Whistle while you work or whistling in the wind? Whistleblowing update and future trends

Bruce Carr QC, Devereux Chambers
Sophie Belgrove, Devereux Chambers
Statistics

- Whistleblowing claims – percentage of disposals by outcome and jurisdiction

<table>
<thead>
<tr>
<th>Category</th>
<th>2013/14</th>
<th>2014/15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Total</td>
<td>2,658</td>
<td>1,676</td>
</tr>
<tr>
<td>ACAS Conciliated Settlements</td>
<td>40%</td>
<td>35%</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>24%</td>
<td>24%</td>
</tr>
<tr>
<td>Successful at hearing</td>
<td>3%</td>
<td>5%</td>
</tr>
<tr>
<td>Unsuccessful at hearing</td>
<td>14%</td>
<td>18%</td>
</tr>
<tr>
<td>Dismissed at a preliminary hearing</td>
<td>3%</td>
<td>2%</td>
</tr>
<tr>
<td>Struck Out (not at a hearing)</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>Default judgment</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>Dismissed Rule 27</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Dismissed Upon Withdrawal</td>
<td>7%</td>
<td>8%</td>
</tr>
<tr>
<td>Case Discontinued</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>
Main elements

• Did the Claimant make a protected disclosure?
• Was the protected disclosure the cause of the Claimant’s dismissal or detriment? There are different tests for causation depending on the type of claim.
Protected disclosure

- Section 43A ERA – a ‘protected disclosure’ is a ‘qualifying disclosure’ (as defined by section 43B ERA) which is made by a worker in accordance with sections 43C to 43H ERA.

- Section 43B ERA – defines a ‘qualifying disclosure’.

- Sections 43C to 43H ERA prescribe the persons to whom, or the circumstances in which, a disclosure is to be made if it is to be a ‘protected disclosure’.
Qualifying disclosure

• A ‘qualifying disclosure’ means 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—
  - that a criminal offence has been committed, is being committed or is likely to be committed,
  - that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
  - etc.
Information versus allegation

• Must be a disclosure of information.

• *Cavendish Munro Professional Risk Management v Geduld* [2010] ICR 325.

• *Goode v Marks and Spencer plc* (EAT, 10 April 2010, unreported).


• *Western Union Payment Services UK Ltd v Anastasiou* (EAT, 21 February 2014, unreported).

• *Kilraine v London Borough of Wandsworth* (EAT, 26 January 2016, unreported).
Can you aggregate disclosures?

• Not unless there are ‘embedded communications’.

• *Bolton School v Evans* [2007] ICR 641.

• *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540.

• *Barton v Royal Borough of Greenwich* (EAT, 1 May 2015, unreported).
Reasonable belief

• The disclosure must, in the reasonable belief of the worker making the disclosure, be made in the public interest and tend to show the relevant wrongdoing.

• *Babula v Waltham Forest College* [2007] ICR 1026.

• *Chesterton Global Ltd (trading as Chestertons) and another v Nurmohamed* [2015] ICR 920.

• *Morgan v Royal Mencap Society* (EAT, 22 January 2016, unreported).
Tending to show relevant wrongdoing

• There must be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employee is relying.


• *Bolton School v Evans* [2006] IRLR 500.

• *Western Union Payment Services UK Ltd v Anastasiou* (EAT, 21 February 2014, unreported).
Public interest

• 2013 reforms: ‘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…’.

• ‘Public interest’ is not defined in the statute.

• Chesterton Global Ltd (trading as Chestertons) and another v Nurmohamed [2015] ICR 920.

• Underwood v Wincanton plc (EAT, 27 August 2015, unreported).
Who can make the disclosure?

- What is a ‘worker’?
‘Detriment’ claims

• Section 47B ERA:

‘A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure’.

• 2013 reforms – additional right not to be subjected to a detriment by any act, or deliberate failure to act, done by a co-worker or agent of the employer on the ground that the worker has made a protected disclosure.
Unfair dismissal claims

• An employee has the right not to be unfairly dismissed (section 94 ERA). Note the exclusion of such claims from the scope of section 47B – see section 47B(2)

• Section 103A ERA:

‘An employee who is dismissed shall be regarded... as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure’.
Causation comparison

• Summary in Salisbury NHS Trust v Wyeth (EAT, 12 June 2015, unreported).

• Unfair dismissal claims – what was the reason or principal reason in the Respondent’s mind for the conduct?

• ‘Detriment’ claims – the Respondent must prove the protected disclosure did not materially influence its treatment of the whistleblower. But note the route back to liability for dismissal falling on the employer – sections 47B(1A) and (1B) – based on the lower threshold for liability
‘Separability’

- *Woodhouse v West North West Homes* [2013] IRLR 773.
Post-termination whistleblowing

Good faith – remedy

• 2013 reforms.
• Good faith relevant to remedy.
• Reduction of compensation by up to 25 per cent.
• Section 49(6A) – ‘detriment’ claims.
• Section 123(6A) – unfair dismissal claims.
• Street v Derbyshire Unemployed Workers’ Centre [2004] IRLR 687.
Vicarious liability

• 2013 reforms.

• Section 47B(1B) ERA:

  ‘Where a worker is subjected to a detriment by anything done as mentioned in subsection (1A) [i.e. acts and omissions of co-workers and agents] that thing is treated as also done by the worker’s employer’.

• ‘Reasonable steps’ defence available to the employer – section 47B(1D) – in the case of an act by a co-worker.
Procedural matters

• Time limits:
  • *McKinney v London Borough of Newham* [2015] ICR 495.

• Striking out claims:
  • *Romanowska v Aspirations Care Ltd* (EAT, 25 June 2014, unreported).
  • *Schaathun v Executive & Business Aviation Support Ltd* (EAT, 30 June 2015, unreported).
EAT guidance for tribunals (1)

- *Blackbay Ventures Ltd (trading as Chemistree) v Gahir* [2014] ICR 747 (paragraph 98).
- Each disclosure should be identified by reference to date and content.
- The alleged failure or likely failure to comply with a legal obligation (or similar) should be identified.
- The basis on which the disclosure is said to be protected and qualifying should be addressed.
EAT guidance for tribunals (2)

• Each failure or likely failure should be separately identified.

• The source of the legal obligation should be identified and capable of verification by reference for example to statute or regulation...
EAT guidance for tribunals (3)

• Whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the ‘old’ law whether each disclosure was made in good faith; and under the ‘new’ law whether it was made in the public interest.

• In ‘detriment’ claims... it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant.

• Finally – good faith or public interest.
Interim relief

• Section 128 ERA – where an employee claims that he has been unfairly dismissed and the reason or principal reason for the dismissal is that he made a protected disclosure.

• Seven day time limit. No oral evidence (usually).

• Test – ‘it is likely that...’ (section 129 ERA).

• Ministry of Justice v Sarfraz (EAT, 7 February 2011, unreported).

• Parsons v Airplus Int Ltd (EAT, 4 March 2016, unreported).
Developments since 2013 (1)

- July 2013 – Department for Business, Innovation and Skills (‘the BIS’) issued a call for evidence.
Developments since 2013 (2)

- The Small Business, Enterprise and Employment Act 2015 provided a new power, with effect from 1 January 2016, under section 43FA ERA – for Secretary of State to introduce regulations requiring regulators to report annually.


Whistleblowing Commission

• Commission established by PCAW.
• Contained a series of proposals for reform, some of which have been implemented – e.g. Code of Practice.
Other proposals for future reform

• Other possible changes:
  • Duty to whistle blow?
  • Financial incentives – as per US;
  • Extension of scope of disclosure to include gross waste or mismanagement of funds and serious misuse/abuse of authority;
  • Same causation test for dismissal and detriment;
  • Extension to list of protected workers.
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