Whistleblowing Claims

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1. Introduction

The Public Interest Disclosure Act 1998 ("**PIDA 1998**") was "*an Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes*" and received Royal Asset on 2 July 1998 (coming into force exactly a year later). It was introduced against the background of a series of major scandals and disasters (the Piper Alpha explosion, the Zeebrugge ferry disaster and the Clapham and Ladbroke train crashes, to name but a few) when it became clear that employees within the organisations concerned had known that something was seriously wrong but had failed to come forward for fear of reprisal, or had reported concerns in the wrong way to the wrong people. Over time, a consensus had grown (culminating in PIDA 1998) that workers who blew the whistle on matters of public interest deserved and required legal protection from retribution. The Bill, unusually for an employment protection measure, had received total cross-party support during its legislative process and was warmly welcomed by the CBI and the IoD on the one hand and the TUC on the other; the measures were perceived as being in the interests of both workers and business.

2. The legislative framework

All of PIDA's substantive provisions took effect as amendments to the Employment Rights Act 1996 ("**ERA**"):

- Part IVA ERA – which defines the meaning and scope of 'protected disclosures'.
- Section 47B ERA – which confers a right on *workers* (s.43K(1) ERA makes clear that a specially extended definition of worker applies in this context) not to be subjected to any detriment on the ground that they have made a protected disclosure.
- Section 103A ERA – which stipulates that an *employee* will be regarded as having been unfairly dismissed if the principal reason for his or her dismissal is that he or she made a protected disclosure.

Only 'protected disclosures' are covered by the ERA and to be categorised as such, a disclosure must satisfy three conditions set out in Part IVA of the ERA:

- It must be a 'disclosure of information';
- It must be a 'qualifying disclosure' – i.e. one that, in the reasonable belief of the worker making it, is made in the public interest[1] and tends to show that one or more of six 'relevant failures' has occurred or is likely to occur; and
- It must be made in accordance with one of the six specified methods of disclosure.

[1] If the disclosure was made on or after 25 June 2013.

3. Was there a 'disclosure of information'?

Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of 'relevant failure' (discussed below). The phrase 'disclosure of information' is intended to have a wide reach and an employee need only communicate the information by some effective means in order for the communication to constitute disclosure of that information; there is no requirement for the disclosure to be in writing and even handing over a video recording could amount to a disclosure: *Aspinall v MSI Meech Forge Ltd* EAT 89/01.

In addition, protection is not denied simply because the information being communicated was already known by the recipient (see S.43L(3) ERA[2]); in other words, a disclosure of information can take place even when an individual is provided with information of which they are already aware.

Notwithstanding the broad reach of the provision, it is crucial to remember, however, that there must still be a disclosure of information. As Slade J pointed out in *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, there is a distinction between 'information' and the making of an 'allegation':

"*…the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.' Contrasted with that would be a statement that 'You are not complying with the Health and Safety requirement'. In our view this would be an allegation not information.*"

As such, a solicitor's letter expressing concern as to the fairness and lawfulness of the claimant's treatment and threatening legal action had not conveyed facts, it had simply expressed dissatisfaction with his treatment; that did not amount to a 'disclosure of information'.

This distinction between conveying facts and making an allegation was applied in *Smith v London Metropolitan University* [2011] IRLR 884 such that the raising of grievances about the claimant's workload did not amount to a 'disclosure of information'. In *Goode v Marks & Spencer* UKEAT/0442/09 where the claimant had breached confidentiality by writing to a newspaper about possible changes to be made to his pension scheme, it was held that all he had done was to vent his highly adverse opinion about the proposal; the only 'information' that he had disclosed was that he was unhappy about it, which fell short of a failure to fulfil a legal duty on the part of the company.

The distinction between 'information' on the one hand (which could be protected) and the making of an allegation or statement of position on the other (which would not be protected), however, can be a fine one. It is easy to envisage circumstances in which a statement of position could involve the disclosure of information, and vice versa. As Judge Eady said in *Western Union Payment Services Ltd v Anastasiou* [2014] All ER (D) 13 (May), "*the assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.*" In that case, the EAT held that relevant information would be contained in opinion about a perceived relevant failure (whether sales targets would be met) provided that the nature of the alleged failure was relatively clear. In other words, whilst the most obvious form of disclosure will concern primary facts, there can be cases of mixed primary facts and opinion which on balance still qualify.

Furthermore, the EAT stressed in *Millbank Financial Services Ltd v Crawford* [2014] IRLR 18 that whilst *Cavendish* drew a distinction between a mere allegation or statement of position on one hand and conveying of facts on the other, facts conveyed could relate to an employer's omission to act as well as positive acts (in this case referring to the lack of support on a probationary period). In short, a complaint is not to be classified as a mere allegation simply because it is expressed in the negative. In *Gebremariam v Ethiopian Airlines* [2014] IRLS 354, the EAT held that a mere assertion of a breach of the obligation to undertake a pregnancy risk assessment did not 'convey facts', but communication of the fact that the claimant had not had a risk assessment, or that she was not given a warning before redundancy selection did 'convey facts' even if phrased as an allegation.

Four further points warrant consideration in the context of 'disclosure of information':

- 'Disclosure of information' is not made by demonstrating concerns about an issue by action, such as when the IT Manager broke

[2] "*any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.*"

into the employer's network to prove his concerns about IT security in *Bolton School v Evans* [2007] IRLR 140 (CA).

- It is conceivable that information can be comprised in different communications and aggregated to form one disclosure which could be protected in law (even though at least one of them alone would not have qualified in itself): see *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 546. Whether two communications can when taken together amount to a disclosure of information is, however, a question of fact in the individual circumstances. Although the later case of *Barton v Royal Borough of Greenwich* (2015) UKEAT/0041/14 seems to go against this and suggest that aggregation of different communications is not appropriate, the point was dealt with fairly shortly in that judgment and *Norbrook* was not cited; the point made in *Barton* should not necessarily be considered a point of law and the better way of looking at it is that on the specific facts there was no aggregation.

- If necessary, legislative protection can apply to a disclosure made *after* termination of employment: see *Onyango v Berkeley Solicitors* [2013] IRLR 338.

- A disclosure made at a former employer can be protected even if acted upon after that employment has ended (and acted upon by a new employer). In *BP v Elstone* [2010] IRLR 558, the claimant made certain protected disclosures to BP about safety matters while he had been employed by a company dealing with BP; he was dismissed because of this. When he later worked freelance for BP and they found out he had been dismissed by his previous employer, they refused to give him further work. This was held to be protected by the whistleblowing provisions, even though the disclosure was while in the employment of a previous employer and the detriment was imposed later by a different entity.

4. Is the disclosure a 'qualifying disclosure'?

Once it is established that a disclosure of information has taken place, the next consideration is whether or not that disclosure can be categorised as a 'qualifying disclosure'. A 'qualifying disclosure' is defined in S.43B ERA as "*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest*[3] *and tends to show one or more of*" the following (which are collectively referred to as the 'relevant failures'):

- that a criminal offence has been committed, is being committed or is likely to be committed – S.43B(1)(a) ERA.

- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject – S.43B(1)(b) ERA.

- that a miscarriage of justice has occurred, is occurring or is likely to occur – S.43B(1)(c) ERA.

- that the health and safety of any individual has been, is being or is likely to be endangered – S.43B(1)(d) ERA.

- that the environment has been, is being or is likely to be endangered – S.43B(1)(e) ERA.

- that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed – S.43B(1)(f) ERA.

In short, to amount to a qualifying disclosure, the 'disclosure of information' must in the 'reasonable belief' of the worker:

- be made in the public interest; and

- '*tend to show*' one of the six relevant failures (set out above) has occurred, is occurring or is '*likely*' to occur.

(a) 'Reasonable belief' - low threshold

The test of 'reasonable belief' is, in essence, a subjective one. The focus is on what the worker in question believed rather than what anyone else might or might not have believed. It is not even necessary for the information itself to be actually true: see *Darnton v University of Surrey* [2003] IRLR 133.

The test is not, however, 100% subjective. S.43B(1) ERA requires the belief to be reasonable; this introduces an objective element into the test, suggesting there has to be some substantiated basis for the worker's belief. As such, tribunals will take into account a worker's individual circumstances such that those with professional or insider knowledge will be held to a different standard in respect of what it is 'reasonable' for

[3] If the disclosure was made on or after 25 June 2013.

them to believe: see *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4. Furthermore, truth and accuracy of the information are not entirely irrelevant; the determination of the factual accuracy of the information will be an important tool in helping to determine whether the worker did in fact have a reasonable belief that the disclosed information tended to show a relevant failure.

Rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief.

(b) Public interest

The requirement that the worker must have a 'reasonable belief' that the disclosure is made in the public interest (as introduced into S.43B(1) ERA by s.17 Enterprise and Regulatory Reform Act 2013 ("**Enterprise Act 2013**")) only applies to cases where the disclosure was made on or after 25 June 2013, not simply to cases where the detriment or dismissal said to flow took place after that date. The purpose of this amendment was to resolve the problem created by *Parkins v Sodexho Ltd* [2002] IRLR 109 (i.e. the use of protected disclosure provisions in private employment disputes that do not engage the public interest). With the introduction of the public interest requirement, the obligation that the disclosure be made in 'good faith' gave way (although it still applies in relation to disclosures made before 25 June 2013 and for which *Street v Derbyshire Unemployed Workers Centre* [2004] IRLR 687 is the leading authority); 'good faith' now only explicitly being relevant in relation to remedies.

This legislative change was explored by the EAT in *Chesterton Global Ltd v Nurmohamed* [2015] IRLR 614. The claimant had been dismissed after making three disclosures about financial irregularities at Chestertons which had an effect on his earnings (and the earnings of 100 other employees). The employer argued that the disclosure concerned personal matters which used to be covered by *Parkins* and as a result did not satisfy the new public interest test. The EAT, however, upheld the Tribunal's decision that the claimant had a reasonable belief that the disclosure was made in the public interest (notwithstanding the fact that he was primarily concerned with his own earnings). In short, the effect of the legislative amendment did not mean that there could not be any protection if personal interest was involved, especially in the case of a group of people (it is noteworthy that the Government during the legislative process culminating in the Enterprise Act 2013 rejected an amendment which would have ruled out any case involving a breach of employment contract).

It is questionable whether the public would really be interested in managers not getting paid bonuses at an estate agency, but it seems clear that the question in many cases should be whether there was a reasonable belief that a disclosure was in the public interest, as opposed to just in his personal interest.

(c) The 'relevant failures'

The disclosed information must 'tend to show' either a past, present or future state of affairs: commission of a criminal offence, failure to comply with a legal obligation, occurrence of a miscarriage of justice, endangerment of the health and safety of any individual, damage of the environment, or a cover-up of any of these. It is immaterial whether the relevant failure to which the information relates occurred in the UK or elsewhere (S.43B(2) ERA) and a protected disclosure can be in relation to the failure by a person other than an employer: see *Hibbins v Hesters Way Neighbourhood Project* [2009] IRLR 198.

Sometimes the state of affairs contemplated is a legal breach (as with S.43B(1)(a) to (c) ERA) sometimes a risk of harm (as with S.43B(1)(d) and (e) ERA). If it is a legal obligation, the information disclosed must identify the general nature of the obligation, even if not 'chapter and verse'. Furthermore, the worker wishing to rely on the whistleblowing protection bears the burden of establishing the relevant failure: *Boulding v Land Securities Trillium (Media Services) Ltd* [2006] All ER (D) 158 (Nov).

In the context of a future state of affairs (i.e. that an employer is "likely" to fail to comply with any legal obligation to which it is subject), the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation: the relevant part of the decision in *Kraus v Penna plc* [2004] IRLR 260 in this regard remains good law.

5. Is the 'qualifying disclosure' protected?

The mere fact that a disclosure is a qualifying disclosure within the meaning of S.43B ERA is not sufficient to confer statutory protection on a whistleblower (i.e. not sufficient for it to be categorised as a protected disclosure). The

disclosure must also be made in the correct manner. The ERA provides for six categories of circumstances in which a qualifying disclosure will become a protected disclosure (s. 43C to 43H ERA).

The objective of the legislation is that the worker should in the first instance seek to resolve the matter privately with his employer. If that is unrealistic or impossible, or if they have already tried without success, then only then would it be appropriate to bring the matter to a wider audience. The statutory provisions construct a tiered disclosure regime; the tiers are defined by the comparative ease with which a worker gains protection depending on the person or body to whom the disclosure is made.

(a) Least stringent conditions: The easiest way for a worker to make a protected disclosure is to make it to his or her own employer (S.43C(1)(a) ERA), to a legal adviser (S.43D ERA) or, in the case of those employed by statutory bodies, to a Minister of the Crown or a member of the Scottish Executive (S.43E ERA).

There is some doubt as to whom, within a company or organisation, a disclosure should be made for it to be regarded as the worker's 'employer' for the purposes of S.43C(1)(a) ERA. The statutory provisions are silent. It seems likely, however, that a disclosure made to any person senior to the worker with express or implied authority over the worker should be regarded as having been made to the 'employer'. A disclosure made to a junior colleague or even one of equal status, on the other hand, would likely not be covered. Where a dispute arises as to whether a disclosure was made to the appropriate person, a Tribunal will pay close attention to the provisions of any relevant whistleblowing policy.

By virtue of S.43C(2) ERA, a worker who in accordance with an authorised procedure, makes a qualifying disclosure to a person other than his or her employer is to be treated for the purposes of the legislation as having made the qualifying disclosure to the 'employer'. A disclosure to an individual or confidential hotline under a fraud or bribery prevention policy is likely to fall within S.43C(2) ERA.

(b) Intermediate conditions: This tier covers two of the ways in which a protected disclosure can be made. First, S.43C(1)(b) ERA provides for a disclosure to be made to any other person whom the worker believes to be responsible for the relevant failure; the worker must show that he or she reasonably believed that the relevant failure related to the conduct of the other person or to a person in respect of which the other person has legal responsibility. Second, S.43F ERA provides for a disclosure to be made to a prescribed person or body charged with overseeing and investigating malpractice within certain organisations (i.e. the HSE, the Inland Revenue, the FCA, the GMC, the NMC etc.). A person who makes the qualifying disclosure to such a body will be protected only if he or she reasonably believes that the information is substantially true.

(c) Most stringent conditions: S.43G ERA provides for disclosure to an entirely outside body, such as the police or the press (such disclosures are known as 'external disclosures'). Not only must the worker reasonably believe that the information disclosed is substantially true but the worker must also show that he or she did not make the disclosure for the purposes of personal gain and must satisfy one of the further conditions in S.43G(2) ERA and that the disclosure was reasonable in all of the circumstances (S.43G(3) ERA).

The conditions governing disclosures concerning an 'exceptionally serious failure' are set out in S.43H ERA.

6. Liability for detriment

The regime is set out in S.47B ERA and has two essential elements. Firstly, there needs to be a 'detriment', which raises a number of considerations. Secondly, the detriment needs to be "on the ground that" the worker has made a protected disclosure.

(a) Meaning of detriment

'Detriment' under S.47B ERA is viewed subjectively, from the viewpoint of the worker. It is established if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his disadvantage. No physical or economic consequences are necessary, and detriment can be found even if the detrimental action seems minor to an objective observer (*Shamoon v RUC* [2003] ICR 337). As a result, it is a low threshold.

Given this low threshold, the potential instances of detriment are myriad. They include refusal of promotion or training, denial of a bonus, and disciplinary action as well as any retaliatory measures that disadvantage the job holder. It is also a potential detriment to expose the identity of

the whistleblower, so prompting them to be ostracised by their colleagues. Again it may be a detriment to expect a whistleblower to move roles to avoid contact with those colleagues criticised in the disclosure. Threats by an employer to take action would also constitute 'detriment'. In one ET case, the considered reaction of a company chairman *"You are in deep shit, girl"*, was held to be sufficient.

The right is a right not be subjected to any "detriment, by any act or any deliberate failure to act". Typical failures in response to whistleblowing complaints are failures to investigate the complaint or an excessive delay in doing so. The failure must be deliberate, such that the employer has made a conscious choice not to act. That can be inferred if the employer has done something inconsistent with such an act, or (given the wording of S.48(4)(b) ERA) from prolonged indecision. A failure to step in to prevent a state of affairs from continuing can amount to 'subjecting the' whistleblower to a detriment, even if that failure is not directly causative of the disadvantage.

(b) Conduct by colleagues

Sometimes the alleged detriment is retaliatory conduct by colleagues in response to the whistleblower's allegations. For instance, an employee accused of misconduct in the protected disclosure may retaliate by subjecting the whistleblower to verbal or physical abuse. This potentially renders those colleagues personally liable if the retaliatory conduct was committed in the course of their employment (S.47B(1A) ERA), and also is treated as the acts of the employer for which the employer is potentially liable (S.47B(1B) ERA). The employer has a statutory defence if it can show that it took all reasonable steps to prevent the worker from acting in that way (S.47B(1D) ERA). In practice, this will turn on :

- whether the employer has put in place a whistleblowing policy;
- whether the policy makes clear that victimisation of whistleblowers will not be tolerated;
- whether workers have been trained on the policy; and
- the employer's track record at dealing with whistleblowing allegations

(c) Sufficient causation

This is often the key battleground in whistleblowing cases. Where both a protected disclosure and a detriment have been established, there needs to be a sufficient causal connection between the two for the claim to succeed. The statutory language speaks of being subjected to a detriment 'on the ground of' making a protected disclosure (S.47B(1) ERA). That connection is established if the disclosure had a material influence on the detrimental treatment, in the sense of being more than a trivial influence (*Fecitt v NHS Manchester* [2012] ICR 372). Given that the burden of proof is on the employer, the employer must show that the detrimental treatment was "in no sense whatsoever" on the ground of the protected disclosure. So where an employer has a variety of motives for its actions, it is enough that one of the motives was a response to the protected disclosure.

This is the same causation test that applies in discrimination claims, and so discrimination caselaw is potentially relevant. It is a different causation test to the test that applies where employees are complaining of dismissal (see below). Just as in discrimination cases, tribunals will often ask 'the reason why' an act or a failure to act took place, to assess whether there was any connection with the protected disclosure. In that context, tribunals will consider what inferences can reasonably be drawn from the primary evidence as to the employer's motives.

If the evidence indicates that a delay in responding to a whistleblowing allegation is caused by incompetence or insufficient resources, then the claim will fail. Likewise there may be many unsavoury reasons for particular treatment that are unconnected to the disclosure. It is open to a tribunal to reject the purported reason advanced by an employer without accepting a claimant's contention that it was linked to whistleblowing. On the evidence, the tribunal may decide that the true reason was a different reason not advanced by either party unconnected to the whistleblowing (*Kuzel v Roche Products Ltd* [2008] ICR 799). In *Kuzel* the real reason for detrimental treatment was an unfair loss of temper by a manager, rather than the claimant's protected disclosure, or her conduct as the employer had alleged.

(d) Manner of disclosure

It is open to employers to argue that detrimental action was taken because of the manner of disclosure, rather than the content of the

disclosure. It could be argued that disciplinary action was taken because the disclosure breached confidentiality, or the allegations were false. In *Bolton School v Evans* [2007] ICR 641, a teacher was disciplined for hacking into the school's computer system to prove it was not secure. The Court of Appeal accepted the school's argument that it was the irresponsible way in which the teacher had sought to make his disclosure that had led to the warning, rather than the warning itself.

Evans was a case of automatically unfair constructive dismissal, which may be more fruitful territory for an employer to make such distinctions. But such a reliance on the manner of disclosure is unlikely to succeed in many 'detriment' cases, given that the content of the disclosure need only have a material influence on the detriment. Disclosures that are otherwise protected do not lose their protected status if expressed in intemperate language; and false allegations are still protected if the worker reasonably believes that the information disclosed showed a relevant failure.

(e) Linked detriments

Sometimes one detrimental act can lead to a second detrimental act. So an unfair reference may cause a claimant to be refused an internal promotion. If the reference was unfairly negative on grounds of a protected disclosure, with the intention that the claimant will be denied the promotion, then the employer will still be liable for the (innocent) decision to refuse promotion if it was infected by the nature of the reference (*Ahmed v Bradford* EAT 27.10.14).

7. Dismissal

(a) Workers

Workers who are not employees can complain that their dismissal is a detriment contrary to S.47B ERA for which they are entitled to a remedy. The advantage is that the Tribunal need only be satisfied that the dismissal was materially influenced by the protected disclosure.

(b) Employees

Dismissed employees face a higher hurdle. They cannot invoke the detriment regime under S.47B ERA, and need to rely on the unfair dismissal regime in Part X ERA. They have a right to complain that their dismissal is automatically unfair if the reason (or principal reason) is that the employee has made a protected disclosure : S.103A ERA. In the case of multiple disclosures, the question is whether, taken as a whole, the disclosures were the reason or principal reason for dismissal. Equally, dismissal for redundancy is automatically unfair if the reason or the principal reason for the selection is that the employee has made a protected disclosure : S.105(6A) ERA.

Unlike in detriment claims, the tribunal will be looking to identify a single reason for the detriment – either the only reason, or where more than one, the predominant reason. So an employer can escape liability if the protected disclosure was one of the reasons, but not the predominant reason.

(c) Identifying the dismissing officer

The focus in cases of express dismissal will be on the facts and beliefs that caused the decision maker to dismiss – either consciously or subconsciously. That is the reason for dismissal. So it is crucial to identify the decision maker. If the dismissing officer acted reasonably in relying on evidence gathered as part of an investigation, the dismissal will not be automatically unfair even if the evidence itself was tainted by reason of a prior protected disclosure (*Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658).

Contrast that with a case where some person involved in the disciplinary process with an inadmissible motivation has manipulated the decision maker's beliefs. In *Baddeley*, the Court of Appeal, obiter, said that the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation. Protected disclosures must still be the principal reason for the dismissal.

(d) Constructive dismissal

It is open to an employee to argue that his resignation was a constructive dismissal automatically unfair contrary to S.103A ERA, given the employer's previous repudiatory conduct. In such a case, the predominant reason for the repudiatory conduct must still be the employee's protected disclosures. The same detriments may be advanced as individual detriment claims under S.47B ERA and repudiatory conduct supporting a claim under S.103A ERA. Given the low threshold for detriment discussed above, it does not follow that any proven detriments, individually or cumulatively, will be a repudiatory breach of contract. That must be separately argued and established.

(e) Eligibility

As with any claim for automatically unfair dismissal, there is no minimum service requirement to qualify to bring such a claim.

8. Remedy

(a) Detriment claims

For remedy purposes, detriment claims are analogous to discrimination claims. The tribunal must make a declaration that the claim is well founded (S.49(1)(a) ERA), and may make award of award of compensation, in such sum as it considers 'just and equitable in all the circumstances' (S.49(1)(b) ERA). The focus is on compensating the claimant rather than punishing the employer. Unlike in discrimination cases there is, however, no power to make a recommendation. So a typical award for established detriment will be an award for injury to feelings, any resulting personal injury, and any consequential financial loss.

The tribunal is attempting to reach a fair figure given what loss has been caused by the detriment. This may require evaluating the loss of a chance. In *Das v Ayrshire & Arran Health Board* (EAT 28.11.14), a doctor was the only applicant for a health service position that was subsequently withdrawn. The ET decided that the reason why the position was withdrawn was because the doctor had previously made complaints. However, he only had a slender chance of appointment even if the position had not been withdrawn, so his compensation was reduced by 90%. That was upheld on appeal.

(b) Dismissal claims

Where an employee has been automatically unfairly dismissed and the predominant reason for the dismissal is a protected disclosure, the same principles apply as with ordinary unfair dismissal claims. The remedies of re-instatement and re-engagement are potentially available. In relation to financial remedies, there will be a basic award and a compensatory award, but the compensatory award will be restricted to financial loss. As established in *Dunnachie v Kingston Upon Hull City Council* [2004] ICR 1052, the tribunal has no power to award non-financial loss arising from dismissal, whether injury to feelings or personal injury.

There is no cap on awards for automatically unfair dismissal. As a result, they can be very significant. In *Watkinson v Royal Cornwall Hospitals NHS Trust* (ET, 2008), the successful Claimant, a 53 year old Trust Chief Executive, on an annual salary of just under £150,000 was awarded over £1.2 million in compensation.

(c) Dismissal and Detriment claims combined

Where a claimant seeks a remedy for both pre-dismissal detriment under S.47B ERA and dismissal under S.103A ERA (as for instance in a constructive dismissal case), a tribunal can make an award of injury to feelings (or personal injury) for the pre-dismissal detriment. In a case of constructive dismissal, the act of dismissal is the employee's termination of contract, such that the effect of all conduct up until resignation can be compensated in a detriment claim (*Melia v Magna Kansai* [2006] ICR 410).

An unresolved question is whether a worker claiming a remedy for a detriment amounting to dismissal can claim a separate award for injury to feelings. S.49(6) ERA provides that the compensation awarded must not exceed the compensation that would be available for automatically unfair dismissal. It is unclear whether this should be interpreted as referring to the aggregate total of compensation awarded (being both a basic and compensatory award) or to types of compensation recoverable for unfair dismissal. In the latter case, there would be no jurisdiction to award injury to feelings; in the former, it may be restricted to the level of the basic award.

(d) Adjustments

As explained above, there is no longer a requirement that a disclosure must have been made in good faith to receive protection. But lack of good faith is potentially relevant to the remedy. Where it appears to the tribunal that the protected disclosure was not made in good faith, then the tribunal has the power to adjust the remedy by up to 25% (S.49(6A); S.123(6A) ERA).

Such reductions are likely to be rare, given that claimants must have a reasonable belief that the disclosure is in the public interest. Claimants without such a reasonable belief will generally not be acting in good faith.

Both detriment and dismissal awards can be reduced for contributory fault (S.49(5); S.123(6) ERA). Where the detriment claim is brought by an employee, then the award can be adjusted upwards or downwards by up to 25% for a failure to follow the ACAS Code (S.207A Trade Union and Labour Relations (Consolidation) Act 1992). The

same applies to an unfair dismissal award. It has yet to be decided whether, for these purposes, the ACAS code applies to an employee who does not have the necessary length of service to bring an ordinary unfair dismissal claim.

9. Tactical issues

Whistleblowing cases can be factually complex and expensive to litigate. Often there will be several protected disclosures alleged and several potential detriments stretching over a long period of time. Robust case management is vital, not just by the tribunal, but also by the parties. This involves not just identifying the protected disclosures and the alleged detriments, but the dates of each. It requires identifying the recipients of the disclosures, and the decision makers in relation to the detriments.

Earlier detriments may potentially be out of time, particularly when issued within three months of the end of employment. Unless earlier detriments form part of a series of similar acts or failures as later detriments, then proceedings must have been issued before the end of the period of three months beginning with the date of the earlier detriment, even if the existence of the detriment was not known about by the Claimant at the time (*McKinney v Newham* [2015] ICR 495). Time will only be extended if it was not reasonably practicable to issue proceedings in time. That is a high hurdle for any Claimant.

Employers should consider whether some of the detriments can be struck out at a preliminary hearing, as being out of time. That may substantially reduce the extent of the issues. Witnesses will generally be the decision makers in relation to the alleged detriments or dismissals.

Much of the financial value in whistleblowing claims flows from post dismissal financial losses. Resources should be concentrated on establishing or resisting the dismissal claim, as well as evaluating its strength. There the key witness for the Respondent will be the dismissing officer. Key considerations will be whether he or she knew of the protected disclosure and had any motive for being influenced by it. Seeking a deposit order may put pressure on the claimant where there are obviously fair reasons for a dismissal and there is little evidence suggesting that the previous protected disclosure was the predominant reason for dismissal. That may be sufficient to dissuade some litigants from proceeding. However, it is only in exceptional cases that a tribunal will strike out a whistleblowing claim as having no reasonable prospects of success where the central facts are in dispute (*Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126).

10. Conclusion

Whilst the scope for bringing successful whistleblowing cases has been reduced by the public interest requirement introduced to overrule *Parkins v Sodexo*, these cases remain potentially attractive to many - those without the necessary service to bring an unfair dismissal claim, those without a protected characteristic to bring a discrimination claim, and those anxious to avoid the statutory cap. The low threshold for establishing detriment, coupled with the easier causation test, will make S.47B a more fruitful route to success. But as recent caselaw has shown, certain dismissal claims may well succeed in the future even if an innocent dismissing officer has been manipulated to sack an employee. Whenever litigating in this area, on either side, it is vital to identify the key factual and legal issues at an early stage in order to achieve the best outcome.

Disclaimer

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Bruce also has an employment focused personal injury practice with a particular expertise in stress, harassment and bullying claims.

In the legal directories, he is recommended as a leading junior for his employment and his personal injury expertise. Legal 500 2015, notes '*He is fully up to date on case law, and has a wealth of experience on all different aspects of employment law',* and that '*He excels in his forensic approach and is a real master of the detail.*

Reported and other notable cases include: Cooper v Barclays (EAT 2014), *Z v A* [2014] IRLR 244, *Dickins v O2* [2009] IRLR 58 (CA), *D'Silva v NATFHE* [2008] IRLR 412 (EAT), *Scott-Davies v Redgate* [2007] ICR 348, *Barke v SEETEC* [2005] IRLR 633 CA, *Carr v Matrix* (EAT 2004).

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Robert has a busy employment law practice in the full range of employment claims. He is an impressive advocate who acts for a wide range of both claimants (usually senior level executives) and respondents from public sector bodies to large international corporations. He is specialist in discrimination and whistleblowing claims and has a busy appellate practice. Robert is acutely aware that advice is often needed at short notice; he has developed a reputation for being able to deliver pragmatic advice within short timeframes and is retained by two PLCs to provide advice in relation to complex internal disciplinary and contractual matters (when a tribunal looks likely to arise).

He has extensive experience in High Court litigation arising out of the employment relationship and issues concerning restrictive covenants, team moves, breach of confidence and breach of fiduciary duty and the obtaining of injunctive relief (given his complementary commercial litigation practice).

He combines excellent academic credentials with a rigorously practical approach. This, along with his reputation as a determined and tenacious advocate, results in him being instructed on complex and high value matters and often against opponents who are many years his senior.

Before coming to the Bar, Robert graduated from Girton College, Cambridge as the Sir Francis Goldsmid Law Scholar. He subsequently taught undergraduate law at Cambridge, before working for one of the leading offshore law firms in its Guernsey litigation team, where he was involved in a range of commercial and employment disputes with an international flavour. His international practice has continued at the Bar and he is experienced in disputes before the Guernsey Courts, BVI Courts and the Dubai International Financial Centre.