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Whistleblowing – a new pandemic?

Causation and the public interest test

Andrew Burns QC

- **Rise of the whistleblower and Covid-19**
 - 89% rise in protected disclosure claims since 2016
 - Increase in interim relief applications
 - Protect report surge in calls during 2020
 - Potential for strategic whistleblowing
- **Is it a Disclosure?**
- **Causation** –reason or principle reason for the treatment/dismissal
- **Executive whistleblowing** –uncapped damages
- **Gilham** – is everyone now a worker?
- **Practical tips and strategies** for whistleblowing cases



Whistleblowing in 2020



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Whistleblower nurse says 80 per cent of NHS staff on one hospital ward have caught coronavirus due to lack of PPE protective gear
(Daily Mail, 20 April 2020)

'Furlough fraud' claims on the rise, says whistleblowing charity
(People Management, 22 May 2020)

Bad behaviour whistleblower reports in financial sector rise 35%
(FT, 31 May 2020)

Whistleblower exposes 'test and trace' shambles
(Daily Mail, 29 May 2020)

HS2 whistleblower demands apology for 'ruining my life'
(The Times, 3 June 2020)

Uber whistleblower Susan Fowler: 'Everything was chaos'
(FT, 13 March 2020)

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What is a Protected Disclosure?



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*‘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... [a breach of legal obligation]***

Employers often turn whistleblowing claims into state trials by arguing:

- there was nothing illegal reported
- it was not in the public interest

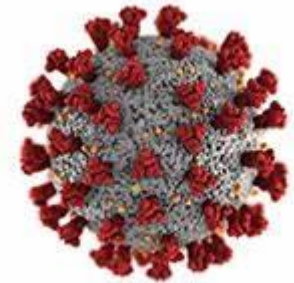


Section 43B ERA: information that the health or safety of any individual is likely to be endangered;

Employees may disclose **information** tending to show a COVID health risk:

- Coughing worker is not wearing a mask
- Lack of screens or distance between workers
- Failure to clean surfaces/equipment
- Worker criticised for staying at home

Not **allegation** – “this office is unsafe”



- C raised concerns that the accounts had been incorrectly stated to the benefit of shareholders. This meant C and 100 other managers were paid less.
- Reasonable belief that the disclosures were in the public interest. 100 senior managers were the public and anybody who relied on the incorrectly stated accounts.
- C won in Court of Appeal
- Public interest? (a) number whose interests are served; (b) nature of interest; (c) nature of wrongdoing; (d) identity of wrong-doer.



- EAT: Following *Chestertons* “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”. No more and no less.
- CA: A claim can be brought under s.47B(1A) against an individual co-worker for subjecting C to the detriment of dismissal. Section 47B(2) only excluded a claim against the employer.

The disclosure must be specific

- *Kilraine v Wandsworth London Borough Council*
 - Statutory test is ‘information that tends to show’
 - Disclosure has to have sufficient factual content and specificity such as is capable of tending to show one of the matters specified in s.43B(1)
- *Williams v Brown*, 2020, EAT – objective test in part – ET must decide whether factual content can be ‘reasonably construed’ as tending to show the illegality
- C must be able at trial to identify the legal obligation – see *Arjomand-Sissan*, *Simpson v Cantor Fitzgerald*, *Robinson v Al-Qasimi* (in CoA in 2021)

- May be more than one reasonable view as to whether disclosure was in public interest
- Post-event justification of reasonable belief possible
- *Ibrahim v HCA International* [2019]
 - S.43B(1)(b) is broad enough to include defamation
 - ET held C did not have subjective belief in the public interest element of his disclosure - his concern was only about him and personal effect of rumours.
 - CoA held that C gave some evidence but his belief in public interest should be directly investigated.

- The reason for the treatment or dismissal
- Employer's mental processes (conscious or subconscious) behind the act or omission
- Motivation of managers – *Royal Mail v Jhuti*
- Not a “but for” test (*Arriva London South Ltd v Nicolaou* [2012] ICR 510)
- It is the making of the disclosure which is protected so it must be that which is the reason.
- Dismissal – sole or main reason test – high threshold
- Detriment – some causative effect test – wider test

Two Key Types of Case

(1) Events which break the chain of causation e.g:

- relationship breakdowns
- workplace operations or staffing issues
- *Fecitt v NHS Manchester* [2011] ICR 476



(2) Matters separable from the disclosure e.g:

- the tone or manner of a complaint
- misconduct related to the disclosure – *Bolton Schools*
- unreasonable refusal to accept grievance outcome
- Clear cases: *Panayiotou v Kernaghan* [2014] IRLR 500
- Not exceptional but genuine: *Shinwari v Vue* [2015]

- Normally, consider mental processes of decision maker
- Where the ‘real reason’ is whistleblowing, the dismissal should be automatically unfair: *Jhuti v RMG*
- Where the real reason is hidden by an invented reason, the ET must penetrate the invention and look to the real reason of the manipulating manager.
- *Cadent Gas v Singh* - trade union auto unfair dismissal
 - Two decision makers were not motivated by prejudice for union activities, but a senior manager involved in the investigation was – that was enough.



Tips for causation issues

- Take care that upset with manner and substance of the complaint do not overlap
- Ensure the reasons for any act are noted at the time
- Consider how to plead/respond to manipulation of decision maker where relevant
- Plead causation arguments in the ET3, even if only in the alternative
- Do not rule out unattractive arguments
- Ensure witness evidence deals with separable features properly and carefully

- Dilution of disclosures
- “Some of the complaints related to manifestly false accounts by the appellant...A worker cannot expect to have protection for a host of complaints unjustifiably brought... on the basis that amongst them there is one [reasonable] issue”
- The danger of an employer disciplining a whistleblower
- C accused of ‘weakening genuine whistleblowing’ by raising disclosures in bad faith. But some were reasonable, so it was a detriment to damage his reputation and integrity
- But employer won on causation – the detriment was caused by the false disclosures, not by the protected disclosures

[2020] ICR 1226, [2020] IRLR 374, CA

Executive Whistleblowing

Sacked Co-op chief loses £5.2m dismissal claim



Russell Jenkins
Last updated at 12:01AM, March 25 2016

The Co-operative Group has emerged victorious from a bitter legal battle with a former employee who claimed she was sacked because she was about to blow the whistle on a “feral institution where malpractice was rife”.

Kath Harmeston claimed she had been dismissed before she could blow the whistle on malpractice
Peter Byrne/PA

Post a comment

NEWS

Co-op director claims she was sacked over her equal pay concerns



Ex-HR director Sam Walker has brought a claim of equal pay, discrimination and unfair dismissal against the Co-op

Who can blow the whistle?

- *Workers* are protected under ERA 1996
 - Worker must have a contract with the employer
 - But *Gilham* [2019] ICR 1655 not a worker – she was a district judge
 - Supreme Court: Judge needed protection under ECHR Art 10 (freedom of expression) and UK's failure was a breach of Art 14 (discrimination against non-workers!)
 - Implications: volunteers, secondees, sub-contractors – all people who work for you in the wider sense may be whistleblowers.

- Treat everyone as having whistleblowing protection
- Focus on documenting your reasons for dismissal or detriment well – nothing to do with whistleblowing
- Further and Better Particulars: Require C to identify public interest and basis for reasonable belief
- Strike out unlikely to be sustainable. Sensible to take preliminary issues?
- Strike out some weaker disclosures to narrow issues.
- Claims against named respondents for detriment as well as against employer for dismissal.



Thank you

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