be reasonable – *Darnton v University of Surrey*
- The reasonable belief is that the disclosure *tends to show* not that it does – *Kraus v Penna*

WORKERS

- The whistleblower must be a '*worker*' which includes an agency worker – s. 43K, homeworkers and freelancers falling within s. 230(3)
- NHS workers can be whistleblowers
- The wording should be given a purposive interpretation – *Day v Lewisham and Greenwich NHS Trust*

IN THE PUBLIC INTEREST

- Protected disclosure was introduced by Public Interest Disclosure Act 1998 yet those words were not featured in the original legislation
- Amendment in ERRA 2013 introduced a need to show that the whistleblower also reasonably believed the disclosure was in the public interest
- *Chesterton Global v Nurmohamed* – there are no absolute rules as to what *'in the public interest'* means

GOOD FAITH

- As a quid pro quo for this new provision on public interest, there is now no need to show the disclosure was in good faith
- Only relevance of good faith now is in terms of compensation – ET can reduce it by 25% for bad faith
- Good faith is not the same as personal gain
- Should whistleblowers be rewarded financially as in the US?

INFORMATION OR ALLEGATION?

- Clear division between information and allegation – *Cavendish Munro v Geduld*
- Softened – information can contain an allegation *Kilraine v Wandsworth BC; McDermott v Sellafield Ltd*
- The test - is there '*sufficient factual content and specificity*' so as to be capable of showing one of the matters in s. 43B(1)
- Is what is expressed simply an opinion?

AGGREGATED DISCLOSURES

- Two or more disclosures can be read together to form a single protected disclosure – *Norbrook Laboraties v Shaw; Simpson v Cantor Fitzgerald Europe*
- Whether to do so is a matter of fact in each case

SPECIFICITY

- '*Save in obvious cases, the source of the obligation should be identified and capable of certification by reference for example to statute or regulation*' - *Blackbay Ventures v Gahir*– but see
- *Eiger Securities v Korshunova* – disclosure must identify a legal breach not something wrong, immoral or in breach of Guidance – EAT stressed the link between identification of the breach and the reasonableness of the worker's belief

SPECIFICITY (2)

- *Twist DX v Armes* – Linden J said the authorities showed *"a range of formulations where there need be no express reference to legal obligation – where it is obvious, common sense or sufficiently clear"*. ETs should refer to the '*evidentially exacting*' words of the statute

QUALIFYING vs. PROTECTED DISCLOSURES

Kealy v Westfield Community Development Association per Judge James Tayler:

- 'Qualifying disclosure' concerns the nature of the disclosure made
- The 'qualifying disclosure' must become a 'protected disclosure'
- 'Protected disclosure' concerns the person to whom the disclosure is made

QUALIFYING DISCLOSURE

Williams v Michelle Brown Am per HHJ Auberbach:

1. Disclosure of information
2. Worker's belief in the public interest
3. Reasonable belief in 2. above
4. Worker must believe disclosure tends to show one or more of the matters in 43(a)-(f)
5. Reasonable belief in 4. above

PROTECTED DISCLOSURE

- To whom was the disclosure made? i.e. within s. 43C or 43 G? Then ask
  - Does the worker reasonably believe the information disclosed any any allegation in it are substantially true?
  - Is the disclosure made for personal gain?
  - In all the circumstances, is it reasonable to make the disclosure?

DETRIMENTAL ACTION AFTER EMPLOYMENT HAS ENDED

- Detriment post-termination was actionable *Woodward v Abbey National – 'to hold otherwise would be palpably absurd and capricious'* per Ward LJ
- The EAT has taken this further to hold that a disclosure post-termination leading to detriment is permissible - *Onyango v Berkeley t/a Berkeley Solicitors* - ERA s.230 defining a worker as *"those who are in or have ceased to be in a contractual relationship"*.

THE REASON WHY

- The issue for the ET is why did the employer act as it did – was it on the ground of the employee's protected disclosure? Or for some other reasons

- *L.B Harrow v Knight*
- *Hossack v Kettering Council*
- *NHS Manchester v Fecitt*

REASON OR CONSEQUENCES?

- In *Fecitt* the disclosure led to a '*dysfunctional situation*' – the Court of Appeal held that this was the cause of moving the whistleblowers, not the disclosure itself; the employer is not under an obligation to ensure that whistleblowers are not adversely affected in such a situation
- It rejected the submission that the dysfunctional situation was not the inevitable consequence of the disclosure

DISCLOSURE OR REFUSING TO ACCEPT THE OUTCOME?

- *Martin v Devonshire Solicitors* - wholly unreasonable and disruptive conduct
- *Panayiotou v Chief Constable of Hampshire*

DISCLOSURE OR THE MANNER OF THE DISCLOSURE?

- Is it what the whistleblower did or the way they did it?
- *Aspinall v MSI Mech Forge* – photos endangering trade secret
- *Bolton School v Evans* – hacking into the computer system to show it could be hacked
- *Blitz v Vectone Group Holdings*– unprofessional conduct

DECISION-MAKER'S KNOWLEDGE ABOUT THE PROTECTED DISCLOSURE

- *Royal Mail Group v Jhuti* – Supreme Court holds that in the case of dismissal under s 103A ERA 1996 where the decision is influenced by malign information based on a protected act (i.e. a manager's evidence), the ET should *'penetrate through the invention rather than allow it to infect its own determination'* per Lord Wilson.
- The question is *'which human being is to be taken to have the state of mind which falls to be attributed to the company?'*

JHUTI DOES NOT APPLY TO DISCRIMINATION CLAIMS

- *Alcedo Orange Ltd v Ferridge-Gunn* – the Court of Appeal affirmed its decision in *CLFIS (UK) Ltd v Reynolds* that in cases of discrimination, an act of discrimination had to be committed *because* of discrimination of the actor in question – therefore the malign party had to be named as a respondent
- There is therefore a distinction between s. 103A unfair dismissal and discrimination

DISMISSAL AND DETRIMENT

- *Fecitt* stressed the distinction between dismissal and detriment –
- Dismissal (s. 103A) is governed by Part X of ERA 1996 - the disclosure must have the reason or principal reason for the employer's action
- Detriment (s. 47B) is governed by Part – the disclosure must have only a material effect on the employer's action – '*more than minimal*'
- *Timis v Osipov* confirmed this

CLAIMING DETRIMENT AND DISMISSAL

- In addition to dismissal, a worker can claim detriment for actions until and after dismissal - *Timis v Osipov*.
- This includes bringing claims of detriment against third parties, i.e. directors of the employer company who were party to the decision to dismiss – despite wording of s. 47B(2), which excludes dismissal from detriment as claimable by an employee
- This can circumvent the prohibition on claiming injury to feelings on dismissal

DETRIMENT

- Detriment includes action and deliberate *in*action by the employer – incompetence is not enough
- Detriment is not defined but means what a worker can reasonably take as a detriment – an unjustified sense of grievance is not a detriment – *Barclays Bank v Kapur*
- The detriment *'must have been caused in the employment field'* i.e. connected to the employer's employment rather than non-work life - *Jesudason v Alder Hey Children's NHS Foundation*

PRESCRIBED PERSONS

- Public Interest Disclosure Prescribed Persons Order 2014 – list of outside bodies to whom disclosure may be made
- Workers may see this is a safer route than disclosure to their employer – instilling a sense of trust?
- Remember ET1 Box 10 about alerting the regulator

REDUCTION OF COMPENSATION FOR LACK OF GOOD FAITH

- s. 49(6A) permits ETs to reduce compensation by up to 25% for lack of good faith - to date there is no caselaw on this section
- Bad faith includes using the disclosure as a bargaining tool *Bachnak v Emerging Markets Partnership (Europe) Ltd*
- Burden of proof to show bad faith remains on the employer in cases of automatic unfair dismissal *Lucas v Chichester Diocesan Housing Association Ltd*

INTERIM RELIEF

- An employee can be reinstated pending the Hearing s. 128 ERA 1996 -the application must be made no more than 7 days after EDT
- The reinstatement is as an employee but does not mean allowing the worker to return – *Steer v Stormsure*
- The test is higher than reasonable likelihood of success of success – it is the higher test of 'pretty good chance of success' - *Hancock v Ter-berg*

GOVERNMENT REVIEW OF WHISTLEBLOWING LAWS

- In March 2023, Govt. announced a review into the effectiveness of current whistleblowing laws
- Issues to be looked at include the definition of ‘worker’ and whether the legislation has enabled whistleblowing, as well as responsibilities
- It was expected to conclude in Autumn 2023

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