

WHISTLEBLOWING
Law and Practice

JOHN BOWERS QC
MARTIN FODDER
JEREMY LEWIS
JACK MITCHELL

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Chapter 3: Protectable information

A. Overview of section 43B Employment Rights Act 1996

Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198 confirms that the failure does not have to be that of the employer to be the subject matter of a qualifying disclosure to the employer. A disclosure can relate to failure of a third party.

B. Reasonable belief

For a reiteration of the principles and an examination of Employment Tribunal consideration of the issue of reasonable belief see *Muchesa v Central & Cecil Housing Care Support* [2008] UKEAT 0443_07_22

C. Tends to Show

3.25 Tends to show

The significance of the phrase “tends to show” was emphasised in *Babula v Waltham Forest College* [2007] ICR 1045 (CA). Wall LJ (who gave the only substantive judgement) commented (at para 79) that:

“It is also, I think, significant that section 43B(1) uses the phrase "tends to show" not "shows". There is, in short, nothing in section 43B(1) which requires the whistleblower to be right. At its highest in relation to section

43B(1)(a) he must have a reasonable belief that the information in his possession "tends to show" that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer made in good faith (section 43C(1)(a))”

3.37 (3) *The disclosure must contain “information”*

The judgment of the EAT in *Cavendish Munro Professional Risks Management Ltd v. Geduld* [2010] ICR 325, [2010] IRLR 38, [rather restricts the scope of what constitutes a “disclosure”. The employee’s solicitors wrote a letter stating that they had “given full advice” to the employee regarding his rights as a shareholder, director and employee including in relation to a “purported agreement between the parties signed immediately before the Christmas break but 'back dated” They said there were issues regarding the validity of the agreement and unfair prejudice the employee and that the employee 's position was fully reserved regarding his rights and claims in this regard. They said they had advised him that such arguments were significant and very likely to be successful in Court The letter also said that the employee was putting forward a proposal

“...as a means to bring a swift conclusion to the current position. If it is not accepted in its entirety then our client will take all steps that are necessary to protect his position including issues regarding the purported shareholders agreement; the actions of the company's accountant regarding the purported valuation and the various threats and circumstances surrounding the position our client finds himself in with the remaining two shareholders which has led to unfair prejudice upon our client as a shareholder by the company. Such unfair prejudice does raise the issue as to the future of the company.”

Was this letter capable of being a “disclosure”? The ET held it was. The case came before the EAT (Slade J presiding) which said it was instructive to note that the introductory note to PIDA stated its purpose as being to protect individuals who make certain disclosures of information in the public interest. They noted that the ERA recognised a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in section 43F. There the two terms were clearly intended

to have different meanings. That "information" and "an allegation" were different was also clear from the victimisation provisions in the Sex Discrimination Act 1975 and in the Race Relations Act 1976. The Sex Discrimination Act, section 4(1)(b) refers to victimisation where:

"4. (1) A person discriminates against another person, the person victimised, in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons and does so by reason that the person victimised has (b) *given information* in connection with proceedings ..." (emphasis added)

□

Then in a separate provision, section 4(1)(d), provides that there is a different way in which a person can assert victimisation namely that:

"... the person victimised has *alleged* that the discriminator has committed an act ..."

(emphasis added)

Thus the victimisation provisions of the discrimination legislation set out different ways in which an individual could assert victimisation, by giving "information" and making "an allegation". The ordinary meaning of giving "information" was "conveying facts". A complaint or allegation might not necessarily convey facts (at least not directly). The EAT said this:-

"In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43."

The EAT held that the ET was wrong. Mr Geldud's solicitors' letter set out a *statement of his position*, did not *convey information* as contemplated by the legislation let alone *disclose information*. It was a statement of position quite

naturally and properly communicated in the course of negotiations between the parties.

3.56, 3.64 to 3.70 Criminal Offence and Legal obligation

In *Babula v Waltham Forest College* [2007] ICR 1026 the Court of Appeal decided that the reasonable belief test applies to whether there is a criminal offence or legal obligation. The Court therefore overturned the decision in *Kraus v Penna plc* [2004] IRLR 260 (EAT) on this issue.

Mr Babula, an American citizen, was employed by the respondent college as a business studies lecturer. He was told by his students that his predecessor had used lesson time to teach religious studies, dividing the class into Islamic and non Islamic groups, and had told the Muslim students that he wished a September 11 incident would occur in London. Mr Babula raised the matter with a supervisor, who took the view that no action was required. Concerned that there might be a threat to national security and believing that at the least an offence of incitement to racial hatred had been committed, and that the college had failed to comply with a legal obligation to report it, Mr Babula contacted the CIA and FBI and informed the college that he had done so. The disclosure led to a series of actions by the college which Mr Babula felt left him with no choice but to resign. The employment tribunal struck out the claim as having no reasonable prospect of success, on the ground that, on the basis of the facts asserted by Mr Babula, any incitement was to religious, not racial, hatred, which was not an offence at the time, and, therefore, the disclosure was not a qualifying disclosure complying with section 43B(1) ERA. In rejecting this view, the Court of Appeal emphasised that if a worker reasonably believed that a criminal offence had been committed, was being committed or was likely to be committed, and provided his belief was found by the tribunal to be objectively reasonable, neither the fact that the belief turned out to be wrong nor the fact that the information which he believed to be true did not in law amount to a criminal offence was sufficient, of itself, to render the belief unreasonable. The Court noted that this approach was also supported by policy considerations. As Wall LJ noted (at para 80):

“The purpose of the statute, as I read it, is to encourage responsible whistleblowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute.”

Chapter 4: Good faith

C. Burden of proof

4.36 The guidance in *Lucas v Chichester Diocesan Housing Association Limited* EAT/0713/04, as to the need for an allegation of bad faith to be made explicit in advance, was qualified in *Roberts v Valley Rose Limited t/a Fenbank Nursing Home* EAT/0393.06 31 May 2007. In *Roberts* it was held that as a matter of pleadings it was sufficient to assert bad faith even though the precise grounds differed from that later relied upon. In that case, the ultimately successful basis for alleging bad faith was made clear in disclosure, set out in witness statements exchanged in advance of the hearing and explored in cross-examination.

New section. Costs and Good Faith

In *Clark v Clark Construction Initiatives Ltd* [2008] I.C.R. 635 [2008] IRLR 364. the EAT (at paragraph 114) held that the ET was entitled to conclude that it was unreasonable to bring the particular protected disclosure claim that had failed because the disclosure had been shown not to have been made in good faith. The EAT said that the claimant was in a position to know that he had not made the complaint to the employers in good faith, in the sense that it was not for a purpose which the law is willing to protect. That was not something that would only have become obvious after the evidence had been heard and it followed that the claimant was seeking to recover compensation notwithstanding that he ought to have known that the claim would not succeed. That justified the ET in concluding that the claimant’s conduct was unreasonable.

Chapter 5: The three tiers of protection

5.03 Disclosure to the employer

In *Premier Mortgage Connections Limited v Miller* EAT/0113/07, 2 November 2007, the EAT commented that the term “employer” is wide enough to cover a disclosure made by a worker to the employing company by presenting the complaint to a single serving director. Unsurprisingly, the EAT noted that disclosure to an ex-director did not constitute disclosure to the employer.

5.07 s.43C(1)(b)(ii): Legal responsibility

In *Premier Mortgage Connections Limited v Miller* EAT/0113/07, 2 November 2007 the claimant, Miss Miller, contended that funds had been wrongly diverted out of the employing company to another organisation with which one of the directors was involved. The tribunal found that there was a qualifying disclosure having regard to Miss Miller’s belief that the diversion of funds amounted to a criminal offence and a failure lawfully to account for the company’s income. The disclosure was made to a former director (Mr Day), but the tribunal found that the disclosure fell within s.43C(1)(b)(ii) ERA because it related to wrongdoing (by others) whilst Mr Day was still a director. The tribunal concluded that there was a protected disclosure also concluded that this was the principal reason for dismissal.

The EAT allowed the appeal but remitted the matter to the tribunal to determine the issue of reasonable belief. The EAT emphasised that the disclosure must, in order to fall within s.43C(1)(b)(ii), be made to a person reasonably believed to have an ongoing legal responsibility for dealing with the relevant failure at the time the disclosure is made. Subject to application of the “reasonable belief” test, this would therefore not cover disclosure to a former director.

The EAT's reasoning appears to proceed on the basis that the director must have an enduring legal responsibility for dealing with the complaint. Thus, the EAT criticised the tribunal's focus on the fact that the allegations related to wrongdoing whilst Mr Day was still a director and noted (at para 44) that:

“It is no doubt true that if Mr Day had in some way defaulted in his duties as director during the period of his directorship, he could still be prosecuted or sued for it. That is because, during the period of his directorship, he had legal responsibility, and he can still be held to account for any failure to meet his legal responsibility. By the time of the disclosure he no longer had that responsibility. He no longer had the powers and duties of a director. Section 43C is directed to legal responsibility. He had no enduring legal responsibility **to deal with the complaint.**” (our emphasis)

However s.43C(1)(b)(ii) requires that the relevant failure relates solely or mainly to a matter for which the person to whom the disclosure is made has a legal responsibility. It does not require that recipient of the disclosure has legal responsibility for dealing with the disclosure. The distinction may be of particular importance when it comes to considering the issue of reasonable belief. On the EAT's analysis, which appears to focus on an ongoing responsibility to deal with the complaint/disclosure, as the EAT expressly noted (at para 38), it will rarely be the case that there could be a reasonable belief that an ex-director has any ongoing legal responsibility for the matter. It may be far more likely that an employee could believe that an ex-director has legal responsibility for a relevant failure which occurred prior to ceasing to be a director. In the case of a health and safety failing, for example, an ex-director will no longer have responsibility for dealing with complaints about the failings, but may have a responsibility (in the sense of accountability or liability) for failings during the period of the directorship, or may reasonably be believed to have such a liability.

As set out in the text of the main work at 5.07, one difficulty in the approach of focussing on a legal responsibility for investigating the disclosure, rather than on accountability or

responsibility for the relevant failure, is that it risks collapsing the distinction with s.43F ERA (disclosure to prescribed persons), and also risks bringing most disclosures to the police within s.43C. The EAT was clearly concerned that s.43C would be too broad if there could be disclosure to an ex-director. However if legal responsibility is limited to circumstances in which the ex-director is accountable or legally responsible for the wrongdoing/relevant failure, this serves to limit the ambit of the provision.

5.08 s.43C(1)(b)(ii): “solely or mainly to conduct of another person”.

The EAT in *Premier Mortgage Connections Limited v Miller* EAT/0113/07, 2 November 2007 (at para 40) specifically rejected a submission that, for the purposes of s.43C(1)(b)(ii) ERA, it was necessary for the person to whom disclosure was made to have sole or main responsibility for the matter. In contrast to s.43C(1)(b)(i), there is no such requirement. It is sufficient that the disclosure relates solely or mainly to a matter for which the recipient of the disclosure has a (not necessarily the sole or main) responsibility.

5.10 s.43C(1)(b): Reasonable belief

The importance of the reasonable belief element of the test in s.43C ERA was emphasised in *Premier Mortgage Connections Limited v Miller* EAT/0113/07, 2 November 2007. Thus, even though the disclosure was made to an ex-director (at the time of the disclosure), and the EAT noted that there would rarely be a reasonable belief in such circumstances, the matter was remitted to the tribunal to make findings as to reasonable belief.

Chapter 6: Who is protected under PIDA?

6.10 Agency Workers, s 43K (1) (a) ERA.

In *Croke v Hydro Aluminum Worcester Limited* [2007] ICR 1303 the EAT held that in construing the extended definition of a worker in s.43K ERA, it is, by analogy with other statutory provisions relating to discrimination or victimisation, appropriate to apply a purposive construction. The legislation is therefore to be construed, where this can properly be done, so as to provide protection rather than to deny it. Where, as in *Croke*, an individual supplied his services to an employment agency through his own company, and the employment agency in turn provided the services of that company to an end user, if the individual did work for the end user the tribunal could conclude that he was a worker of the end user for the purposes of s.43K(1)(a) ERA. This is subject to satisfying the statutory requirement that the terms upon which he worked were substantially determined not by the worker but by the person for whom he worked (the end user), or by a third person (which might be the employment agency) or both.

6.21A Police Officers

In *Lake v British Transport Police* [2007] EWCA Civ 424 (04 May 2007) the claimant, a former British Transport Police Officer contended that he had been dismissed on the ground of his having made a protected disclosure. The Employment Tribunal and the EAT had accepted the argument from the respondent that decisions of the Police Disciplinary Board and the Police Appeals Tribunal could not be the subject of a collateral attack and accordingly could not be the subject of an unfair dismissal claim. The British Transport Police had accepted that the decision of the Chief Constable dismissing an appeal from the Police Appeals Tribunal could be the subject of such a claim and the point was therefore to an extent academic. However the Court of Appeal reversed the decision of the ET and the EAT and held that the ET did have jurisdiction to make its own decision as to whether a section 103A case had been established albeit that the Chairman of the panel enjoyed immunity from being called as a witness and any remarks he made during the course of the proceedings could not be impugned.

Chapter 7: The Right not to suffer Detriment

(2) Vicarious liability

Paragraph 7.36 to 7.39

In *Cumbria County Council v Carlisle-Morgan* [2007] IRLR 314 (EAT) the issue arose as to the application of principles of vicarious liability in the context of detriments on the grounds of a protected disclosure. Mrs Carlisle-Morgan, the Claimant, was employed by the respondent County Council as a support worker. She worked at a supported residential home for two men with severe learning difficulties. The Claimant made protected disclosures to her supervisor, and to her supervisor's line manager, relating to concerns as to how a colleague, Mrs Horsman, who was another support worker, had been treating residents at the home. The tribunal found that the Claimant was then subjected to detrimental treatment by Mrs Horsman on the grounds of the protected disclosures. This included being shouted at and called a "bitch", ignored by her and being the subject of a threatening remark.

The ET found that the County Council was vicariously liable for actions of Mrs Horsman, and therefore had subjected the Claimant to a detriment on the grounds of a protected disclosure. On appeal it was argued that the principle of vicarious liability had no application to the Employment Rights Act 1996. In support of this it was said that claims under section 47B ERA do not create statutory torts and, unlike in relation to other discrimination legislation, there is no express provision for vicarious liability. On this basis it was argued that the employer could only be liable for the acts of an employee where the employee had express or implied authority to do that which was complained of. These arguments were rejected by the EAT, and the decision of the ET was upheld. The EAT emphasised that an employer may be liable for the acts of its employees done in the course of employment whether or not what the employee did would be actionable against the employee. The EAT also said it was wrong to draw a line between acts of someone in authority over the claimant and the acts of other employees. The proper approach was (at para 42):

“to see whether as a matter of fairness and justice, turning, in the circumstances of each case, on the sufficiency of the connection between the

breach of duty and the employment and/or whether the risk of such breach was one reasonably incidental to it'

see per Auld LJ in *Majrowski* in the Court of Appeal at para 37, (i.e. the “close connection” test).”

(5) Drawing inferences

Paragraph 7.82

See the discussion of *Kuzel v Roche Products Ltd* [2007] IRLR 309 below.

G. Complaints to an employment tribunal in claims of victimisation

(1) Statutory grievance procedures and Whistleblowing claims

Paragraphs 7.90 – 7.96

An ambitious argument that Paragraph 15(2) of Schedule 2 to the Employment Act 2002 should be interpreted as meaning that it was not necessary to present a grievance to make a claim arising from a subsequent detriment was rejected by the EAT in *Waite v South Coast Ambulance Services NHS Trust* [2008] UKEAT 0274/08.

The statutory grievance procedures were abolished (along with the statutory dismissal and disciplinary procedures) on 6th April 2009. However, transitional provisions mean that case arising from a dismissal or detriment occurring before that date will be determined in accordance with the old regime. In addition, cases where the detriment is on-going and straddles the 6th April 2009 will also be dealt with under the old regime, provided that a grievance or claim is submitted on or before 4th July 2009 (4th October 2009 in the case of claims where the jurisdiction has a six month time limit). Cases relating to dismissal ought to be easier, with the statutory procedures continuing to apply where the employer has started the disciplinary action on or before 5th April 2009.

Where a complaint falls squarely within the ‘new’ regime, regard will have to be had to the new ACAS Code of Practice on Disciplinary and Grievance Procedures. Any failure to comply is relevant to the question of liability only in unfair dismissal cases, but it may

impact on the level of compensation awarded in other cases. The consequences of failure to comply with the elements of the code are much less draconian as the employee does not potentially lose the right to bring their claim and there is not “automatic” unfair dismissal as previously provided for by s98A ERA. Employment Tribunals will have a discretion to increase or decrease compensation by up to 25% in appropriate cases. As with the statutory procedures, the Code only applies to employees, rather than workers, save for the limited exception of claims involving a breach of the right to be accompanied.

New subsection- transmission of details of PIDA claims to relevant regulators Secondary legislation has been introduced¹ to amend ET Rules of Procedure to provide for the substance of allegations giving rise to PIDA claims to employment tribunals to be forwarded to the relevant regulator so that the allegations of the underlying issue can be investigated where appropriate by the regulator. As of 5th April 2010 employment tribunals will be allowed to send copies of the employment tribunal claim form (ET1 claim form), or extracts from it directly to the relevant regulator. The regulator will then assess the information and investigate if appropriate as part of their normal regulatory duties, procedures and processes. Only those claims accepted by the employment tribunal where PIDA is identified as a jurisdiction would be subject to this process. The relevant regulator would be identified from the list of prescribed persons under the PIDA legislation. A claimant will have to “opt in” to this process by making the appropriate indication on the form ET1.

Chapter 8:

G. The burden of proof

Paragraphs 8.19 to 8.27

Now see *Kuzel v Roche Products Limited* [2007] IRLR 309 where the EAT considered the burden of proof in relation to automatically unfair dismissal under

• ¹ Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010

s.103A ERA (dismissal by reason of a protected disclosure). In relation to ordinary unfair dismissal (under s.98(4) ERA) the burden is on the employer to establish the reason for dismissal. If the employer fails to establish a potentially fair reason, the dismissal is unfair, but it does not follow that it is automatically unfair under s.103A ERA. This may be significant in relation to issues such as minimum qualifying periods for claiming unfair dismissal or the statutory cap on the compensatory award (which does not apply to s.103A dismissals). The proper approach to the burden of proof was summarised as follows (at para 47):

- “(1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason? Has she raised some doubt as to that reason by advancing the s103A reason?
- (2) If so, has the employer proved his reason for dismissal?
- (3) If not, has the employer disproved the s103A reason advanced by the Claimant?
- (4) If not, dismissal is for the s103A reason.

In answering those questions it follows:

- (a) that failure by the Respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s103A;
- (b) however, rejection of the employer’s reason, coupled with the Claimant having raised a *prima facie* case that the reason is a s103A reason entitles the Tribunal to infer that the s103A reason is the true reason for dismissal, but

- (c) it remains open to the Respondent to satisfy the Tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the Tribunal is not that advanced by the Respondent;
- (d) it is not at any stage for the employee (with qualifying service) to prove the s103A reason.”

In response to a contention that the approach set out in *Igen v Wong* should be applied in the context of a whistleblowing claim, the EAT said that there was a danger in taking a broad view that, because the protection afforded to ‘whistleblowers’ is protection against a form of discrimination (more particularly victimisation), the statutory regime applied to those unlawfully discriminated against on grounds of sex, race, disability, religion, sexual orientation, or now age, can simply be grafted onto the provisions of the ERA under which the protected disclosure protection is provided. There were differences between the parallel elements in the whistleblowing protection must be borne in mind. The ‘reverse burden of proof’ introduced into the discrimination statutes, eg s.63A Sex Discrimination Act (SDA), leading to the *Igen* guidance, had not been incorporated into Part IVA ERA and the burden of proof is provided in s.48(2) ERA. There was no room to import some different formulation of the burden of proof from another statute. Section 103A did not provide expressly for the burden of proof. However the Court of Appeal’s guidance in *Maud* was binding on the EAT and employment tribunals and the alteration to the burden of proof in the discrimination statutes did not alter that approach. The EAT said that “some assistance” could be derived from *King v Great Britain-China Centre* in relation to the drawing of inferences, in particular in the event that the employer’s explanation for the subjecting to detriment was found to be inadequate or unsatisfactory.

The Court of Appeal, [2008] ICR 799, [2008] IRLR 530, approved the EAT’s statement as to the correct approach although the actual ruling whereby the case had been sent back to the ET was reversed. The Court of Appeal decided that the ET had not misdirected itself as to the correct burden.

Chapter 10: Employment Tribunals Procedure and Alternative Dispute Resolution

The relationship between a protected disclosure dismissal and an ‘ordinary’ unfair dismissal claim

Paragraph 8.09

In *Golding v Southfields Community College* [2006] UKEAT 0395_06_1210 (12 October 2006) Mrs Golding’s claim form had identified that she had “made objections known” to alleged behaviour by the head teacher in the college where she worked in requiring her to “massage” attendance figures and that it was “then that the bullying and intimidation began.” She said she had been dismissed “because I made my objections known” but there was no reference to section 103A or to a protected disclosure. Subsequently (and very shortly before the hearing of her case) Mrs Golding sought to amend her claim to made explicit that her contention that she had been dismissed contrary to s.103A ERA. The ET rejected this application. The EAT allowed Mrs Golding’s appeal. The claim form did “not address with any precision the matters which Mrs Golding will have to establish in order to meet the definition in section 43A and 43B, nor for that matter does the amendment” but in the EAT’s view the “makings of the case are there”. The application to amend “involved the addition of factual details and the addition of another label for facts already pleaded but ...did not involve entirely new factual allegations changing the basis of the existing claim.” The ET had erred in characterising the amendment as raising a substantive amendment outside the time limits.

New Subsection – Striking Out

Paragraph 10.15A

In *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 (CA) the Court of Appeal (Maurice Kay LJ giving the only substantive judgment) made some important observations to the effect that it will generally not be appropriate for the Tribunal to use its power to strike out cases as having no reasonable prospect of success in a whistleblowing context where the facts are disputed. The claimant was a surgeon

employed by the Trust. He was summarily dismissed and made a claim in the tribunal that his dismissal was automatically unfair because the reason for it was that he had made protected disclosures. There was an alternative claim under s 98 ERA. The Trust said that the true reason for the dismissal was that the claimant was responsible for a breakdown of relationships in his department and within the Trust such that the employment relationship could not continue and that it had been fairly terminated. The Trust contended that the proceedings in the Employment Tribunal were totally without merit and at a pre-hearing review sought to persuade the Chairman (sitting alone) that the Claimant's claim had "little prospect of success" and to make an order he pay a deposit not exceeding £500 as a condition of being permitted to continue to take part in the proceedings (2004 Rules, rule 20). The Trust produced a letter addressed to the chief executive of the Trust from "all the senior members of the maxillofacial department within the three district general hospitals", signed by 9 persons, which expressed the view that there was a complete lack of confidence in and a total breakdown of the relationships between the claimant and the senior staff within the department which had significant effects on the service provision and the quality of care provided to patients within the hospitals and sought urgent confirmation that immediate progress would be made to redress these issues before a complete breakdown of the services results. The claimant disputed the date of the document and challenged the good faith of some or all of the signatories. At the second of two hearings the Chairman struck out the Claimant's entire application on the basis that it had no reasonable prospect of success. The EAT allowed the claimant's appeal on the ground that the decision of the Employment Tribunal at the second hearing was vitiated by apparent but not actual bias on the part of the chair; and also because, in the EAT's view, this was not an appropriate case for the use of the strike out power under rule 18(7)." On appeal to the Court of Appeal the Trust challenged both parts of the judgment and order of Elias J.

The Chairman's judgment had stated:

"The whistleblowing claim would have no reasonable prospect of success in my view in that the tribunal would go on to find that the principal reason for dismissal was not that the claimant had made a protected disclosure but that he was

dismissed for 'some other substantial reason' within the meaning of Section 98 of the 1996 Act, namely irretrievable breakdown of the relationship of trust and confidence. In the light of the letter from all the claimant's nine colleagues asserting irretrievable breakdown of trust and confidence, together with their statements to the effect that they could no longer work with him and that members of the department would resign if he returned from suspension, any reasonable tribunal would take the view that irretrievable breakdown in relationships with the consequent prospect of disappearance of the department was the principle reason for dismissal... I am therefore of the opinion that the claim based on public interest disclosure has no reasonable prospect of success. I would go further and say I have no doubt that it is bound to fail in that any reasonable tribunal will find that public interest disclosure was not the principle reason for dismissal."

A similar conclusion had been reached in relation to the alternative claim under s.98 ERA.

The Court of Appeal upheld the decision of the EAT that the judgment was vitiated by apparent bias because of the view expressed in the document promulgated after the first hearing and then went on to agree with the EAT that in any event the use of the strike out power was inappropriate in the circumstances. There might be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success (Kay LJ referred to *ED&F Mann Liquid Products Limited v Patel* [2003] EWCA Civ 472 at paragraph 10 per Potter LJ; a commercial case). However what was important was the particular nature and scope of the factual dispute in question. The claimant was contending that others turned on him because he was a whistleblower. The Trust contended that the claimant was impossible to work with and that he unreasonably jeopardised the proper functioning of the hospital. The Chair's reasoning was based on her decision that the letter from the nine colleagues and the statements they made meant that any reasonable tribunal would on that basis decide that the Claimant was dismissed not because he had made protective disclosures but because of an irretrievable breakdown of relationships for which he was responsible. Kay LJ said it was legally perverse to reach this conclusion. There was a crucial core of disputed facts

that was not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation but the present case did not approach that level. Kay LJ then said this (at paragraph 30)

“Whistleblowing cases have much in common with discrimination cases, involving as they do an investigation into why an employer took a particular step, in this case dismissal.

The applicant will often run up against the same or similar difficulties to those facing a discrimination applicant. There is a similar but not the same public interest consideration. In *Anyanwu v South Bank Student Union* [2001] ICR 391, Lord Steyn said at paragraph 24:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

Lord Hope of Craighead added at paragraph 37:

"I would have been reluctant to strike out these claims on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on

assumptions as to what the claimant may be able to establish if given an opportunity to leave evidence."

Kay LJ said that the same or a similar approach should generally inform whistleblowing cases, subject to the kind of exceptional case to which he had referred. The judgment thus echoes what the EAT said in *Boulding v Trillium* in respect of submissions at the close of the claimant's case that there is no case to answer: see paragraph 10.43 of the main work. For further observations on the exercise of the power of summary dismissal of proceedings where the facts are in dispute (though not in the context of a whistleblowing claim) see *Hudson v University of Oxford* [2007] EWCA Civ 336 (27 February 2007). Where the Court of Appeal allowed an appeal on the basis that the conclusions of the Employment Tribunal and the EAT were on the basis of a factual analysis or a legal analysis founded on a factual assumption which might not be correct and correctness of which would depend upon an assessment of the evidence.

Section G. Costs

In *Clark v Clark Construction Initiatives Ltd* [2008] I.C.R. 635 [2008] IRLR 364. the EAT (at paragraph 114) held that the ET was entitled to conclude that it was unreasonable to bring the particular protected disclosure claim that had failed because the disclosure had been shown not to have been made in good faith. The EAT said that the claimant was in a position to know that he had not made the complaint to the employers in good faith, in the sense that it was not for a purpose which the law is willing to protect. That was not something that would only have become obvious after the evidence had been heard and it followed that the claimant was seeking to recover compensation notwithstanding that he ought to have known that the claim would not succeed. That justified the ET in concluding that the claimant's conduct was unreasonable.

Chapter 11: Private Information, Public Interest

Privacy and Article 8 of the European Convention on Human Rights paragraphs 11.14 to 11.17

The Court of Appeal dismissed the Defendant's appeal ([2007] 3 WLR 194) from the judgment of Eady J in *McKennitt v Ash* holding that the judge had been right in his determination of what did and did not constitute private information within the ambit of Art. 8.

11.121 - 11.122 See now *Guja v Moldova*, ECtHR, 12th February 2008, Application no. 14277/04 and *Kudeshkina v Russia*, ECtHR, 14th September 2009, Application no. 29492/05 two ECHR cases where the free expression took the form of whistleblowing.

Chapter 12: Protecting Informants' Identities

(2) The public interest defence to a *Norwich Pharmacal* application

Paragraphs 12.22 to 12.27

The Court of Appeal dismissed the Trust's appeal from the decision of Tugendhat J (*Merseyside Care NHS Trust v Ackroyd* [2007] EWCA Civ 101; [2008] EMLR 1). The Master of the Rolls delivered the judgment of the court and said that the balance was essentially a matter for the judge citing Sedley LJ in *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274, [2002] 2 Lloyd's Rep 229. The question the judge had to decide was one upon which different people could reasonably reach different conclusions and upon which many factors would be relevant on both sides of the scales. It was a question of law which was heavily fact-dependant and value-laden, and upon which many factors would be relevant on both sides of the scales. It was an exercise not dissimilar to the exercise performed by a judge in balancing the various factors which were identified by Lord Nicholls in *Reynolds* as being relevant to the issue of *Reynolds* privilege. In *Galloway v Daily Telegraph* [2006] EWCA Civ 17 at [68], in giving the Master of the Rolls had himself said:

“The right to publish must however be balanced against the rights of the individual. That balance is a matter for the judge. It is not a matter for an appellate court. This court will not interfere with the judge’s conclusion after weighing all the circumstances in the balance unless he has erred in principle or reached a conclusion which is plainly wrong.”

The Court of Appeal should adopt the same approach to an appeal in a case of this kind. The balancing of the considerations relevant to the question as to whether it was necessary and proportionate to order the disclosure of the journalist’s source was essentially a matter for the judge and not for an appellate court. Tugendhat J had taken into account the key considerations on either side of the argument and in those circumstances there was no basis on which the Court of Appeal could properly interfere with the balance he struck.

In the future to the avoid such lengthy proceedings as had taken place in the MGN/Ackroyd saga the Master of the Rolls added that the Court could see no reason why an editor should not be asked to confirm that the source for an article or programme is not a journalist whose own article 10 and section 10 rights would fall to be considered if his or her identity were disclosed. Failure to do so might give rise to an inference that these very important issues are likely to arise in subsequent litigation and, depending on any other question raised by proceedings against the editor, might legitimately give rise to an application for summary disposal on the basis that it is difficult to see what possible justification there could be for refusing to disclose that fact. Disclosing the name of a journalist would focus the attention of the court on the critical issue of the disclosure of that journalist’s source at an early stage. This was important because it is obviously highly desirable that disputes of this kind were resolved as soon as possible after the relevant incident had occurred.

Chapter 15 Obligations to Blow the Whistle

B. Implied reporting obligations under the contract of employment

In respect of the duty under the contract of employment to disclose an employee's own wrongs and those of fellow employees see now *Kynixa Limited v Hynes and others* [2008] EWHC 1495 where the third defendant did not owe fiduciary duties but was nevertheless under a duty, once she knew that approaches had been made by a competitor to more senior employees and herself to inform the claimant of those approaches.

C. Directors and employees who owe fiduciary obligations

As to the duty of a fiduciary in *Attwood Holdings Limited v Woodward and others* [2009] EWHC (Ch) where Mr John Martin QC sitting as a deputy judge followed the cases referred to in 15.64 -15.65 and held that if a director learns that an employee is proposing to set up in competition he is under an obligation to warn the company of that fact and that obligation cannot be any weaker merely because he is himself involved in that proposal.