INTRODUCTION TO EMPLOYMENT LAW
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PUBLIC INTEREST DISCLOSURES (WHISTLEBLOWING)

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PUBLIC INTEREST DISCLOSURES:

Whistleblowing

1 INTRODUCTION

1.1 Whistleblowing is a convenient if emotive description of a current or former member of staff reporting malpractice in his or her organisation.

1.2 The Public Interest Disclosure Act 1998 (PIDA) came into force on 2 July 1999 and provides protection for workers against detriment or dismissal who report malpractices by their employers or third parties.

1.3 The law is complex and specific. Protection against detriment or dismissal is only provided if the disclosure is made in the manner prescribed by statute. Basically, to be protected, the disclosure must be a 'qualifying disclosure' of 'information' made in accordance with one of the specified methods.

1.4 Linking a dismissal to a protected disclosure is an attractive objective for a claimant as there is no financial cap on compensation and no service requirement.

1.5 Broadly, prior to 25 June 2013, the law aimed to encourage whistleblowing that was done in good faith and to the right people, and to discourage whistleblowing that was badly motivated or misdirected. However, following a number of high profile cases, amendments to the existing legislation came into force on 25 June 2013 to encourage whistleblowing that is in the 'public interest' with less emphasis on the whistleblower's motivation.

1.6 It is important that whistleblowing is handled sensitively, robustly and proportionately. If not, whistleblowing disclosures have the potential to damage corporate reputation, absorb a huge amount of management time and involve considerable legal costs and litigation risk. For many employees blowing the whistle is a very real psychological and emotional dilemma that unfolds in a legal context. Whistleblowers handled well have the potential to become assets to the business, but treated poorly they will become liabilities. Whistleblowing processes and procedures should form part of the overall governance and risk management framework.

2 WHAT PROTECTION IS AVAILABLE?

2.1 The Public Interest Disclosure Act 1998 (PIDA) came into force in Great Britain on 2 July 1999 and provides protection for employees/workers against detriment or dismissal who report malpractices by their employers or third parties by inserting legislative provisions into the Employment Rights Act 1996 (ERA).

2.2 There are two levels of protection for whistleblowers:

(a) Unfair dismissal (s103A ERA)

The dismissal of an employee will be automatically unfair if the reason, or principal reason, is that they have made a protected disclosure. The same applies to selection for redundancy.

There is no qualifying minimum period of service, and tribunals are also not restricted by the usual upper limit on compensation. Whistleblowing claims are sometimes used tactically for this reason.

(b) Unlawful detriment (s47B ERA)

Employees and other workers (broadly defined) are protected from being 'subjected to any detriment by any act, or any deliberate failure to act' by his or her employer done on the ground that he or she has made a protected disclosure.

The ERA does not define what constitutes a detriment. It will be for a tribunal to decide if a detriment has been suffered. Detrimental treatment commonly includes damage to career prospects, being suspended, disciplined, passed over for promotion, relocated and excluded from workplace matters.

2.3 Employers should also be aware that the whistleblowing provisions represent an exception to an employee's normal duty of confidentiality. Any provision in an agreement is void in so far as it purports to prevent a worker making a protected disclosure. This includes any settlement agreement whereby the worker agrees not to take proceedings against the employer (s43J(1) ERA).

3 WHO IS PROTECTED?

3.1 In short, assume most types of employees/workers are protected.

3.2 Employees/workers broadly defined

The concept of a 'worker' in the whistleblowing legislation is broad and includes, among others, agency workers, freelance workers, seconded workers, homeworkers and trainees, non-executive directors, as well as employees. This is much broader than 'employee' status and 'worker' status, which applies to other rights set out elsewhere in the ERA 1996.

In *International Petroleum Ltd v Osipov* UKEAT/0058/17/DA and UKEAT/0229/16/DA, the Employment Appeal Tribunal (EAT) held that non-executive directors can fall within the definition of 'worker' for the purposes of the whistleblowing provisions within the ERA 1996. The Supreme Court has held that Limited Liability Partnership members also fall within the definition (*Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32).

3.3 Tripartite relationships

The extended definition of 'worker' is also interpreted to ensure maximum protection for a worker in a tripartite relationship. This means that an individual who qualifies for whistleblowing protection under the general 'employee' definition in relation to one party should not consequently be precluded from claiming protection against another party under

the 'extended' definition. In the case of an agency worker both the agency and the end-user will be subject to the whistleblowing provisions. See *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742 EAT, concerning an agency worker and *Day v Health Education England, Public Concern at Work (intervener) and Lewisham and Greenwich NHS Trust (interested party)* [2017] IRLR 623 (UKCA) concerning a junior doctor in training.

3.4 Former employees/workers

Even former employees/workers are protected. Detrimental treatment that occurs after the employment relationship has ended is covered. A former employee/worker who makes a protected disclosure post-termination may bring a whistleblowing claim for post-termination detriment, provided the detriment is linked to their former employment. This most commonly arises in relation to the provision of a disputed adverse reference (*Woodward v Abbey National plc (No.1)* [2006] ICR 1436 and *Onyango v Adrian Berkeley t/a Berkeley Solicitors* EAT 0407/12).

3.5 Overseas employees/workers

The House of Lords test set out in *Lawson v Serco* [2006] UKHL determined whether an overseas employee can sue their employer in a British employment tribunal, also applies to whistleblowing claims. Essentially, the test is whether the connection between the circumstances of the employment relationship and Great Britain and with British employment law is sufficiently strong.

In *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32 an LLP member seconded to (and employed by) a Tanzanian law firm was able to bring a claim in Great Britain.

3.6 **But** must be related to employment

In *Tiplady v City of Bradford Metropolitan District Council* [2019] EWCA Civ 2180, the Court of Appeal confirmed that for the purpose of section 47B ERA a detriment must be in the field of employment, the protection under s47B does not extend to a detriment suffered by a worker in their private or personal capacity. In this case, Mrs Tiplady, who was employed by the council, took issue with the way it dealt with planning issues affecting a property she owned in an area under the council's control. She resigned and brought claims alleging that she had been subjected to detriments on the ground of making protected disclosures. The tribunal found that the detriments complained of arose from the council dealing with her property issues and so concerned her as a householder rather than as a worker and therefore not covered by s47B.

4 WHAT IS A 'QUALIFYING DISCLOSURE'?

4.1 To attract protection, a whistleblower must have made a 'qualifying disclosure' under section 43B(1) ERA 1996:

"*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*…[list of six relevant failures]".

4.2 From this brief definition, there are a number of requirements for a qualifying disclosure:

(a) *Disclosure of information*. The worker must make a disclosure of information.

(b) *Nature of the worker's belief*. The worker must have a reasonable belief that the information tends to show one of the 'relevant failures' and 'is made in the public interest'.

(c) *Subject matter of disclosure*. The information must relate to one of six types of 'relevant failure' (see below).

4.3 Disclosure of information

The disclosure must be a disclosure of information, not a matter of opinion or an allegation (*Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38). In practice, information and allegations are often intertwined. The question is whether the disclosure has "sufficient factual content and specificity" such as is capable of tending to show one of the six relevant failures.

The Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436 agreed there was no disclosure of any 'information' which tended to show a breach of a legal obligation or any of the other relevant failures in an employee's letter simply complaining of "inappropriate behaviour towards her" without anything more (see 4.5 below).

4.4 Anticipated disclosure?

Until recently, it was thought that merely gathering evidence or threatening to make a disclosure was not sufficient. However, recently a non-binding judgment of the Southampton Employment Tribunal has called this into question.

In *Bilsbrough v Berry Marketing Services* ET 1401692/2018, the tribunal considered whether an individual can rely on the statutory protection as a result of the employer becoming aware that the individual is "considering making" a protected disclosure as opposed to actually making one, to which it answered - yes, they can.

The tribunal held that the whistleblowing provisions had to be read purposively in a way that went beyond the precise words used. Protection should be extended to workers who suffered because they were considering making a protected disclosure, or were expected to make a protected disclosure in the future. The ET stated that without the law extending that far, whistleblowers would not be adequately protected: "if a person cannot consider making a disclosure without the risk of sanction, even if that consideration leads to a decision not to make a disclosure, then there will be a chilling effect on the making of protective disclosures".

Accordingly, the ET found the relevant statutory provisions should be read as a worker has the right not to be subjected to any detriment on the ground that he has made or considered making a protected disclosure and that he may not be dismissed for that reason.

Although only a non-binding first-instance judgment, this judgment potentially extends the boundaries of the whistleblowing protection in order to shield from detrimental treatment not

only employees who have made protected disclosures, but in some cases those who are merely considering or preparing to do so.

4.5 Spotting a disclosure of information guidance:

(a) 'Allegation' and 'information' are not mutually exclusive terms. An allegation can possibly contain information (*Kilraine*).

(b) Words that are too general and devoid of factual content capable of tending to show one of the relevant factors will not amount to information. There must be "sufficient factual content and specificity" (*Kilraine*), *but*…

(c) Words that would otherwise fall short can be boosted by context or surrounding communications. For example, the words "You have failed to comply with health and safety requirements" fall short on their own, but may constitute information if accompanied by a gesture of pointing at sharp implements lying on a hospital ward floor (*Kilraine*).

(d) It is not necessary that the information must be unknown to the recipient (s43L(3)), otherwise, employees would be penalised if they made a disclosure not knowing whether the employer already knew it.

(e) A disclosure of information will amount to a 'disclosure' whether it is made in writing or verbally. In *Aspinall v MSI Forge Ltd* EAT/891/01 the EAT held that handing over a video recording could amount to making a disclosure.

(f) Several communications can cumulatively amount to a qualifying disclosure, even though each individual communication is not such a disclosure on its own. For example, a series of e-mails, taken together may possibly amount to a qualifying disclosure. . In *Norbrook Laboratories (GB) Ltd v Shaw* UKEAT/0150/13, the EAT held that three e-mails taken together amounted to a qualifying disclosure. It did not matter that the last e-mail did not have the same recipient as the earlier two because the earlier communications were embedded in the later communication. By contrast, in *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601 the Court of Appeal upheld a finding that 37 communications did not amount to a protected disclosure whether read in isolation or by reference to each other.

4.6 Nature of the worker's belief

The whistleblower has to establish a 'reasonable belief' that the information being disclosed 'tends to show' one or more of the 'relevant failures' set out in section 43B(1) ERA [1996] (see below).

Reasonable belief relates to the worker's belief in the accuracy of the information. This test is, in essence, a subjective one, but with an objective element. The focus is on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. In *Babula v Waltham Forest College* [2007] ICR 1026, the Court of Appeal held that a belief may be reasonably held and yet be wrong. Provided the

whistleblower's belief is objectively reasonable, the fact that it turns out to be wrong is not sufficient to render it unreasonable and thus deprive the whistleblower of protection.

What is reasonable will depend on all the circumstances, assessed from the perspective of the worker at the relevant time, without the benefit of hindsight (*Darnton v University of Surrey* [2003] ICR 615). However, there does have to be some substantiated basis for the worker's belief. Rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough. For example, *Dr Easwaran v St George's University of London* EAT 0167/10 concerned a doctor complaining about the room temperature in a dissecting lab. He claimed the room was so cold he was in danger of contracting pneumonia (a health & safety breach). When assessing the reasonableness of the belief, the tribunal was right to have regard to the fact that the he was not actually at risk of contracting pneumonia since it is not a condition caused by working in cold temperatures, which he would know being a doctor. As such his alleged belief was clearly not reasonable.

The context of the disclosure of information is relevant. This includes any expert/specialist knowledge the whistleblower has as an insider of the organisation. In *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 at [62] the EAT stated, "… many whistleblowers are insiders, that means that they are so much more informed about the goings on of the organisation of which they make complaint than outsiders and that that insight entitles their views to respect. Since the test is their reasonable belief, that belief must be subject to what a person in their position would reasonably believe to be wrongdoing." The Court of Appeal in *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601 pointed out, that the above works both ways. "Just as someone with experience in the field has information and insight which should be taken into account in his favour, so too he should know better than (say) a lay person who happened to overhear a conversation, whether it does tend to show that something is amiss".

The test for reasonable belief that the disclosure is 'in the public interest' mirrors the above. The test is whether the worker making the disclosure has a reasonable belief that the disclosure was made in the public interest. Accordingly, the public interest test can be satisfied even where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made, provided the worker's belief that the disclosure was made 'in the public interest' was objectively reasonable.

See "Public Interest Test" below.

4.7 Subject matter of disclosure

For there to be a qualifying disclosure of information, the information disclosed must, in the ` reasonable belief of the worker, tend to show that one or more of following has occurred, is occurring, or is likely to occur (the 'relevant failures'):

(a) a criminal offence;

(b) breach of any legal obligation;

(c) miscarriage of justice;

(d) danger to the health and safety of any individual;

(e) damage to the environment; and/or

(f) the deliberate concealing of information about any of the above.

4.8 Disclosures excluded from protection

There are two situations in which a disclosure of information will not constitute a 'qualified disclosure', even if it relates to one of the specified relevant failures and is in the public interest. These are:

a) where the person making the disclosure commits an offence by making it — s43B(3) ERA; and

b) where the disclosure of information is one in respect of which legal professional privilege could be claimed in legal proceedings and is made by the person to whom the information was disclosed in the course of obtaining legal advice — s43B(4).

S43B(4) prevents legal advisers and their staff from claiming the protection of the whistleblowing legislation if they disclose, in the absence of express instructions from their client, information to which the doctrine of legal professional privilege attaches. This exemption applies even though the disclosure would comprise a 'qualifying disclosure' in all other respects. When determining the circumstances in which s43B(4) applies:

a) the information forming the subject matter of the privileged communication must have been made to a legal adviser (or his or her staff) in the course of obtaining legal advice and be covered by legal professional privilege; and

b) a subsequent disclosure of that information must have been made by the legal adviser or his or her staff.

If these conditions apply, the right of the legal adviser (or his or her staff) to assert that the disclosure is a qualifying disclosure for the purpose of the protected disclosure provisions is lost.

The exclusion under s43B(4) equally applies to in-house legal counsel. This means that an in-house counsel will not generally be able to bring a whistleblowing complaint on the basis that the employer reacted badly to his or her advice. In *Smith v Scapa Group plc and ors* ET Case No.2400172/17, Ms Smith held the position of group counsel and company secretary. She claimed to have made a protected disclosure when she advised the CEO that his proposal for requiring a senior employee to sign up to a restrictive covenant as a condition of participating in a share incentive scheme was potentially in breach of contract. The employment tribunal found that the disclosure was excluded from protection by s43B(4). The CEO disclosed his proposal to Ms Smith in the course of obtaining legal advice as to how to get the employee to agree to sign up to restrictive covenants. Ms Smith's advice to the CEO was therefore information in respect of which a claim to legal professional privilege could be maintained at that time.

4.9 But no general exception for disclosures carried out as an integral part of the worker's work

Outside s43B(4), there is no exception in the ERA for disclosures carried out as an integral part of the worker's work *Leclerc v Amtac Certification LTD* UKEAT/0244/19/RN. In *Leclerc*, the claimant was employed as a technical reviewer for a body for assessing the technical documentation and quality managements systems of manufacturers of medical devices to ensure compliance with regulations and certifying that the medical devices are fit for purpose, safe and effective. As such, her job involved, by its very nature, communicating information about possible issues which would carry a real risk to health and safety or might involve breaches of legal obligations of clients' products her employer tested (Mrs Leclerc's claims ultimately failed due to lack of a causal link).

5 "PUBLIC INTEREST" TEST

5.1 2013 introduction of public interest requirement

Breach of any legal obligation is by far the most common category of relevant failure relied upon by workers making protected disclosure claims. The EAT's 2002 controversial interpretation of 'legal obligation' in *Parkins v Sodexho Ltd* [2002] IRLR 109 permitted whistleblowing complaints to be made in a far broader range of circumstances than was anticipated at the time the provisions were enacted.

The EAT in *Parkins v Sodexho* held that there is no reason to distinguish a legal obligation which arises from a contract of employment from any other form of legal obligation. This raised the possibility that any complaint about any aspect of an individual's employment contract could be a protected disclosure, despite the dispute being of no direct concern to anyone other than the worker(s) concerned and the employer.

To deal with the perceived *Parkins v Sodexho* problem, on 25 June 2013, the legislative provisions were amended so that to amount to a 'qualifying disclosure', there must be a "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…"

But has the introduction of a 'public interest' test lived up to the hype and ended use of the whistleblowing provisions to essentially increase significantly the value of a personal employment dispute? Well…

5.2 The 'public interest' test: judicial guidance

In April 2015, the EAT in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* UKEAT/0335/14/DM held that an individual reasonably believed that his disclosure relating to an alteration to accounting figures, which negatively affected his and 100 other senior managers' commissions, was 'in the public interest'. In particular, 'the public' can refer to a subset of the general public, even one composed solely of employees of the same employer. Also, it did not matter that the individual was mostly motivated by concern about his own position. Shortly after the *Chesterton* judgment, in *Underwood v Wincanton plc* UKEAT/0163/15/RN, the EAT also held a group of four employees raising a grievance concerning a contractual overtime issue was a sufficient subset of 'the public'.

In July 2017, the Court of Appeal upheld the *Chesterton* EAT judgment. In dismissing the appeal, the Court observed that the 2013 'public interest' amendment to the ERA was intended to reverse the effect of the EAT's decision in *Parkins v Sodexho Ltd* in some cases. **However**, the 2013 change did not exclude private contractual matters being a breach of a 'legal obligation' and potentially covered depending on the circumstances.

In providing judicial guidance on what is or is not in the public interest, the Court of Appeal deliberately decided against creating what it referred to as a bright line test. On the one hand, a disclosure of a breach of contract will not automatically be 'in the public interest' simply because it was in the interest of anyone else besides the worker making the disclosure. On the other hand, this did not mean that multiplicity of persons sharing the same interest can never, by itself, convert a personal interest into a public one.

The Court went on to hold that when considering whether a disclosure relating to a breach of the worker's own contract of employment is 'in the public interest', the relevant factors are:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

(c) the nature of the wrongdoing disclosed; and

(d) the identity of the alleged wrongdoer.

5.3 In *Elysium Healthcare No 2 Ltd v Ogunlami* UKEAT/0116/18/RN, a disclosure that a colleague was taking a vulnerable patient's food contrary to an employer's policy was found to be a protected disclosure relating to breach of a legal obligation and in the public interest. It now appears that anything that is capable of amounting to breach of the employment contract, which also has a public interest element (in this case shining a light on the mistreatment of vulnerable patients) may amount to a qualifying disclosure. Interestingly, the EAT did not consider it essential for the worker in this case to show that he believed the relevant breach of the employer's policy to be part of the employment contract itself, suggesting a liberal approach will be taken in such matters.

5.4 In *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007 a hospital interpreter made a complaint to HR that he was being defamed by rumours that he had breached patient confidentiality. The EAT held the tribunal was entitled to conclude that the 'public interest' element was absent as Mr Ibrahim's concern was a personal concern that he was being defamed and the impact that had on him. However, on further appeal, the Court of Appeal held the tribunal's finding that the disclosures "were not made in the public interest, but rather with a view to the claimant clearing his name and re-establishing his reputation" deals with what Mr Ibrahim's motive was, but not with his subjective belief at the time. It is possible for a disclosure motivated by personal self-interest to nevertheless still also be made in the "public interest". As such the case was sent back to tribunal to determine whether he had a subjective belief that the disclosure was in the public interest.

5.5 While a degree of flexibility is desirable, the multifactorial test does leave some unhelpful uncertainty. The Court of Appeal and EAT decisions suggest that the introduction of the

'public interest' requirement may not be as significant a change as many commentators anticipated. Even in cases where the individual is primarily concerned with their own self-interest, there is potential for the individual to establish a belief that it is made "in the public interest", by referring to concern for colleagues who may find themselves in a similar position. 'The public' for these purposes do not necessarily need to be outside the employer's workforce.

6 TO WHOM A DISCLOSURE CAN BE MADE? (METHOD OF DISCLOSURE)

6.1 Not only is the content of the qualifying disclosure important, but the way in which the information is disclosed must also satisfy the legislative provisions to be a 'protected disclosure'.

6.2 There are seven permissible methods of disclosure, which are set out in sections 43C to 43H ERA 1996. The manner in which the worker makes the disclosure dictates the ease with which they gain protection. The requirements are structured to impose additional obligations the further removed the recipient of the information is from the worker's employer. The first place for any worker to turn is his employer; next is the legal adviser, and so on:

(a) disclosure to the **employer** - A qualifying disclosure to the employer is a protected disclosure.

(b) disclosure to the **person believed to be responsible** for the relevant failure - Where the worker reasonably believes a third party (such as a client or supplier) is responsible for the wrongdoing, they can report it to that third party without telling the employer.

(c) disclosure to a **legal adviser** - Workers can disclose matters to their legal adviser in the course of obtaining advice.

(d) disclosure to a **Minister of the Crown** - Workers employed by a person or body appointed under statute can report matters to the relevant minister.

(e) disclosure to a **prescribed person** - Parliament has approved a list of 'prescribed persons' to whom workers can make disclosures, provided the worker believes the information is substantially true and concerns a matter within that person's area of responsibility, for example, HMRC, the Health and Safety Executive and the Office of Fair Trading.

(f) **wider** disclosure - Wider disclosure is either:

- external disclosure; or
- disclosure of exceptionally serious failures.

Disclosure to anyone else is only protected if the worker believes the information is *'substantially true'* and *'does not act for gain'*. Unless the matter is 'exceptionally serious', they *must have already disclosed it to the employer or a prescribed person*, *or believe that, if they do, evidence would be destroyed or they would suffer reprisals*. Disclosure to that person must also be reasonable in the circumstances (*Collins v the National Trust* (ET case 2507255/05), *Bolkavac v DynCorp Aerospace Operations* (UK) Ltd (ET case 310272)).

	Employer	Person believed respons-ible	Legal Adviser	Minister of the Crown	Pre-scribed Person	Other wider discl.
Qualifying disclosure: (a) Worker reasonably believes that information tends to show malpractice; and (b) For disclosures on or after 25 June 2013, worker reasonably believes that disclosure is in the public interest.	✓	✓	✓	✓	✓	✓
(c) Reasonable belief that it is 'substantially true'	✘	✘	✘	✓	✓	✓
(d) Good faith (for pre-25 June 2013 only)	✓	✓	✘	✓	✓	✓
(e) Not for personal gain	✘	✘	✘	✘	✘	✓
(f) Reasonable in circumstances to make disclosure	✘	✘	✘	✘	✘	✓
(g) Worker: • previously disclosed to employer, or prescribed person; or • reasonably believes evidence likely to be destroyed; or • reasonably believes they will suffer detriment if raised with employer or prescribed person.	✘	✘	✘	✘	✘	✓ unless the matter is 'exceptionally serious'

7 CAUSATION & TAINTED INFORMATION

7.1 Causal link

Evidence of a protected disclosure and a detriment or dismissal is not enough to satisfy the whistleblowing provisions: there must be a causal link between the two. The standard of proof for this causal link differs depending on whether the claim is one of unfair dismissal or one of detriment:

(a) Dismissal claims ("the reason" or "principal reason")

S103A will not apply unless the protected disclosure was 'the reason' (or, if more than one, the principal reason) for the dismissal.

In *Bolton School v Evans* [2007] ICR 641 CA, a teacher did not enjoy the protection of the whistleblowing provisions when he hacked into his employer's computer system in order to expose its vulnerabilities. The Court held that even if a protected disclosure could be established, the principal reason the teacher was disciplined was for hacking into the school's computer system.

In *Parsons v Airplus International Ltd* [2017] UKEAT, the reason for dismissal was held not to be that the individual had raised concerns but instead that she had behaved in a rude and irrational manner when communicating her concerns.

In *Kong v Gulf International Bank Ltd* EA-2020-000357-JOJ and EA-2020-000438-JOJ, the reason for dismissal was held not to be the content or fact of Ms Kong's protected disclosures, but the way in which she conveyed them using personal criticisms calling into question the competence of a colleague. The disclosures were properly separable from the reason for the dismissal.

(b) Detriment claims ("materially influences")

Under s47B, the detriment must have been 'done on the ground that' the worker made a protected disclosure for the claim to succeed. In *Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372, the Court of Appeal stated section 47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower. The test for causation in detriment cases is therefore significantly less onerous than that applied in respect of dismissals.

In October 2021, the EAT in *Secure Care UK Ltd v Mott* EA-2019-000977-AT, confirmed that "there can be no doubt that the causation tests to be applied under section 103A [dismissal] and section 47B [detriment] respectively are distinct".

7.2 Erroneous belief of the decision-maker (dismissal)

The Court of Appeal has held that, in a whistleblowing dismissal case, it is irrelevant that the employer genuinely believed that the employee's disclosure was not protected, *Beatt v Croydon Health Services NHS Trust* [2017] IRLR 748. To determine whether a dismissal is automatically unfair under section 103A, two questions must be answered:

1. Was the making of the disclosure the reason (or principal reason) for the dismissal?

2. Was the disclosure in question a protected disclosure within the meaning of the ERA?

Question 1 requires an enquiry into what facts or beliefs caused the decision-maker to decide to dismiss. Was the reason the protected disclosure or something else? In contrast, for question 2 the belief of the decision-maker is irrelevant. If the reason (or principal reason) for

the dismissal was the protected disclosure, it does not matter that the employer genuinely believed that the disclosure did not amount to a protected disclosure.

While the causation principle sounds straight forward, this is not always easy to apply in a complex factual scenario as the Court points out in *Beatt*:

> "*it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis…employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected or…that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made*".

7.3 Manipulation of decision-maker (dismissal)

As stated above, where an employee is dismissed, it will be automatically unfair if the principal reason for the decision to dismiss was that they made a protected public interest disclosure (section 103A ERA). But what if the decision-maker is being manipulated by another? In the case of *Royal Mail Ltd v Jhuti* [2019] UKSC 55, the dismissing officer was unwittingly misled by the employee's line manager (to whom the protected disclosure was made).

In 2017, the Court of Appeal held that it is only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss that are relevant. **However**, in November 2019, the Supreme Court has unanimously confirmed that an employer is liable for the reasons of any manipulator in the "hierarchy of responsibility above the employee" even where that reason is hidden from the decision-maker(s). The improper actions or motive of a line manager will therefore be attributed to the employer. In other words, if a line manager determines that he or she should be dismissed for one reason, but hides it behind an invented reason, which the decision-maker adopts, the reason for the dismissal is the hidden (unfair) reason rather than the invented reason.

In 2021, the EAT in *Kong v Gulf International Bank* clarified that the principles in *Jhuti* will only disturb the general rule - that the reason for dismissal is the reason operating on the mind of the decision-maker(s) - in very limited circumstances. The EAT stressed that three essential requirements must be met before the principles in Jhuti will apply:

1. The person whose motivation is attributed to the employer must have tried to procure the employee's dismissal because of the protected disclosure(s).

2. The dismissing manager must be "peculiarly dependent" upon that person as the source for the underlying facts and information.

3. The role or position of the person who 'procured' the dismissal is such that it would be appropriate to attribute their motivation to the employer. Knowledge of decision-maker (detriment)

7.4 Unlike the position in relation to unfair dismissal claims against the employer, a person who subjects a whistleblower to a detriment must personally be motivated by the protected disclosure for a detriment claim to succeed (*Malik v Cenkos Securities Plc* [2018] UKEAT).

8 DETRIMENT BY CO-WORKERS & EMPLOYER VICARIOUS LIABILITY

8.1 2013 introduction of new provisions

While the introduction of the 'in the public interest' requirement was the most heralded of the 2013 changes to whistleblowing protection, it was by no means the only significant change.

Since the introduction of whistleblowing protection in 1999, it has been the case that the act (or omission) of the employer in failing to prevent reprisals by colleagues, or failing to address a grievance about reprisals, may itself amount to a detriment (*Abertawe Bro Morgannwg University Health Board v Ferguson* UKEAT/0044/13). However, prior to the 2013 changes, an employer was not vicariously liable under the whistleblowing legislation where its employees victimised their whistleblowing colleague. There was no provision in the legislation making it unlawful for employees to victimise whistleblowers, and vicarious liability can only arise where an employee has done an unlawful act (*Fecitt and ors v NHS Manchester*).

Following the 2013 legislative changes, protection extends to a worker who is subjected to detriment on whistleblowing grounds by another worker (widely defined) or agent of his employer. The employer will be liable for the acts of the co-worker or agent unless it can show that it took all reasonable steps to prevent the co-worker or agent from doing the act in question or acts of that description (section 47B(1D)). In addition, a co-worker who has victimised a whistleblowing colleague will be personally liable for damages, unless able to rely on a statement by the employer that they would not be contravening the ERA in undertaking the act and if was reasonable to rely on the statement (section 47B(1E)).

8.2 Dismissal consequent on detriment (employers' vicarious liability)

As stated earlier, whistleblowers have two levels of protection under the ERA: unfair dismissal (section 103A) and unlawful detriment (section 47B).

The Court of Appeal has confirmed that, there is no obstacle to an employee recovering compensation for dismissal consequent on detriment via a claim under s47B(1A) with the employer being vicariously liable for actions of a wrong-doer co-worker (subject to any reasonable steps defence) (*Royal Mail v Jhuti* [2017] EWCA Civ 163 and *Timis and Sage v Osipov and ors* [2018] EWCA Civ 2321; also see *Heslop v Oxford Said Business School Ltd & Dr Andrew White* ET 3334934/2018).

Whether the statutory provisions allow a "detriment" claim to be brought where the detriment complained of is dismissal is controversial. The Court of Appeal rejected legal arguments that where the detriment complained of is dismissal, any claim is restricted to an unfair dismissal claim. According to the Court of Appeal 'dismissal consequent on detriment' claims are possible. Thus a claim against a worker or agent for the detriment of dismissal (or a detriment which results in dismissal) can give rise to both direct liability (against the worker or agent – see below) and vicarious liability (against the employer) for the dismissal.

Employers should ensure they have a well-publicised whistleblowing policy and take steps to prevent whistleblowers being harassed by colleagues. An employer will have a potential statutory defence to a whistleblowing vicarious liability detriment claim if it can show that it took all reasonable steps to prevent a fellow worker from doing the act in question or acts of that description. What amounts to 'all reasonable steps' will depend on the circumstances of the case. So far there have been no cases considering what amounts to 'all reasonable steps' in a whistleblowing context. However, by analogy with discrimination law, among the matters likely to be considered by a tribunal are:

- whether the employer has put in place a whistleblowing policy;
- whether the policy makes it clear that victimisation of whistleblowers will not be tolerated;
- whether the policy has been brought to the workforce's attention via training; and
- how the employer deals with complaints regarding detrimental treatment by whistleblowers.

8.3 Dismissal consequent on detriment (co-worker/agents liability)

An individual's personal liability for detriment which they cause to a whistleblower colleague does not cease with that colleague's dismissal (or termination, in the case of a non-employee whistleblower). In October 2018, the Court of Appeal in *Timis and Sage v Osipov and ors* [2018] EWCA Civ 2321 (formerly known as *International Petroleum Ltd and ors v Osipov and ors*) upheld a tribunal finding that the actions of two non-executive directors in giving an instruction to dismiss and implementing that instruction were actionable as a detriment claim (the NEDs fell within the extended definition of 'workers' for whistleblowing purposes). Where a distinct prior detrimental act done by a co-worker (broadly defined) results in the whistleblower's dismissal, the whistleblower can still recover compensation for losses flowing from the dismissal, subject to the usual rules on remoteness and quantification of loss.

In *Osipov* the directors were personally liable for just over £2 million of losses, the employer company being insolvent.

8.4 Unfair dismissal claim vs dismissal consequent on detriment claim

Following the judgments in *Osipov* and *Jhuti,* dismissed whistleblowers are increasingly likely to run parallel unfair dismissal and detriment claims.

Advantages and disadvantages of detriment claims (s47B) over unfair dismissal claims (s103A):

Advantages:

- Availability of injury to feelings awards.
- Significantly lower causation threshold test (materially influences rather than principal reason).

- Potential recovery of damages from co-worker.

Disadvantages:

- Remedies of reinstatement/re-engagement not available.
- Basic award damages (current maximum £16,140) not available.
- Possible 'reasonable steps' defence for the employer.

9 'GOOD FAITH'

9.1 With the exception of disclosures to legal advisers, a qualifying disclosure by a worker made before 25 June 2013 was only protected if it was made in good faith. Good faith is not the same as truth. A disclosure that turns out to be false may still be protected if the worker acted in good faith (*Trustees of Mama East African Women's Group v Dobson* UKEAT/0219/05). Likewise, a true disclosure could be found to be made in bad faith.

9.2 Good faith has been described as acting with honest motives (*Street v Derbyshire Unemployed Workers' Centre* [2004] IRLR 687 (CA)). A disclosure made for an ulterior motive (for example, malice or personal antagonism) is unlikely to be in good faith. Mixed motives will present tribunals with difficulties, but they should look at the predominant purpose of the disclosure in considering whether it was made in good faith.

9.3 A disclosure that is made predominantly to put pressure on an employer not to dismiss, or to strengthen the employee's position in negotiations, is unlikely to be in good faith (*Bachnak v Emerging Markets Partnership (Europe) Ltd (No 2)* UKEAT/0288/05).

9.4 As part of the 2013 changes, the 'good faith' requirement was removed. A claim under s47B or s103A will not fail as a result of an absence of good faith.

9.5 Although the good faith requirement was removed from the test for liability, it does still come into play as to remedy. A new section 123(6A) (compensatory award) was inserted into the ERA 1996, which provides:

> "Where –
>
> (a) the reason (or principal) reason for the dismissal is that the complainant made a protected disclosure, and
>
> (b) it appears to the tribunal that the disclosure was not made in good faith,
>
> the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%."

Please note section 123 ERA 1996 relates to the compensatory and not the basic award. It also introduces a new section 49(6A) (remedies for detriment) in the same terms save that (a) above instead reads 'the complaint is made under section 48(1A), and…'

9.6 Therefore, the tribunal will still be required to assess whether or not the claimant had an ulterior motive for the disclosure. It seems likely that the burden will remain with the respondent to prove that the disclosure was not made in good faith.

10 REMEDIES

10.1 The usual remedies for unfair dismissal and detrimental treatment apply. However, particular points to note:

(a) Linking a dismissal to a protected disclosure is an attractive objective for a claimant as there is no financial cap on compensation for unfair dismissal and there is no minimum length of service requirement for bringing a claim of detriment or unfair dismissal based on whistleblowing. This is one of its advantages over "ordinary" unfair dismissal cases (section 108, ERA 1996).

(b) Tribunals have the power to reduce compensation by up to 25% if the disclosure was not made in good faith (see 'good faith' above).

(c) Where a tribunal finds that an employee has been unfairly dismissed for making a protected disclosure, it is not unusual for them to also find that the employee has been stigmatised or 'black-listed' in some way on the job market because of their disclosure and the resulting publicity. This can result in the tribunal being more inclined to make a substantial award for future loss of earnings, on the basis that the employee may not realistically be able to find future employment in their industry, or at a similar level of seniority or remuneration (see *Royal Cornwall Hospitals NHS Trust v Watkinson* UKEAT/0378/10/DM and *Lingard v HM Prison Service* ET/1802862/04).

(d) Tribunals may award compensation for injury to feelings arising from a detriment, but not from a dismissal (*Virgo Fidelis Senior School v Boyle* UKEAT/0644/03). In *Local Government Yorkshire and Humber v Shah* UKEAT/0587/11 and UKEAT/0026/12, the EAT upheld an award of £25,000 for injury to feelings, stating that "the employment tribunal had correctly directed itself that detrimental action taken against whistleblowers should always be regarded as a very serious breach of discrimination legislation".

(e) There is no rule of law preventing whistleblowers from claiming post-termination losses on the ground that the losses are attributable to pre-termination detriments. Whether those losses are recoverable is a question of fact (*Wilsons Solicitors LLP v Roberts* [2018] EWCA Civ 52).

10.2 In certain types of unfair dismissal case, including those on the ground of whistleblowing, a tribunal can grant the employee **interim relief** by making an order for the continuation of their employment pending final determination of the case (sections 128-129, ERA 1996).

(a) The purpose of an order for interim relief is to preserve the status quo until the full hearing of the claimant's claim. If the application is successful, the employer will be ordered to reinstate or re-engage the employee pending the determination of the unfair dismissal claim, or, if the employer is unwilling to agree to either, then the tribunal may

make an order continuing the employee's contract of employment until such final determination. The practical effect is that the employee is 'suspended' on full pay pending the investigation of their complaint by the employment tribunal. Accordingly this can be a potentially powerful tool for a claimant.

(b) There are strict time limits for seeking interim relief. An application must be made before the end of the period of seven days immediately following the effective date of termination.

11 WHISTLEBLOWING POLICIES

11.1 The whistleblowing legislation does impose a positive obligations on employers to implement a whistleblowing policy (although there are specific rules applicable to listed companies and the financial services sector - see below). Nevertheless, having a policy that sets out clear procedures by which staff can confidentially report genuine concerns about illegal, unethical or otherwise unacceptable conduct is highly advisable.

11.2 In March 2015, BEIS published Whistleblowing: Guidance for Employers and Code of Practice. The guidance notes that, while the law (in most cases) does not require employers to have a whistleblowing policy, having one shows an employer's commitment to listening to workers' concerns. It is equally important to ensure that workers know about the policy and understand how to make a disclosure. The guidance sets out tips about what a policy should include, as well as considering how an employer should deal with disclosures that are made.

11.3 There are good business reasons why employers should have a written policy on whistleblowing, which is communicated to workers, including:

(a) **Internal control**: From the employer's perspective it is much better for it to provide a route for employees to report any genuine concerns about possible malpractice internally. Having a policy encourages a culture where concerns are reported without fear of reprisals. Operating without a whistleblowing policy increases the likelihood of allegations of malpractice being taken outside the organisation, for example to the sector's regulating body or even to the media.

(b) **Early warning system:** Devising and operating a whistleblowing policy can also increase the employer's chances of detecting any malpractice before it seriously damages its business. If concerns are raised at an early stage, it is likely to be easier to address issues raised to avoid more serious regulatory breaches or reputational damage.

(c) **Reduce litigation risk**: A policy can send a clear message to staff and management about the importance of whistleblowing, the policy will minimise the risk that whistleblowers will be dismissed or suffer a detriment, which could lead to litigation under the whistleblowing legislation.

(d) **Establishing a statutory defence:** Having a policy will assist in establishing:

(i) a statutory reasonable steps defence to claim for vicarious liability of a detrimental treatment/victimisation by a colleague who breaches the policy.

(ii) an "adequate procedures" defence to a Bribery Act 2010 offence.

(iii) a "reasonable prevention procedures" to prevent the facilitation of tax evasion defence under the Criminal Finances Act 2017.

(e) **Compliance:** Some employers are subject to requirements to have a policy:

(i) Public bodies - the Government expects all public bodies to have written policies.

(ii) Listed companies - The UK Corporate Governance Code requires UK listed companies to have written whistleblowing arrangements, or to explain why they do not. The company's audit committee is responsible for keeping them under review.

(iii) Financial services - The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have certain rules, which impact on the content of whistleblowing policies and procedures for affected firms. The Market Abuse Regulation (596/2014) (MAR) also requires firms carrying out regulated financial services activities to have in place appropriate internal procedures through which their employees can report breaches of MAR.

(iv) US companies - US listed companies and their subsidiaries are obliged under the Sarbanes-Oxley Act (SOX) to operate whistleblowing arrangements, including an anonymous telephone hotline for reporting financial irregularities.

11.4 It is best practice for the policy to have in place a clear reporting structure in relation to both making, and dealing with a protected disclosure. Making the disclosure to the right person is crucial in terms of an organisation being able to manage it properly and limiting risk/exposure as well as an individual obtaining protection. Thought will need to be given as to whom is ultimately responsible, corporately, for whistleblowing (for example is it Compliance or HR? PLCs and larger companies are likely to have it sitting under the audit or risk committee). A whistleblowing policy should cross-refer to other relevant policies (such as grievance, equal opportunities and health and safety) to maintain the proper forums. But don't forget to have some flexibility to enable the worker to bypass the level of management at which the problem may exist.

11.5 Key practical tips:

(a) The policy should deal with:

(i) what information should be disclosed, how and to whom; and

(ii) what will happen following a disclosure being made.

(b) The policy should link into relevant and appropriate regulatory regimes and obligations.

(c) Communicate the policy. As a minimum make sure the policy can be clearly found on an intranet and signposted effectively. Other steps such as awareness courses and training are also best practice. The better publicised and incorporated into an organisations' daily practices a policy is the more effective it will be. Ensure that those who are likely to have to deal with the whistleblowing disclosure are clear on the policy, know what it says and follow it. Appropriate training will help avoid claims and enable an organisation to minimise the negative impact of whistleblowing.

(d) Hotlines: many (often larger) employers offer a confidential 'whistleblowing hotline' to their staff as a route by which a concern may be reported. Such lines are operated by a third party, which relays the relevant information on to the employer. If the employer's whistleblowing procedure authorises disclosure to a third party, disclosure under that procedure to the third party is treated the same as disclosure by the worker to the employer (section 43C(2)), ERA 1996.

12 GOOD PRACTICE CHECKLIST

✓ **Implement a whistleblowing policy**

- Set out clear procedures by which staff can confidentially report concerns about illegal, unethical or otherwise unacceptable conduct.
- Ensure the policy deals with what information should be disclosed and to whom and what will happened following a disclosure being made.
- Ensure that it enables the worker to bypass the level of management at which the problem may exist.
- Consider introducing a confidential whistleblowing hotline.

✓ **Communicate the policy**

- Assign a senior leader to "own the policy" and communicate the importance of the policy to all senior leaders.
- As a minimum, make sure the policy can be clearly found on an intranet and is signposted effectively.
- Other steps such as awareness courses and training are also best practice.
- Make it clear that victimisation of a whistleblower will lead to disciplinary action.
- Ensure that those who are likely to have to deal with the whistleblowing disclosure are clear on the policy, know what it says and follow it.

✓ **Log disclosures**

- Develop a process for logging and managing disclosures under the whistleblowing policy. Consider using an IT solution for added governance.

- Separate the alleged wrongdoing from any other aspect of the disclosure and decide on the course of action.

- Appoint a designated individual/team trained in the policy.

✓ **Investigate**

- Investigate disclosures promptly.

- Beware of knee-jerk reactions.

- Keep the whistleblower informed as to the progress where possible. Silence or apparent inaction may lead the whistleblower to become suspicious and make a disclosure externally.

✓ **Requests for information**

- Narrow and focus the scope of the investigation and deal with it proportionately.

✓ **Report**

- Ensure the response is objective and not retaliatory.

- Follow through with any recommendations.

- If disciplinary actions recommended (be it against the whistleblower or the wrongdoer colleague) follow an appropriate disciplinary procedure.

- Consider who in the organisation needs to be informed and the level of information provided.

13 PRESCRIBED PERSONS REPORTING DUTIES

13.1 The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 came into force on 1 April 2017.

13.2 They set out the requirements for prescribed persons to report annually on disclosures of information received from workers. The regulations provide that the reporting period will be 12 months beginning on 1 April each year. Without disclosing information that may identify the worker, the employer or the person in respect of whom the disclosure has been made, the report should contain:

(a) the number of disclosures received in the reporting period which it believes are qualifying disclosures and fall within their remit.

(b) the number of the above disclosures in respect of which it decided to take further action.

(c) a summary of the action it took and how the disclosures have impacted its ability to perform its functions and objectives.

(d) an explanation of its functions and objectives.

The report must be published within 6 months of the end of the reporting period on its website or other appropriate manner. There is no requirement to report any disclosure the prescribed person reasonably believes does not fall within its remit.

14 EUROPEAN REFORM

14.1 A new EU Directive on the protection of persons who report breaches of EU law is being introduced. It is intended to introduce minimum harmonised EU-wide standards of protection to whistleblowers within the EU when they report breaches of EU law. Following the UK's exit from the EU, only nine member states have comprehensive rules on whistleblowing. The Whistleblowing Directive (2019/1937/EU) came into force on 16 December 2019 and Member States have until 17 December 2021 to introduce the required measures.

14.2 The Directive sets minimum standards guaranteeing protection for whistleblowers who report breaches of a wide range of EU laws, including those relating to financial services, environmental protection, consumer protection, product and transport safety, data protection and privacy, as well as competition law and corporate tax rules.

14.3 The new rules will cover, among others, the introduction of reporting mechanisms across all industry sectors within both private companies and public institutions. The Directive also envisages protection against dismissal, demotion and other forms of retaliation by the employer.

14.4 While most of the content of the Directive is already contained in domestic UK law, there are some differences in particular, under the Directive:

- Provides protection relating to specified breaches of EU law, whereas the UK's Public Interest Disclosure Act 1998 (PIDA) gives protection to those making disclosures relating to breaches of UK law including the very wide "breach of any legal obligation".

- Organisations with 50 or more employees must establish internal reporting channels and respond to reported concerns within three months (or six months in complex cases). This is a contrast to the UK position where, with limited exceptions, such as for financial services firms within the scope of the Financial Conduct Authority’s (FCA) whistleblowing regime, there are no specific requirements in respect of the whistleblowing arrangements that companies must operate.

- Whistleblowers have the right to make an external disclosure to a competent national authority or, in limited cases, a public disclosure. Different provision apply in the UK in relation to disclosures other than to the employer.

- Protection is extended to "facilitators", namely those who assist whistleblowers in the reporting process, third parties connected with the whistleblower such as colleagues and

family members who could suffer retaliation in a work context, and legal entitles that the whistleblower owns, works for or is connected with in a work-related context.

- The identity of the whistleblower must not be disclosed without explicit consent to anyone beyond the staff members who receive and follow-up on the report.

- Member states will be required to ensure that whistleblowers have free access to comprehensive and independent advice on when whistleblower protection applies, which reporting channel may be best and any alternatives.

14.5 Although the UK is no longer required to implement the Whistleblowing Directive following Brexit, the UK agreed that it would not reduce employment law rights below the standards that existed on 31 December 2020 to the extent that this affects trade or investment. The UK may need to adapt its whistleblowing legislation to align fully with the Directive, for example, by obliging employers to give feedback to whistleblowers and to ensure that it protects a wider range of whistleblowers (including freelancers and shareholders). Additionally, reform at the EU level is relevant to companies with operations in the UK and EU, especially those that maintain a single whistleblowing policy and procedures across all its group companies.