Introduction

Whistleblowing continues to be in the general and legal news and the continuing spate of case law spurs this further edition of the updater hard on the heels of the last one. First we have the Supreme Court’s decision on whether a member of an LLP is a worker (he/she is): Clyde & Co LLP and another (Respondents) v Bates van Winkelhof (Appellant) [2014] UKSC 32 discussed under chapter 6. Secondly there is another case on worker status –Keppel. Thirdly there is Co-Operative Group Ltd v Baddeley [2014] EWCA Civ 658 (15 May 2014) [2014] EWCA Civ 658 discussed under chapter 8. We also note the age discrimination case of Reynolds as it parallels developments in whistleblowing on the issue of whose (that is to say which individuals’) reasons are relevant in deciding whether a detriment was inflicted on or a dismissal was because of a proscribed ground. We also detail the Government’s response to the evidence it received following its call for the same last year. The extension of prescribed persons to include MPs is noted under Chapter 5.

Reform

On 25 April 2013 the Enterprise and Regulatory Reform Act 2013 (“ERRA”) received Royal Assent. It introduced the first major legislative changes to the whistleblowing provisions first brought in by the Public Interest Disclosure Act 1998:-

- A disclosure no longer qualifies for protection unless the worker reasonably believes it is “made in the public interest”. That qualification applies to all disclosures without exception.

- But, secondly, protection no longer depends on the disclosure having been made in good faith. Instead lack of good faith can lead to a reduction in compensation of up to 25%.

- Employers will be vicariously liable for whistleblowing victimisation by workers and agents, subject to a defence in relation to workers (but not agents)
of taking all reasonable steps to prevent this. Liability is also imposed on the worker or agent.

- There are amendments so as to include certain healthcare professionals who were identified as outside of the scope of whistleblowing protection due to their contractual arrangements. There is also provision to extend the categories of workers to whom protection will apply, which is an issue subject to further consultation by way of a “Call for Evidence” (see below). Amongst those falling outside the scope of protection at present are job applicants, partners, LLP members (subject to the outcome of the upcoming appeal to the Supreme Court in *Bates van Winkelhof v Clyde & Co* [2012] IRLR 992), volunteers (unless within s.43K(1)(a) ERA) and non-executive directors.

These changes came into effect on 25th June 2013 as regards any qualifying disclosure made on or after that date. The previous regime continues to apply to any claim arising in respect of a prior qualifying disclosure, even if it relates to a dismissal, or detrimental act or failure to act, on or after 25th June 2013 (s.24(6) ERRA).

On 12 July 2013 the Department for Business, Innovation and Skills launched a Call for Evidence to look at the current whistleblowing laws, and specifically whether there is enough support for people to report wrongdoing. The closed in November last year.

Running alongside (but predating) the Call for Evidence, the whistleblowing charity Public Concern at Work established a Whistleblowing Commission to look at reform. The Whistleblowing Commission reported its findings in November 2013. More detailed consideration is outside the scope of this updater but the details are available at [http://www.pcaw.org.uk/whistleblowing-commission-public-consultation](http://www.pcaw.org.uk/whistleblowing-commission-public-consultation). The key recommendations were:

- The Secretary of State to adopt the Commission’s Code of Practice detailing whistleblowing arrangements in the workplace. This Code of Practice to be taken into account by courts and tribunals when whistleblowing issues arise. *(Rec 1)*
- Regulators to require or encourage the adoption of this Code of Practice by those they regulate. *(Rec 2)*
- Regulators should review the licence or registration of organisations which fail to have in place effective whistleblowing arrangements. *(Rec 3)*
- Regulators to be more transparent about their own whistleblowing arrangements and annually report on their operations. *(Rec 5)*
- Specific provisions against the blacklisting of whistleblowers. *(Rec 10)*
- Strengthening anti-gagging provisions in the law. *(Recs 17 & 18)*
- Specialist training for tribunal members to handle whistleblowing claims effectively. *(Rec 21)*
- Strengthening and clarifying the legal protection for whistleblowers contained within the Public Interest Disclosure Act. *(Recs 8-20)*
- Updating and broadening the definition of worker to include: student nurses, doctors, social workers and health care workers; volunteers and interns; priests; foster carers; non-executive directors; public appointments; LLP
members and all categories of workers listed under the Equality Act 2010.

(Rec 10)

The Government’s Response to the evidence received

The Government’s response to the evidence received was published in June: see https://www.gov.uk/government/consultations/whistleblowing-framework-call-for-evidence

The headline is that the whistleblowing framework in isolation does not always prevent malpractice from taking place. Nor does it encourage people to raise concerns. The Government proposes changes through a Small Business, Enterprise and Employment Bill to be enacted by April 2015. But the proposed changes are very limited indeed.

Categories of disclosure which qualify for protection

The response suggests that the only additional categories which the government contemplated including was “abuse and misuse of power” and “gross waste or mismanagement of funds”. The legal advice received by the government was that the inclusion of such categories would create legal uncertainty and whilst the issue will be kept under review there is no present intention to reform in this respect. “Improved guidance will be produced to identify what may or may not be covered when making disclosures under the categories as they stand.

Methods of disclosure

The Government refers to the inclusion of MPs within the list of prescribed persons. No other hard edged reforms are proposed: the government will work to improve guidance and create a model whistleblowing policy to help businesses by improving understanding of how the statutory provisions work; making clear the role an employer should be playing in relation to whistleblowers; highlighting the benefits to a business through embracing an open culture of whistleblowing.

The ET referral to prescribed persons system and the role of prescribed persons

The ET referral process is going to be the subject of further research and consideration. Prescribed persons will be required to report annually on whistleblowing in a measure designed to strike a balance between the desires of individuals to know action has been taken in respect of their disclosure with the constraints that prescribed persons operate within (in particular their responsibilities to maintain confidentiality).

The definition of “worker”

Student nurses will be covered through secondary legislation. No other changes are proposed (the decision of the SC in van Winklehof being noted as removing any requirement for reform in respect of LLP members) but the government will “continue to keep this area under review”
It is something of a surprise that job applicants are not going to be given specific protection: they will have to content themselves with claims against former employers where a negative reference is given because of whistleblowing and/or reporting their suspicion that they are on a whistleblowing blacklist to the ICO.

Financial incentives to blow the whistle

There are, presently, no plans to introduce financial incentives as an integral part of the whistleblowing framework to reward whistleblowers. A crumb of solace will be the view of the government that ETs should order the reimbursement of issue and hearing fees to successful whistleblowing claimants. The consideration being given to the impact of incentivisation by the FCA and PRA is noted and “in due course” the government may consider whether financial or other incentives would be beneficial.

Non statutory measures

The more important intended measures have been picked up in the notes above. A table of the full set of recommendations is contained at pages 21-22 of the document.

Whistleblowing in the NHS

On 23 June 2014, in response to a number of reported NHS whistleblowing cases, Ministers appointed Sir Robert Francis QC to lead an independent inquiry (a review) into whistleblowing in the NHS. This type of review is interesting because it is not a public inquiry, however given the timescale involved, the type of inquiry and its speed may be influenced by the election next year. The terms of reference are available here https://www.gov.uk/government/groups/whistleblowing-in-the-nhs-independent-review#terms-of-reference

Observation

The original spur for reform of PIDA was the perception on the part of the Government and in certain other quarters that the law protecting whistleblowers was being abused- in particular by workers raising complaints as to the treatment meted out to them as individuals as breaches of their employment contract. The introduction of the new public interest test may be expected to reduce the scope for such “abuse” and hence the number of claims invoking PIDA. On the other hand the removal of liability to remedy might reassure some potential claimants who would otherwise have been deterred by risk that they might lose their claims altogether if they were found to have acted otherwise in good faith. Any impact is unlikely to be immediate, not least because the scope of the new test of being “made in the public interest” is yet to be tested, and that is in turn liable to be reflected in any advice given to prospective whistleblowers. In working out what the eventual overall result of the changes will be it is of course necessary to bear in mind the potentially chilling effect of the introduction of employment tribunal fees. Whilst whistleblowing claims tend to be brought by claimants whose potential losses are considerable (and the cost/benefit ratio may be more favourable than in the more general run of cases) we would suggest that it may be thought unfortunate that, in addition to the various other difficulties that confront whistleblowers, there is now added the need to incur considerable extra expense in issuing their proceedings and getting to a hearing.
Chapter 3

The new public interest test

Section 17 of ERRA amended section 43B (1) of the Employment Rights Act so that it now provides as follows (with the amendments shown underlined):

(1) In this Part 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---

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

The new requirement only applies to a disclosure made on or after 25th June 2013 (ERRA section 103).

Some introductory observations can be made by analogy with the pre-existing reasonable belief test (see in particular Darnton v University of Surrey [2003] IRLR 133 (EAT) and Babula v Waltham Forest College [2007] ICR 1045 (CA), discussed in paragraphs 3.26 to 3.41 of the main work). The worker must genuinely believe that the disclosure is made in the public interest and it must be objectively reasonable, judged from the worker’s perspective, to hold that belief. A worker who has given no thought either way to whether the disclosure involves a public interest element cannot therefore succeed. If however there is plainly a public interest element it is likely to be relatively straightforward to establish some awareness of and belief as to this.

If a genuine belief is held, a value judgement may then be required but what is required may depend on the particular circumstances of the worker and the resources available to them. More might be expected of somebody with expertise in the area or with the ability and resources to assess the significance of the information: see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 (EAT).

Bearing these considerations in mind, we suggest that guidance which was issued by the Government in its June 2013 policy document needs to be treated with considerable caution. The document commented that:
“In future, whistleblowing claims will only be valid where an employee blows the whistle in relation to a matter for which the disclosure is genuinely in the public interest. This will exclude breaches of individuals’ employment contracts and breaches of other legal obligations which do not involve issues of a wider public interest.”

It is not the case that the disclosure must be “genuinely in the public interest”. Whether that is intended to convey that it must in fact be in the public interest, or that it requires only a genuine belief, it fails to reflect the reasonable belief test. As noted above, the belief must not only be genuine but also reasonable. The question as to whether it is sufficient that the breach of a legal obligation involves issues of a wider public interest is discussed at paragraph 3 below.

A number of further questions of interpretation arise:

1. No definition is provided of “the public interest”- a concept which is not without its difficulties; see generally Jameel and others v Wall Street Journal Europe SPRL [2006] UKHL 44, [2007] 1 AC 359 in the context of the Reynolds defence to a claim of defamation and the cautionary words in Smith Kline and French Laboratories (Australia) Ltd v Department of Community Services and Health [1990] FSR 617 Gummow J at 663. In most cases it may be expected that this will be addressed on the basis that the starting point will be to hear from the worker as to why it was believed that disclosure was in the public interest and then to assess if that was a tenable view i.e. that it was reasonably available to the worker.

2. There may be an issue as to whether the new test entails a focus on the motive of the worker making the disclosure. The key issue here is whether the test indicates that the worker must reasonably believe that making the disclosure is in the public interest (irrespective of the worker’s motive), or whether it entails a focus on the worker’s motive for making the disclosure (or indeed whether both are relevant). Take the example of the claimant, Mrs Street, in Street v Derbyshire Unemployed Workers’ Centre [2005] ICR 97 (CA), the leading case on the meaning of the previous good faith test. She made disclosures which plainly had a public interest element. These included allegations that, in effect, her boss had engaged in fraud to obtain funding for the Centre at which she worked. Even though she was found to have had an honest and reasonable belief that her allegations were substantially true, her claim failed because her principal reason for making the disclosures was found to be personal antagonism for her boss. The question then arises as to whether the same would follow under the new test. Would her ulterior motive mean that her disclosure was not made in the public interest but was instead made out of personal antagonism? Or would it be open for her to say that irrespective of her motive for making the disclosure, she held a reasonable belief that making it was in the public interest (i.e. that it was in the public interest that the disclosure be made irrespective of the reason for doing so)?

Taking the revision to s.43B(1) alone it might be thought that there is indeed a focus on motive. After all, in reaching its decision in Street the Court of Appeal placed emphasis on the introductory wording of the Public Interest Disclosure Act 1998, as being an Act “to protect individuals who make certain disclosures
of information in the public interest”. This therefore mirrored the language now inserted in s.43B ERA.

But there are two factors which strongly suggest that the new test is not about motive. First, the context of the change was that it was intended to reverse the rule in *Parkins v Sodexo* where a worker could raise a qualifying disclosure on the basis of a breach of a legal obligation even if there was no public interest element to the disclosure. The focus of the change was therefore on the subject matter of the disclosure rather than on motive. Second, and still more significantly, at the same time as introducing the new public interest test, the previous good faith requirement was removed and relegated to a remedy issue. This clearly contemplated that a claimant could succeed at the liability stage notwithstanding a predominant ulterior motive for making the disclosure. Indeed the plain reason for making the change was in recognition that a focus on the motive for making the disclosure could have an excessive deterrent effect; encouraging employers to seek to discredit the motives of the “messenger” rather than listening to the message.

3. There may be an issue as to whether the test is solely concerned with whether the disclosure is reasonably believed to involve the public interest, or is also concerned with whether it also requires a value judgment as to whether in all the circumstances it was in the public interest that the disclosure be made. By way of illustration, a worker who is aware of some data from clinical testing which indicates that the MMR vaccine may have some dangers would no doubt be able to establish a reasonable belief that a disclosure as to this involves the public interest. But, having regard to issues of herd immunity, or considerations as to whether the data has been adequately checked and verified, and also depending on to whom the disclosure is made, it may not be reasonable to believe that making the disclosure is in the public interest.

The distinct issues as to whether the disclosure (a) involves the public interest and (b) whether making it is in the public interest, is brought into focus by the public interest defence contained in the Defamation Act 2013, which received Royal Assent on the same day as ERRA (25 April 2013). Section 4 of that Act provides:

“(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.”
At common law it was emphasised that the *Reynolds* privilege defence entailed consideration not only of the public interest content, but also of whether the publication was appropriate in the particular circumstances: see *Flood v Times Newspapers Limited* [2012] 2 AC 273 (SC). That is plainly also the case for the new statutory defence. It might be said that, particularly given that this legislation received Royal Asset at the same time as the ERRA, it is a strong indication of the dual elements implicit in the new public interest test in ERRA.

As against that, the different context in which s.4 Defamation Act 2013 is likely to be applied should not be overlooked. It is most likely to be invoked in the context of disclosure to the public generally. That is to be contrasted with the carefully constructed structure for protected disclosures, with its differing conditions depending on to whom the disclosure is made. Bearing that structure in mind, it can be said that where a disclosure is reasonably believed to involve the public interest, it would be inappropriate to impose on workers the further hurdle of having to establish a reasonable belief that in all the circumstances it was in the public interest that the disclosure be made. Instead the appropriate further conditions to be applied are those provided by ss.43C to 43H depending on to whom the disclosure is made.

The same argument can be put in another way. Even if there is an additional requirement for a value judgment as to whether disclosure not only involves but serves the public interest, that could only realistically be of any significance in first level disclosures (i.e. within ss.43C, 43D or 43E). For wider disclosures (ss.43G or 43H) there is a requirement that it was reasonable to make the disclosure in all the circumstances (see paragraphs 5.34 to 5.41 and 5.43 of the main work for a discussion of these provisions). On any view that is a more stringent test than the test of a reasonable belief that the disclosure is in the public interest, since it applies an objective standard rather than a standard of reasonableness viewed from the worker’s perspective. It is therefore inconceivable that a worker, who reasonably believes that a disclosure involves the public interest, could meet all the requirements of s.43G and 43H and yet fail to establish a reasonable belief that the disclosure was made in the public interest.

The same can be said of a disclosure to a prescribed regulator. In that instance (as for wider disclosures) a worker must hold a reasonable belief that the disclosure and any allegation contained within it is substantially true. Again, it may be difficult to conceive of a case where, despite satisfying that requirement and holding a reasonable belief that the disclosure involves the public interest, a worker’s claim would fail on the basis that in all the circumstances he or she did not reasonably believe that making the disclosure to a regulator was in the public interest.

That then only leaves first level disclosures. The policy of the legislation is very much to encourage the making of such disclosures as an early warning signal. Further, in relation to such disclosures it is rather less likely that there will be strong countervailing public considerations which make it unreasonable to believe that making the disclosure is in the public interest despite a reasonable belief that it involves the public interest.
Nevertheless it is possible to conceive of situations where it will be argued in relation to first level disclosures that, even if a worker reasonably believed disclosures involved the public interest, it could not reasonably have been believed that disclosure was in the public interest. Suppose, having initially raised the disclosure, the worker persists in repeating the same disclosure over and again, notwithstanding that it is known that the issues raised are already under investigation. Repeated disclosures can still be qualifying disclosures because of s43L which provides that a reference to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention (though see the suggested limits on this in Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR 325 (EAT), discussed at [3.15] of the Main Work and below). Suppose also that knowing that the matter is under investigation at an appropriate level of management, the employee insists on escalating it to Board level, cutting across reporting lines. That can still be a qualifying disclosure “to the employer” even though “the employer” already knows of it through the lower level of management. Can it then be said that the continued insistence on disclosing the same matters, and cutting across lines of investigation before an investigation has been concluded, does not serve and could not reasonably be believed to serve any public interest? There might be an argument that it will be detrimental to the efficient administration of the company or public body that its Board is distracted by a disclosure which could and should be raised at a lower level- at least unless and until the worker has a reasonable basis for concluding that he or she is not being taken seriously- or that management is engaged in a cover up or that the serious nature of the information or the urgency of any threat explains the needs for escalation.

The issues liable to arise may be illustrated by the decision of the EAT in Ezsias v North Glamorgan NHS Trust [2011] IRLR 550. Mr Ezsias was a surgeon who held concerns as to the clinical competence of colleagues. His complaints were described by an internal inquiry panel as ‘excessively frequent, unacceptably detailed, and unrelenting to an extreme degree’. In turn complaints were made against him by colleagues who were the subject of his complaints. Ultimately he was suspended and then dismissed on the basis of an irretrievable breakdown of relationships with his colleagues. He contended that his complaints amounted to protected disclosures, and that his dismissal was automatically unfair. In his skeleton argument he claimed that there were 75 topics that he complained about. The employment tribunal concluded that it did not need to deal with each of these matters because the complaints were part of Mr Ezsias’ ‘campaign’ against certain colleagues and that the real reason why he made the complaints was to further that campaign, and the disclosures were therefore not in good faith. That reasoning was specifically approved by the EAT (at paras 24, 37).

Whilst there were other grounds on which the claim failed, without further explanation this begs the question as to what the purposes of the campaign

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1 See the EAT’s judgment at para 24.
were. To assert that a campaign was being pursued does not without further explanation address whether it is a campaign to have the relevant failures prevented or dealt with, or whether there is some other ulterior objective of the ‘campaign’. But the question now arises as to whether in the absence of good faith as a barrier, a tribunal could say that there comes a point, in the unrelenting campaign where it could no longer be seen as furthering any public interest and instead amounted to a campaign of harassment.

That said, allegations may well be repeated or escalated by a worker if not satisfied that they have been resolved. But it does not follow that such disclosures could be regarded as not made in the public interest even though reasonably believed to involve disclosures of information which tends to show a relevant failure, and to involve matters of public interest. Indeed perseverance and a determination to be heard and heeded may well be the hallmark of a worker who is genuinely concerned as to matters which are the subject of the disclosure. Indeed experience indicates that all too often it is precisely that determination and resilience which is required before the disclosure is heeded, if it is heeded at all.

4. One potential focus for dispute is as to the circumstances in which a private contractual dispute might give rise to public interest issues. In resisting an amendment which would have confined the exception to cases involving breach of private contractual rights, the Government noted that not all such cases would be excluded. An example may be the case of an employee who holds a regulatory or compliance function, and raises a complaint as to interference with her performance of her role. That might in turn reasonably be believed to raise a wider public interest issue as to the consequences of regulatory failings. Another variable may be where the party in breach is a public body alleged to be abusing power. Or more broadly it might be argued that there are broader public interest issues engaged where the worker reasonably considers that what at first blush is a private grievance in fact should be seen more broadly as exposing wrongdoing of an employer who tends to avoid their employment obligations. In each case it would be for the tribunal first to assess whether that view was genuinely held at the time of the disclosure and whether the view that the disclosure was made in the public interest was one that the worker could reasonably hold.

5. Equally, albeit less likely, the issue may also arise in relation to relevant failures other than past, present or further breach of a legal obligation. One area of controversy is a case where, in the context of an essentially private grievance, a worker contends that she is being caused stress at work. That might be sufficient to found a reasonable belief that health and safety is being endangered (as it was in Fincham v HM Prison Service EAT/0925/01 and EAT/0991/01, 19 December 2002). But given the legislative aim of excluding essentially private complaints, there may be a significant issue as to whether it was reasonably believed that the disclosure was made in the public interest.

Whilst the new public interest test raises some quite different issues from the previous good faith test, there is liable to be some evidential overlap in the matters which are raised as bearing on whether the new requirement is satisfied.
One possibility is that the ulterior motive may be seen as clouding judgment which a tribunal may take into account in relation to whether belief was objectively reasonable. That was an approach adopted in relation to the pre-existing reasonable belief test in Easwaran v St George’s University of London EAT/0167/10, 28 July 2010. One issue was whether Mr Easwaran held a reasonable belief that the temperature in a cadaver room was liable to cause pneumonia. He was involved in an angry altercation as to this, and Underhill J commented that: “it is clear that the Tribunal saw this as a case where his anger … led him into taking an extreme and unjustifiable position about the risk of pneumonia.” (para 23)

A further possibility is that a tribunal may conclude that the worker was so consumed by the personal campaign or antagonism, that no consideration was given to any wider public interest issues. The fact of having used an overtly public interest route, such as the whistleblowing procedure, may be important to counter such a submission. It does not though follow that use of a different route such as a grievance process is inconsistent with having the requisite reasonable belief.

There are other instances where factors relied upon to evidence lack of good faith, and indeed genuine belief in the wrongdoing, may also be relied upon in the alternative as showing lack of genuine or reasonable belief that disclosure was in the public interest. That is particularly so if it is relevant to consider not only whether the disclosure involves public interest issues, but whether in all the circumstances disclosure was in the public interest. An illustration is provided by the decision in Phipps v Bradford Hospitals NHS Trust EAT/531/02, 30 April 2003. The claimant wrote a letter to the medical director raising concerns as to treatment of patients with breast cancer. It was held that the disclosure was not in good faith. The tribunal drew an inference that the claimant had sent the letter to put a marker down that his position was not to be lightly challenged by the medical director. It took into account that (a) the issue had already been the subject of a report and discussion within the Respondent and (b) a failure by the claimant to set out sufficient information in the letter or subsequently to enable the concerns to be investigated. Under the new regime the same matters would no doubt be relied upon to contend that there was no reasonable belief that the disclosure was made in the public interest. The argument could proceed by questioning how it could reasonably have been believed that the disclosure was in the public interest where the matter had already been subject of a report and if the claimant was not going to provide sufficient information to enable the matter to be further investigated.

The judgment of the EAT in Fincham v HM Prison Service (EAT/0925/01 and EAT/0991/01, 19 December 2002) may be thought to indicate that the worker has to actually identify, albeit “not in strict legal language”, the breach of legal obligation which he or she has in mind when disclosing information. As suggested in the main text this was not easy to reconcile with later authority, in particular what Elias P himself said in Bolton [2006] IRLR 500 at para 41. In Western Union Payment Services UK Limited v Anastasiou UKEAT/0135/13/LA the EAT accepted that what mattered was the context. Given all the circumstances would the employer have appreciated at least the general nature of the relevant failure. If that was the case then there was no need for the worker to spell it out. Western Union was concerned with
information given by the employee when he was being asked questions on behalf of the employer as part of an investigation as to whether statements made by the employer to the stockmarket as to the likely number of branches to be opened within the next year should have been made. Mr Anastasiou expressed the view that they should not have been made. In dismissing Western Union’s argument that it was necessary for Mr Anastasiou to identify the legal obligations that were engaged and had or might have been broken by the making of the statements to the stock market the EAT accepted the submission for Anastasiou that the context had to be considered. The information disclosed and circumstances of the disclosure by Fincham were not such as to make it reasonably obvious what relevant failure she had in mind. That was not the case with Mr Anastasiou or Mr Evans in the Bolton case. In both of those cases the context made the relevant legal obligation (sufficiently) apparent.

**Guidance to Tribunal’s as to the proper approach to protected disclosure cases**

See Blackbay Ventures Limited T/A Chemistree v Ghahir Appeal Nos. UKEAT/0449/12/JOJ UKEAT/0450/12/JOJ noted below under Chapter 7.

3.05 **The requirement that the disclosure contain “information”**

Four recent decisions clarify and arguably limit the impact of the Cavendish and Goode decisions. In Millbank Financial Services Ltd v Crawford [2013] UKEAT 0290_13_2009 [2014] IRLR 18 C was a chartered accountant employed by MFS as financial director designate. Her employment was expressed to be subject to a probationary period of six months. During this probationary period she was entitled to one month's notice; after the probationary period she was entitled to three months' notice during the following year. Thereafter, she was entitled to six months' notice. During her probation and at a probation review meeting C was told that her probationary period was being extended and that MFS had concerns about some aspect of her performance. There was no suggestion at that meeting that she would be dismissed. On 15 October, in preparation for a further meeting to be held the following day, C sent a letter by to senior management of MFS. The letter expressed C’s deep disappointment at the way in which the probation review was carried out. It set out some of the background history and a critique of the way that C said she had been treated during her period of employment. In her claim form C argued that the contents of the letter contained protected disclosures. In its response, MFS accepted that it dismissed her because on receiving her letter dated 15 October it became concerned about what it described as her 'combative attitude and inability to accept constructive criticism'. It argued, however, that the letter contained no 'information' for the purposes of s.43B; her allegations, therefore, did not amount to a protected disclosure; and the claim should be struck out. A pre-hearing review was listed to determine this question. C argued that her letter contained information which, in her reasonable belief, tended to show failure by MFS to comply with legal obligations in the following respects: breach of the implied term of trust and confidence; breach of director's statutory duties under the Companies Act 2006; and breach of director's duties under the FSA Code of Conduct. MFS appealed the ET’s refusal to strike out the claim. In dismissing the appeal the EAT distinguished Cavendish. The distinction drawn in Cavendish was between mere allegation or assertion or statement of position on the one hand and the conveying of facts on the other. It is, however, clear from
Cavendish that the facts conveyed might relate to an omission (‘the wards have not been cleaned for the last two weeks’) just as they may relate to a positive action (‘sharps were left lying around’). C’s letter had stated that there had been no feedback during the probationary period; no consultation with the person recruited to carry out the HR function; no consultation with the director, just a single meeting at the end of the probation period with no plan of action and no idea how long the probation period would last. The letter backed up the lack of communication with facts about a failure to ask her to prepare a preliminary report on a matter within her remit and by giving details of the only email which was ever sent to her about changes to her role. It went far beyond simply making an allegation or stating a position. It set out the factual basis of C’s complaint in considerable detail. Although the letter asserted omissions, taking for granted the known fact that MFS has extended her probationary period when it had no contractual right to do so it conveyed facts for the purposes of the whistleblowing provisions in the sense that it conveyed facts about what had not been done.

Norbrook Laboratories (GB) Limited v Shaw [2014] UKEAT 0150 132401 was an appeal from a decision of the ET on a PHR that two emails sent by S on 30 November and 6 December 2010 taken together were capable of amounting to qualifying disclosures. S was Norbrook’s Sales and Business Communications Manager. His duties included managing a team of Territory Managers who operated throughout the United Kingdom. The Territory Managers drove to customers and potential customers to obtain sales. The winter of 2010 was particularly severe and the roads were covered with snow. The Territory Managers were having difficulty getting to their appointments and they raised this with S as their Manager, they were concerned that inability to get to appointments might affect their pay. S in turn sent three relevant emails to Norbrook. In the first he asked for “some advice on what my Territory Managers should do in terms of driving in the snow. Is there a company policy and has a risk assessment been done.” The ET was clear that this could not be a disclosure of information, it was simply an enquiry. The reply was rather vague so in a second email S said he

“was hoping for some formal guidance from the company. The team are under a lot of pressure to keep out on the roads at the moment and it is dangerous. Do I log this as the formal guidance?”.

In a third email S said he was:

“…only after a simply [sic] policy statement to increase transparency and help build morale and goodwill within the team. As their manager I also have a duty to care for their health and safety. Having spent most of Monday and Friday driving through snow I know how dangerous it can be. In addition the time spent battling through the snow is unproductive; they can gain more sales by phoning customers. If they are not going to be paid then I have to put in contingencies for diverting calls to those team members still on the road. In the absence of any formal guidance I take full responsibility for the directions given to my team.”

The EJ gave a self direction that for there to be a qualifying protected disclosure there had to be a disclosure of information. Having considered Cavendish the EJ held that,
looking at the email correspondence as a whole, a number of statements were being made by S as well as queries raised by him. S was informing his employer that the road conditions were so dangerous that the health and safety of his team was being placed at risk. Even though such facts may have been obvious in any event to the employer that did not prevent S in providing that information in the course of the emails making a disclosure which was capable of amounting to a qualifying disclosure within Section 43B(1)(d).

On appeal to the EAT, Norbrook contended that this was perverse and/or erroneous and that no underlying wrong or failure had been identified. Reliance was placed on Goode in support of a submission that S’s state of mind about weather conditions was not the foundation for a reasonable belief that there was any relevant failure as regards the health and safety of any specific member of the team. As in Goode the communications were "…only 'information' in the sense of being a statement of his state of mind…” and as in Cavendish simply voicing a concern, raising an issue or setting out an objection was not the same as disclosing information." Yet further there was nothing in the language of ERA section 43B which permitted a "qualifying disclosure" to consist of several separate disclosures over different days and communicated to different individuals.

The EAT dismissed the appeal. The disclosure must be of information not an allegation (Cavendish paragraph 24). Nor can it be an expression of opinion or a state of mind (Goode paragraph 36) – though as to this see Western Union (below). Further, the information had to be of facts which in the reasonable belief of the worker making the disclosure tended to show (in this case) that the health and safety of any individual had been, was being or was likely to be endangered. An earlier communication could be read together with a later one as "embedded" in it rendering the later communication a protected disclosure even if taken separately they would not fall within section 43B(1)(d) (Goode paragraph 37). Accordingly two communications could taken together, amount to a protected disclosure. Whether they did was a question of fact. The EJ did not err in concluding that in the emails taken together S was communicating information. He was drawing attention to the danger posed to Territory Managers of driving in snowy conditions. This was not just as an expression of an opinion or making an allegation. Information was being provided.

In Greenly v Future Network Solutions Limited [2013] UKEAT 0359_13_1912 the EAT held that it was not appropriate to strike out a case at a PHR because although the pleaded case tended to suggest that no “information” had been disclosed it was possible, when evidence was heard by an ET, that it would emerge that information had been disclosed or was apparent from the context. In that case too the EAT confirmed that two communications taken together could amount to a protected disclosure where neither, standing on its own, would have satisfied the requirements of the section.

In Western Union (see above) the EAT also considered a submission on behalf of the employer that all that Mr Anastasiou had done was disclose his opinion that the projections as to branch openings should not have been given to the stock market by the employer. The EAT rejected this argument. They said that they would follow and apply the approach adopted by the EAT in Cavendish, Goode and Smith: that s.43B
ERA requires the disclosure to be one “of information”, not merely the making of an allegation or statement of position but that

“the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.”

The EAT observed that Mr Anastasiou was providing responses to an investigation. That investigation was concerned with whether the information given to the stock market was correct or whether it had been misleading. To some extent, Mr Anastasiou was being asked to provide his opinion but not simply as to whether he considered the statements in the conference calls should have been made but as to the actual sales position as he understood it. Having made its findings as to what Mr Anastasiou had said in the investigation, the ET concluded that he had provided information – obviously derived from his experience and knowledge of what was happening - as to the likelihood of meeting the sales target and as to the appropriateness of including particular the accounts. The EAT would uphold that finding.

The approach in Western Union provides strong support for the approach suggested in the Main Work (at paras 3.06 to 3.11). There is no bright line divide between statements of opinion and statements of fact, such that only the latter be sufficient for a qualifying disclosure. A statement of opinion will at least disclose the fact that a person holds that opinion. It is a separate question whether that is information which could reasonably be believed to tend to show a relevant failure. It is important to keep those two questions distinct (as emphasised in Easwaran). Context is all important. In Goode the mere expression of a state of mind (the statement that the worker was “disgusted”) could not reasonably have been believed to tend to show a relevant failure. That will not necessarily always be the case. At the very early stage when a person raises the alarm, there may be the minimum of detail provided because the worker reasonably expects to be given the opportunity to expand on the basis for the concerns. In context the simple communication by a worker that, for example, s/he has discovered a suspected fraud, whilst only disclosing a state of mind or opinion, might in context tend to show a relevant failure. The argument would be stronger if that person was in a position where their opinion was expected by its nature to carry weight e.g. if the warning is given by an employee entrusted with an internal auditing responsibility. It would be unsatisfactory if, before the employee has been offered the chance to expand on the concerns, it was open to the employer to dismiss in response to the warning, and then to say that no protected disclosure has yet been made. Conversely if at a stage when the employee has had the opportunity to expand on concerns there is nothing added to substantiate a mere state of mind or expression of opinion, it may well be that the mere fact that the worker holds a particular opinion would be wholly insufficient to support any contention that the worker reasonably believed that it tended to show a relevant failure.
Chapter 4

Removal of the good faith requirement

In each of those sections where it appears, that is to say 43C, 43E, 43F, 43G and 43H, the requirement that a disclosure must be made “in good faith” to be protected was deleted by section 18 of ERRA in relation to disclosures made on or after 25th June 2013. As such, subject to the issue canvassed above as to the meaning of the new public interest test, a predominant ulterior motive will generally no longer mean that the claim fails at the liability stage. That is subject to the qualification that motive still remains a relevant consideration for wider disclosures within sections 43G and 43H. These exclude disclosures made “for the purposes of personal gain”. At least at first instance this has been construed as extending beyond financial gain, so as to include the motive of securing an employment advantage. See the discussion of Kajencki at [5.25] of the Main Work.

Further, the Tribunal has been given a new power to reduce the compensation payable in respect of detriment (s.49(6A) ERA) and to reduce a compensatory award for unfair dismissal (s.123(6A) ERA), by up to 25% where the tribunal is satisfied that the disclosure was not made in good faith. There would seem to be no reason why the law as outlined in chapter 4 will not continue to apply for this purpose. As it now turns out that amendment will be limited to the inclusion of student nurses.

Chapter 5

See now the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014 which makes Members of Parliament prescribed persons with effect from 6th April 2014.

Chapter 6

6.05 See also Suhail v Herts Urgent Care UKEAT/0416/11/RN, 14 November 2012, where the EAT upheld a tribunal’s finding that the claimant, who worked as an out of hours GP for the respondent was not a “worker”. Crucially in that case the GP did not contract directly with the Primary Care Trust (now the NHS Commissioning Board), so the extended meaning of worker in s.43K(ba) (as amended by ERRA) would not assist. Contrast Hospital Medical Group Limited v Westwood [2013] ICR 415 (CA), where the doctor was integrated into the employer organisation and properly regarded as a worker, and Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13/LA, 24 April 2013 where it was accepted that a GP was a worker employed by a Health Board.

6.07 – 6.23

Section 20 of ERRA made amendments to section 43K with effect from 25th June 2013 (ERRA section 103 (2));
(ba) works or worked as a person performing services under a contract entered into by him with a Primary Care Trust under section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to section 84 or 100 of, the National Health Service Act 2006 or with a Local Health Board under section 41(2)(b), 42, 50, 57, 64 or 92 of, or Schedule 7 to section 42 or 57 of the National Health Service (Wales) Act 2006, or with a Primary Care Trust under section 117 of that Act.

(bb) works or worked as a person providing services under a contract entered into by him with a Health Board under section 17J or 17Q of the National Health Service (Scotland) Act 1978,

(c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services works or worked as a person providing services in accordance with arrangements made—

(i) by a Primary Care Trust under section 126 of the National Health Service Act 2006 or Local Health Board under section 71 or 80 of the National Health Service (Wales) Act 2006, or

(ii) by a Health Board under section 2C, 17AA, 17C, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(ea) works or worked as a person performing services under a contract entered into by him with a Health Board under section 17Q of the National Health Service (Scotland) Act 1978.

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment; and any reference to a worker’s contract, to employment or to a worker being ‘employed’ shall be construed accordingly.

(2) For the purposes of this Part 'employer' includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(aa) in relation to a worker falling within paragraph (ba) of that subsection, the Primary Care Trust or Local Health Board referred to in that paragraph.

(ab) in relation to a worker falling within paragraph (bb) of that subsection, the Health Board referred to in that paragraph.
(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and

(ba) in relation to a worker falling within paragraph (ca) of that subsection, the Health Board referred to in that paragraph, and

(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section 'educational establishment' includes any university, college, school or other educational establishment.

Section 20 also added a new subsection 4 to section 43K which gives the Secretary of State new powers to make amendments to that section as to what individuals count as “workers” for the purposes of Part IVA. An order under subsection (4) may not make an amendment that has the effect of removing a category of individual unless the Secretary of State is satisfied that there are no longer any individuals in that category. Any such amendment will be made following the results of the Government’s call for evidence referred to above.

6.07 See now Keppel Seghers UK Ltd v Hinds [2014] UKEAT 0019_14_2006. H was self described as “a site-based Health and Safety Adviser”. He worked within the construction and civil engineering industry engaged on projects as a consultant. His evidence, which was accepted by the Tribunal, was that it is a prerequisite for obtaining work as a Health and Safety consultant within his industry that he provides his services through a company. He was the sole share-holder, director and employee of such a company (“Crown”). He had never employed anyone else and the only purpose of establishing Crown was to meet industry requirements in providing his own consultancy services. Keppel was involved in the construction of energy recovery facilities. At the relevant time it was working on a construction project for a final client, TPS, and approached a recruitment agency (“First”) with a specification for a contractor that it required for this project. The ET found that First sourced the individual contractor

"according to those specifications and put him forward for interview. [Keppel] conducted the interview themselves … [it] interviewed [H] in person …”

There was no direct contractual relationship between H and Keppel such as might enable this case to fall within s 230 ERA. The ET found that H was:

"… ultimately supplied to the respondent via two corporate entities. The first was his own umbrella company Crown … . The services of Crown were not directly supplied to [Keppel] but instead a further intermediary, a recruitment agency called First … set up an interview with the respondent which [H] had at their site in Runcorn, and subsequently was engaged to provide services to them in connection with a construction project that was being done for a final client called TPS."

In considering how H had been introduced to Keppel and how his services were then supplied, the ET found that it was:
"… [H] himself that was introduced to and supplied to do work ultimately for the respondent and not his company, Crown. In the interview that he had with [Keppel] … the interview was with him personally. It was clearly [H] himself who was being engaged by [Keppel] …"

The contract between Keppel and First contained a requirement that any individual contractors providing services to Keppel would have to do so through intermediary companies and envisaged that the contractors (rather than the companies via which they were required to supply their services) would be subject to suitability checks. It was found that it was not in the parties' contemplation that any intermediary company could substitute anyone else for the individuals who had thus been assessed. Whilst the terms on which First engaged (Crown) allowed for a substitute, the ET found that the terms of the end user (Keppel) did not envisage that.

The ET expressly rejected Keppel’s argument that H was in fact employed by Crown and he was able to determine his own terms through that entity (see paragraph 8). The ET held, instead, that Keppel substantially determined the terms of H’s engagement for section 43K(1)(a)(ii) purposes and was the employer for section 43K(2) purposes. The ET found that Keppel set the specification for the work; Keppel authorised changes to H’s hours, he could not dictate his hours; H was obliged to report regularly to Keppel’s manager and was generally subject to Keppel’s control, albeit as a health and safety professional he worked on his own much of the time and was not micro-managed. H’s evidence that it was Keppel that decided that he should leave and also determined the terms of his departure (i.e. his period of paid notice) was not challenged.

HHJ Eady said it was notable that section 43K put the focus on the way in which the relationship had arisen and had been governed: the introduction or supply and the "in practice" substantial determination of the terms of the engagement. That reflected the fact that the whole purpose of this statutory extension to the definition of "worker" and "employer" was to go beyond the normal contractual focus of those terms for statutory purposes in the employment field. She referred to the recognition by Cox J in Sharpe v (1) The Worcester Diocesan Board of Finance Ltd and (2) The Bishop of Worcester UKEAT/0243/12/DM the phrase "terms on which he is or was engaged to do the work" do not imply the existence of a contract (see paragraph 237). Absence of actual day-to-day control would not be determinative. Regard would need to be had to the totality of the contractual provisions and all the circumstances of the relationship, see White v Troutbeck SA [2013] IRLR 949, CA. Section 43K is a provision that takes employment lawyers outside the comfort zone of the contractual approach normally required in determining employment status. The protection extends to relationships where there is no contract in existence between the parties and to cases where there might be no direct contract between the complainant and the user of her services but contracts between each of them and other parties, impacting upon (if not governing) their relationship. This might include a contract between the complainant and an employment agency where the complainant is engaged through her own service company. The focus of s 43K is on what happened in practice rather than on the contractual agreement albeit the contracts provide a useful starting point in this case.
The ET had not lost sight of that or reached conclusions inconsistent with the contractual provisions in question. What happened in practice was that there was a focus on the suitability of H as an individual (not on Crown): H was "sourced" at an individual meeting and was interviewed as such and not as a representative of Crown. That provided sufficient basis for the ET's conclusion that H was introduced as an individual for section 43K(1)(a)(i) purposes. It was “perhaps unhelpful” that the ET did not expressly separate out its consideration of the issue of “supply” from that of introduction but there might be some degree of overlap in terms of the relevant findings of fact in respect of these terms. In any event the judgment had to be read as a whole and the ET clearly kept in mind the important point in each respect: was it H as an individual who had been introduced or supplied? In respect of supply, the ET was again entitled to rely on the same matters as those in relation to the question of introduction. There was force in H’s submission that a contractual right to provide a substitute need not exclude the application of section 43K. The focus of the definition at 43K(1)(a)(i) is on the factual question as to whether or not the complainant has been supplied; it did not include a requirement that no-one else could be supplied in her place. The existence of a right of substitution might point to the fact that it was not, in truth, the complainant who was being supplied but this might not necessarily be so. However that was not a point that arose for determination.

As to the issues raised on the question of determination of the terms of H’s engagement Keppel’s submission was that under section 43K(1)(a)(ii), the focus could be broader – the terms might be determined by more than one entity and might include terms on which the complainant was engaged to do the work (i.e. projecting forward) rather than simply being the terms upon which she is engaged (the reality of what has transpired). HHJ Eady said that both provisions allow that the terms of the engagement might have been determined by more than one entity. Section 43(1)(a)(ii) simply distinguished between terms substantially determined by the worker themselves and terms substantially determined by others. Section 43K(2)(a) then takes the assessment further forward to define the employer as being the party (which, by this stage, cannot be the worker) who substantially determines or determined those terms.

The context of the phrase "to do the work" was is in respect of those terms which "are or were in practice substantially determined ...". There might be a distinction to be drawn as between this provision and the wording of section 43K(2)(a) but the subtlety of it seemed likely to limit its usefulness. In any event HHJ Eady was unable to understand how it was a distinction with practical application in the present case. Keppel had contended in the ET that looking at who had substantially determined the terms on which H was to do the work inevitably led to the answer that Crown did and that, as the sole Director of Crown, that really meant that H had done so. The ET rejected that contention. It held that Crown was simply a vehicle through which H’s services were supplied (as an industry requirement). The ET was entitled to focus on the specific terms of the engagement in question and found that Keppel was in the position of determining both H’s initial terms of engagement ("the terms on which he was engaged to do the work") and during the course of the agreement's operation. Given that the ET had found that it was Keppel which had laid down the specification for the engagement and had interviewed H personally to see if he was suitable, it was entirely consistent for the ET to conclude that Keppel had also determined the initial terms of the engagement. The ET was entitled to look at the various contracts...
relevant to the relationship and to see how these worked in practice. Although the ET referred to “control”, control was not irrelevant to the question as to who determined the terms on which work is to be done. The ET was plainly influenced by the fact that the requirements of the work were laid down by Keppel and that was obliged to report to its manager. Those findings of fact plainly supported its conclusion as to both the initial determination of the terms on which H was "to do the work" and as to the continuing determination of those terms (i.e. that it was the Respondent which was the employer for section 43K(2)(a) purposes). The ET had regard to Keppel’s ability to determine (or control) the terms of the Claimant's engagement through the question of hours and shift arrangements as examples of how this worked in practice. That disclosed no error of law. Other examples were also set out in the evidence.

The appeal was dismissed.

6.37 See now Clyde & Co LLP and another (Respondents) v Bates van Winkelhof (Appellant) [2014] UKSC 32 reversing Bates van Winkelhof v Clyde & Co LLP [2012] EWCA Civ 1207 [2012] IRLR 992. BvW was a member of the respondent LLP. The Court of Appeal held that under s.4(4) of the Limited Liability Partnerships Act 2000 if Clyde & Co had not been registered as an LLP then Winkelhof would have been a partner in an 1890 Act partnership. She was therefore not a “worker” within the meaning of s.230(b) of ERA and therefore could not pursue a whistleblowing claim. The Supreme Court allowed BvW’s appeal. Lady Hale (with whom Lord Neuberger and Lord Wilson agreed) said that the 2000 Act was a UK-wide statute, that there was doubt about whether partners in a Scottish partnership can also be employed by the partnership. It was that feature which explained why section 4 (4) had been included in the 2000 Act. There was no need to give “a strained construction” to section 4(4). All that it was saying was that, whatever the position would be were the LLP members to be partners in a traditional partnership, then that position is the same in an LLP. That was how section 4(4) was to be construed. Once the section 4 (4) point was cleared out of the way the result in favour of worker status became, if not a matter of foregone conclusion, at least one to which a fairly clear pathway lay. Lady Hale opened her discussion of the point by remarking that it was striking ‘how much hard work has to be done in order to find that a member of an LLP is not a worker within the meaning of section 230(3)(b) of the 1996 Act.” It was common ground before the Supreme Court that BvW worked “under a contract personally to perform any work or services”, that she provided those services “for” the LLP and that the LLP was not her “client or customer”. The EAT’s approach had been correct.

Chapter 7

7.41

As to the references to Orr v Milton Keynes Council and the state of knowledge of the dismissing officer, see the updating notes to paragraphs 7.51 and 8.11 below.

7.27A

In Engel v The Joint Committee for Parking & Traffic Regulation Outside London (P.A.T.R.O.L) UKEAT 0520/12/LA, 17 May 2013, the EAT held that a decision by the Chief Adjudicator of the Traffic Parking Tribunal not to allocate cases to a fee paid Parking Adjudicator could not amount to a detriment for the purpose s47B of the Employment Rights Act 1996 because it was made by her in the execution of judicial functions in her capacity as a judicial office holder. Accordingly, it was covered by judicial immunity.

7.50 “On the ground that”

See Northumberland Tyne & Wear NHS Foundation Trust v Geoghegan [2014] UKEAT 0048_13_2901 which was an appeal against findings that the respondent subjected the claimant to detriment for making protected disclosures. The appeal was allowed. The detriments had been identified but the ET’s reasoning did not sufficiently explain how those detriments were related to the protected disclosures.

See also on this point Western Union Payment Services UK Limited v Anastasiou [2014] UKEAT/0135/13/LA where the EAT remitted the case to the ET.

See also The Co-Operative Group Ltd v Baddeley referred to in the notes under paragraph 8.11 below.

In Blackbay Ventures Limited T/A Chemistree v Ghahir Appeal Nos. UKEAT/0449/12/JOJ and UKEAT/0450/12/JOJ the EAT issued guidance as to how ETs should approach a claim of victimisation for making protected disclosures. The guidance is, for the most part, equally applicable to dismissal claims.

– Each disclosure\(^2\) should be separately identified by reference to date and content.

– Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

\(^2\) Applying Greenly v Future Network Solutions Limited [2013] UKEAT 0359_13_1912 a disclosure may be made from more than one communication.
– The basis upon which each disclosure is said to be protected and qualifying should be addressed.

– If a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.

– It is not sufficient …to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations.

– It is …proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

– The ET should then determine
  • whether or not the Claimant had the reasonable belief
  • whether each disclosure was made in good faith/whether it was made in the public interest

– Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant.

– This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

### 7.51-7.66 Knowledge of the protected disclosure: an important caveat

The focus on the mental processes of the employer discussed in these paragraphs needs to be understood with one important qualification. It is *not* always necessary to establish that the person who actually inflicted the detriment was aware of the protected disclosure. In *Western Union Payment Services UK Limited v Anastasiou* [2014] UKEAT/0135/13/LA there was no evidence that those employees who had actually subjected the worker to detriment had been aware of the making of the protected disclosure. The worker’s case was that those employees had been instructed to subject him to detriment(s). The EAT said (at paragraph 74) that they could see that – hypothetically - there might be cases where there was an organisational culture or chain of command such that the final actor might not have personal knowledge of the

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3 This ought, we suggest, to have been a reference to the need to be satisfied that the worker reasonably believed that it was in the public interest that the disclosure be made.
protected disclosure but where it nevertheless still materially influenced the treatment of the complainant worker. However in such cases it would still be necessary for the ET to explain how it had arrived at the conclusion that this is what had happened and the EAT concluded that that explanation had not been given in that case: accordingly the case was remitted. (Disposal hearing [2014] UKEAT 0135_13_1205).

See also the discussion of *The Co-Operative Group Ltd v Baddeley* under Chapter 8 where the Court of Appeal refers to the possibility that the dismissing officer is manipulated by some other person involved in the disciplinary process who has an inadmissible motivation- what it described as an “Iago situation”.

The age discrimination case *Dr Reynolds v Clfis (UK) Ltd* UKEAT/0484/13, 21.5.14 should also be noted. Dr Reynolds was employed by Canada Life FS and was in her seventies. Her contract was terminated by Mr Gilmour on behalf of Canada Life after rumblings of discontent with her performance within management. Her claim that she had been discriminated against on the ground of her age was dismissed by the ET. The ET had said that the decision-maker was Mr Gilmour and no one else. However-as Singh J put it in the EAT - , that was not necessarily the end of the matter.

On Dr Reynolds’ behalf it was argued that even if the sole decision-maker was Mr Gilmour, his decision was shaped and informed by others within Canada Life. If the actual decision to terminate an employee’s contract was taken by a senior manager that person might have no personal knowledge of the employee and might have to rely entirely on reports which have been prepared by others, for example about an employee’s performance or conduct. Dr Reynolds’ contention was that if the mental processes of those who prepared such reports were based on discriminatory grounds, then in principle the Tribunal had to examine those mental processes and could not confine itself to the mental processes of the eventual decision-maker alone. Singh J agreed: he said that the precise point of law that arises had not been the subject of direct authority in the past but drew support for his conclusion from *Nagarajan* and *Igen*. To discharge a reversed burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive.”

The Employment Tribunal found as a matter of fact that the views of others did play that part, in particular a presentation by a Mr McMullan and a Mr Newcombe to Mr Gilmour. But it failed to examine the mental processes of those persons to see if they were based on the prohibited ground of age.

Upholding the appeal Singh J said it will always be a question of fact for the tribunal. It may well be that, having examined the mental processes of those people who are known to have been involved in a significant way in the process leading up to a decision to terminate a person’s employment, the tribunal will conclude that the respondent has discharged the burden of proof. In Dr Reynolds’ case, even though it was known that other identified people were involved in a significant way in the process which led up to Mr Gilmour’s decision to terminate her contract, *their* mental processes had not been addressed by the Tribunal. That was an error of law. It is understood that the case is being appealed.
Section E. Subjection by the employer

The meaning of “subjecting” in this context was considered by the EAT in *Abertawe Bro Morgannwg University Health Board v Ferguson* [2013] UKEAT/0044/13/LA, 24 April 2013, in the context of a GP’s claim against a Health Board. Various allegations were made of deliberate failures to act by investigating the claimant’s concerns, treating his identity with due confidentiality and protecting him from reprisals from the colleagues in the GP’s practice. It was also alleged that the Health Board had subjected the GP to detriments by reason of protected disclosures in forcing her to take voluntary leave as an alternative to suspension and forcing her to be subjected to an investigation. The EAT upheld the tribunal’s refusal to strike out the claim. It rejected the Health Board’s contention that the phrase “subjected to” entails an element of wilfulness. That concept was unnecessary given the needs for the act or failure to act to be by reason of a protected disclosure. Instead the phrase “subjected to” merely connotes an element of causation. The phrase is used instead of the phrase “caused by” so as to encompass deliberate failures to act. So far as concerns deliberate failures to act, there is no necessary requirement that there must be a duty to act. It is sufficient if there is a discretion to do so. It is then sufficient if it is established that the respondent deliberately decided not to act by reason of the protected disclosure.

Vicarious and co-worker liability

ERRA made sweeping changes to section 47B in relation to a claim based on qualifying disclosures made on or after 25th June 20134. It introduced “co-worker” and agent liability for any detriment done to a worker by another worker of the worker’s employer and, reversing the effect of the Court of Appeal’s decision in *Fecitt* (referred to in paragraph 7.37 of the main work), made that employer liable for co worker detriment subject to a reasonable steps defence. As amended s.47B provides by new subsections 1A to 1E that a worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure. Where a worker is subjected to such detriment then that is treated as also done by the worker's employer. For the purpose of the subsection it is immaterial whether the thing is done with the knowledge or approval of the worker's employer, however in proceedings against the claimant worker’s employer based on victimisation by a co-worker (but not an agent), it is a defence for the employer to show that the employer took all reasonable steps to prevent the co worker from doing the thing complained of or from doing anything of that description. A worker or agent of the employer is not liable for doing something that subjects the claimant to detriment if the worker or agent does that thing in

4 see Enterprise and Regulatory Reform Act 2013 (Commencement No 1, Transitional Provisions and Savings) Order 2013, SI 2013/14550.
reliance on a statement by the employer that doing it does not contravene the Act, and it is reasonable for the worker or agent to rely on the statement. However that defence does not prevent the employer from being liable to the claimant worker.

The forms of liability and defences follow the model used in the Equality Act 2010 and its predecessor statutes and the case law in relation to those provisions will fall to be considered and applied.

“course of that other worker’s employment...”

As to “course of that other worker’s employment” see Jones v Tower Boot Co Ltd [1997] IRLR 168, [1997] ICR 254, CA taking a purposive approach: tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words 'in the course of employment' in the sense in which every lay-man would understand them. The test was wider than the doctrine of vicarious liability as applied by the common law of tort at that time, but the common law has itself developed since. The test now adopted at common law is whether the tort of the employee is so closely connected with his employment that it would be fair and just to hold the employer vicariously liable (Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 AC 215 and Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48, [2003] 2 A.C. 366). For recent case law on the meaning of “course of employment” in that context see Weddall v. Barchester Healthcare; Wallbank v. Wallbank Fox Designs [2012] EWCA Civ 25 (CA) [2012] IRLR 307.


“....an agent of W's employer with the employer's authority..”

The leading case is Lana v Positive Action Training in Housing (London) Limited [2001] IRLR 501 considering the parallel provision in s.41(2) of the Sex Discrimination Act 1975: the authority referred to must be the authority to do an act which is capable of being done in a discriminatory manner just as it is capable of being done in a lawful manner. See also Bungay v Saini UKEAT/0331/10, 27 September 2011, [2011] EqLR 1130, applying the common law rules of agency principles explained in Bowstead and Reynolds on Agency (18th edition-1-001) and approved in Yearwood v Commissioner of Police of the Metropolis [2004] ICR 1660, 36. The test of authority is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal and not whether the principal had in fact authorised the putative agent to discriminate.

“...took all reasonable steps to prevent...”

On the face of the statute the reasonable steps defence is available only in relation to co workers and not agents (but see Victor-Davis v London Borough of Hackney UKEAT/1269/01 for a discussion of an alternative approach). The reasonable steps may be taken generally or with specific reference to the act complained of. The burden will be on the employer to show that reasonable steps were taken. The proper approach is to focus on what steps were actually taken prior to the act complained of and whether it would have been reasonable to take further steps: see Canniffe v East Riding of Yorkshire Council [2000] IRLR 555); and Al-Azzawi v Haringey London
**Borough Council (Haringey Design Partnership Directorate of Technical and Environmental Services) UKEAT/158/00, 3 December 2001.** By way of examples see *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045, [2003] ICR 1425 and *Caspersz v Ministry of Defence* UKEAT/0599/05/LA, 3 February 2006. The question is one of fact: *Enterprise Glass Co Ltd v Miles* [1990] ICR 787, EAT, *Balgobin v Tower Hamlets London Borough Council* [1987] ICR 829, EAT.

The imposition of vicarious liability accentuates the desirability of an effective and effectively monitored whistleblowing policy which will assist the employer in showing that reasonable steps were taken to prevent victimisation of a whistleblower by co-workers.

7.79

See also *Mr A Blitz v Vectone Group Holdings Ltd* UKEAT/0253/10/DM, 29 November 2011, where the EAT upheld the distinction drawn by the Employment Tribunal between the disclosure and the manner in which it was conveyed.

7.125

In relation to footnote 54 see *Dolby v Sheffield City Council* [2012] EWCA Civ 1474 (15 November 2012).

7.87 to 7.90

The decision in *Martin v Devonshires* was considered by the EAT in *Woodhouse v West North West Homes Leeds Ltd* UKEAT/0007/12/SM, 5 June 2013, which was another discrimination case. The EAT emphasised the exceptional circumstances in *Martin v Devonshires*. As the EAT noted in *Woodhouse* at [102]:

“*Martin* cannot be regarded as some sort of template into which the facts of cases of alleged victimisation can be fitted. There are no doubt exceptional cases where protected acts have not caused the dismissal or whatever other detriment is at issue. *Martin* is an example of such an exceptional case. But we emphasise the word exceptional; very few cases will have grievances based on paranoid delusions about events that never happened. It seems to us the process of measuring cases against such a yardstick is a dangerous one. One person's conviction that they have been discriminated against is very likely to generate the polar opposite, i.e. that the complainant is irrational, in the person or organisation complained about. Experience of this type of litigation teaches that grievances multiply and so the fact that here are a series of them is not unusual. It is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievances can lead, as a matter of routine, to the case being placed outside the scope of section 27 of the Equality Act. …”

However the pendulum swung – emphatically- back the other way in *Panayiotou v Kernaghan* [2014] IRLR 500 (EAT) a whistleblowing case. P was a policeman who was found to have been subjected to a series of detriments and was ultimately dismissed from the force. The ET found that P made a number of protected disclosures. He contended that the fact that he had made those protected disclosures
influenced the employer in acting as it did and was the reason, or the principal reason, for his dismissal. The tribunal concluded that the employer acted as it did because of P’s long term absence on sickness grounds together with the manner in which P had pursued his complaints. He would not accept any answer save that which he sought and, if he was not satisfied with the action taken following a complaint, he would pursue the matter to ensure that his view prevailed. As a result, the force was having to devote a great deal of management time to responding to P’s correspondence and complaints and he had become “completely unmanageable”.

On P’s behalf it was argued before the EAT that it was not possible to separate out the fact of making a protected disclosure from the frustration of the employer at having to deal with the disclosures or the campaign to right the wrongs that Mr Panayiotou perceived had not been corrected. The EAT disagreed. Section 47B ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. That accorded with Bolton School v Evans [2007] ICR 641. Whilst it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, the employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did. That was the case here. The EAT disagreed with the suggestion in Woodhouse that there was an additional requirement that the case be exceptional for the principle of separability to apply. On the findings of the ET the reason why the force acted as it did was not in any sense whatsoever for an unlawful reason: rather it was the combination of his long term absence and the way in which he pursued his views.

7.122

See Flynn v Warrior Square Recoveries Ltd [2014] EWCA Civ 68, [2014] All ER (D) 48 (Feb) - the threat of a defamation action had disappeared by 30 November 2009. It followed that, once the EAT had correctly identified the legal error on the part of the tribunal in focusing on detriment rather than on act or deliberate failure to act in relation to the issues of time, it had been inevitable that it would be driven to the conclusion that the relevant acts or failures to act in the form of the threats and the failure to withdraw them had ceased to exist long before June 2010.

Chapter 8

8.11

See now The Co-Operative Group Ltd v Baddeley [2014] EWCA Civ 658. The Tribunal’s Reasons for Judgment attracted some attention (the EAT describing the case as being "not the Tribunal's finest hour") because of their somewhat unusual style- what Underhill LJ referred to as:

“...frequently rhetorical, not to say tabloid. The tone can be illustrated by reference to the use of such terms as "stitch-up", "the strong stench of conspiracy", "Machiavellian intrigue" and "a brutal act of managerial homicide"."
Language aside, the case is significant in being one of a number of examples of the appellate courts being dissatisfied, in the context of a whistleblowing claim, with the exposition of the tribunal’s findings of fact and reasoning (see the notes to paragraph 7.50 above). The ET’s decision survived scrutiny at EAT level but not by the Court of Appeal; see Underhill LJ at paragraphs 58 to 60.

However it is also of importance- and these notes concentrate on this aspect- for remarks made by Underhill LJ (who gave the only reasoned judgment) on the subject of “the reason or principal” reason for dismissal, whose “reason” is in issue. We have referred to what might be seen as a parallel development in relation to detriment (and discrimination) in the notes to the preceding chapter.

B was employed by the Co-Op from November 2007 until his dismissal for misconduct on 20 December 2010. In the later part of his employment by the Co-Op he was Quality Assurance Manager. The ET held that the reason for B’s dismissal was that he had made protected disclosures and that the dismissal was thus “automatically” unfair under section 103A ERA. It also held that it would, if section 103A had not applied, have found his dismissal to be unfair under the ordinary provisions of section 98 of the Act. The EAT upheld this decision.

As summarized by Underhill LJ the ET’s reasoning was that, following B’s protected disclosures in connection with sales of date expired pharmaceutical drugs, his line manager, Mr Berne, who resented those disclosures, decided that B “had to go”. Mr Berne used the events surrounding a sale of expired date drugs (with which B had been associated) and a report from a Trading Standards Officer as an opportunity to get rid of B and “orchestrated” his dismissal on that basis. A Mr Atkinson and a Mr Logue took (at least in formal terms) the decisions to dismiss and then to refuse B’s appeal, but they were found to have done so in pursuit of Mr Berne’s agenda. The Tribunal found, at para. 15.1.3, that “[B’s] dismissal was in consequence of his making disclosures qualifying for protection” although in a summary of its conclusions at the end of the Reasons (section 19) the Tribunal also stated that “the reason or principal reason for his dismissal [was] that [B] made a protected disclosure”.

In discussing the “reason or principal reason” requirement Underhill LJ’s judgment traverses the ground covered in paragraph 8.11 of the Main Text, referring to the classic explanation by Cairns LJ in Abernethy and the “set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee”. Underhill LJ comments that Cairns LJ’s exact language “may not be wholly apt in every case” but the essential point is that the “reason” for a dismissal connotes the factors operating on the mind of the person or minds of the persons who made the decision to dismiss: he notes that the same approach applies to the “ground” for a putative detriment contrary to section 47B. Underhill LJ remarked that it had been accepted in the Court of Appeal in the instant case (and appeared to have been accepted by the ET) that the relevant decision-makers – that is, the persons whose motivation was in issue– were Mr Atkinson and Mr Logue (the dismissing and appeal officers). In principle it was immaterial what Mr Berne might have thought or wanted except to the extent that that operated on the minds of Atkinson and Logue.

Underhill LJ added however that there might be circumstances where the actual decision-
maker acted for an admissible reason but the decision was unfair because the facts known to him or beliefs held by him had been manipulated by some other person involved in the disciplinary process who had an inadmissible motivation – “an Iago situation”. But that did not appear to be the way that the ET had viewed the case because Mr Atkinson and Mr Logue were found, not to be innocent dupes but knowing participants, who consciously followed Mr Berne’s agenda. Underhill LJ’s remarks (which were obviously not relevant to B’s case) can be set alongside those of the EAT in Anastasiou referred to in the notes to paragraph 7.51 above.

Underhill LJ went on to point out that it would not be enough for the Tribunal to find that Mr Atkinson and Mr Logue welcomed the opportunity to dismiss B for misconduct because he was a whistleblower – or because they knew that that was Mr Berne’s view. That was not the same as a finding that that was their reason for either Mr Atkinson in dismissing him or, in the case of Mr Logue, rejecting his appeal. Underhill LJ referred to and expressed agreement with the explanation given by the EAT, Elias J presiding, in ASLEF v Brady [2006] IRLR 576, at paras. 78-79 (p. 584):

"78. We would agree that in principle there is indeed a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. ([Counsel for the employer] in fact drew a distinction between reason and motive, but we do not think that the analysis in this case is assisted by referring to the elusive concept of motive.) An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords. For example, it may be that someone perceived by management to be a difficult union official is perfectly properly dismissed for drunkenness. The fact that the employers are glad to see the back of him does not render the dismissal unfair. What causes the dismissal is still the misconduct; but for that, the employee would not have been dismissed.

79. It does not follow, however, that whenever there is misconduct which could justify the dismissal a tribunal is bound to find that this is indeed the operative reason. The Thomson case [Times Corporation v Thomson [1981] IRLR 522] shows that even a potentially fair reason may be the pretext for a dismissal for other reasons. To take an obvious example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then in our view the reason for dismissal – the operative cause – will not be the misconduct at all. On this analysis, that is not what has brought about the dismissal. The reason why the employer then dismisses is not the misconduct itself. Even if that in fact merited dismissal, if the employee is treated differently to the way others would have been treated, being dismissed when they would not have been, then in our judgment a tribunal would be fully entitled to conclude that the misconduct is not the true reason or cause of the dismissal. The true reason is then the antipathy which the employer displays towards the employee."

Underhill LJ referred to the similar exposition in Governing Body of John Loughborough
School v Alexis UKEAT/0583/10, at paras. 32-34). He accepted that distinguishing between cases falling on either side of the line might not be straightforward and would often require careful consideration of the decision-makers’ mental processes.

D. Constructive Dismissal

8.16–8.17

An illustration of the points discussed in these paragraphs is the discrimination case of Clements v Lloyds Banking Plc & Ors [2014] UKEAT 0474_13_3004. C, who was in his 50s, occupied a senior role in Lloyds. His manager had performance concerns, and thought it time for C to move on from his role. The ET found that the manager did not tell C of this view in a proper manner (and thereby committed what was part of a cumulative breach of the implied term of trust and confidence). At one stage of their first conversation the manager said (twice) to C “You’re not 25 anymore”. The ET found that this was discriminatory on the ground of age, even though not intended in that way. After further events at work, C resigned. The ET held that he was entitled to treat himself as constructively dismissed by reason of Lloyds’ breach of the trust and confidence term by seeking to move him on from one role to another without adopting any proper process to do so. Although it had held the specific words found to have been used by the manager to be discriminatory in themselves, it also considered that the use of those words was not a material part of the conduct which amounted to the breach in response to which the claimant resigned. It was careful not to say that the discriminatory words of 5th January were actually part of the breach it held repudiatory. Rather, what it said about 5th January 2012 was that Mr. Shawcross’s approach was not a proper way to go about telling the Claimant that there were concerns about his performance serious enough to call into question whether he should remain in his Business Continuity role. The Tribunal did not separately identify the discriminatory act as part of that breach. Rather, the Tribunal found the employer to be in repudiatory breach by adopting a course of conduct which it found to be an approach seeking to move the Claimant out of his current role, and to appoint someone else.

As Langstaff P put it (at paragraph 28) the Tribunal had found a repudiatory breach but the issue was whether discrimination, as such, was a cause of the dismissal. The real question for determination was whether the resignation was because of the discrimination in any real causative sense. The conclusion that it was not was one of fact: a robust approach has to be taken by courts and tribunals to determining whether of not a particular act has caused or materially contributed to a given effect, for the purposes of determining which of two parties should suffer a given loss – here, the damage caused to the claimant by the discrimination for which he could claim compensation. The Tribunal had considered whether the discrimination involved in telling the claimant he was no longer 25 had played any material part in the breach in response to which the claimant resigned. It did so by asking (appropriately) whether it had “tainted” the dismissal. Its conclusion that it did not was one of fact which would not be upset absent an error of approach/perversity.

8.24
See also *Ross v Eddie Stobart Ltd* UKEAT 0068/13/RN, 28 June 2013, citing paragraph 8.24 and following the authorities there mentioned, upholding the principle that an employee with insufficient qualifying service bears the burden of establishing the alleged automatically unfair reason for dismissal.

**Chapter 9**

In relation to detriment claims, ERRA inserts a new s.49(6A) ERA as follows:

(6A) Where—

(a) the complaint is made under section 48(1A), and

(b) it appears to the tribunal that the protected 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 worker by no more than 25%.

Similarly in relation to unfair dismissal, ERRA amends section 123 of the Employment Rights Act to add a new provision in relation to the compensatory award as follows:-

(6A) Where—

(a) the complaint is made under section 48(1A), and

(b) it appears to the tribunal that the protected 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 worker by no more than 25%.

**9.23 – 9.27**

Now see *Kaltz Ltd v Mrs B Hamer* UKEAT/0198/11/RN, 24 February 2012, where it appears to have been agreed that a deduction could be made for contributory fault where automatically unfair dismissal was made out.

See also *Audere Medical Services Ltd v Sanderson* UKEAT 0409/12/RN, 29 May 2013 which also addresses this point and where the EAT noted that it could see no reason in principle where there could not be a reduction for contributory fault in a case of automatically unfair dismissal by reason of a protected disclosure.

In the light of the reforms introduced by ERRA, an issue is liable to arise as to the relationship between a reduction for contributory fault and the ability to reduce the compensatory award where an employee is found not to have acted in good faith in making the disclosure. In particular, can a tribunal circumvent the limit of 25% on the reduction for good faith by making a further reduction in relation to lack of good faith under the heading of contributory fault? The argument against is that it would be contrary to the statutory scheme. By placing a limit on the extent of the reduction for not acting in good faith, a balance is struck between (a) not overcompensating those who act for an ulterior motives and (b) seeking not to deter workers from raising the alarm for fear that their motives will be attached. The counter-argument is that
there is no inconsistency in allowing a further reduction for contributory fault. A reduction can be made under the heading of contributory fault only if the ulterior motive was causatively relevant to the dismissal, whereas there is no such requirement to make the reduction of up to 25% under the specific good faith provision.

In any event, in most cases this issue can be evaded by drawing a distinction between the ulterior motive, and the acts or failure to act from which good faith might be inferred. Thus, commonly a lack of good faith is inferred from acts or failures to act of the employee, e.g. in seeking to gain an employment advantage (Bachnak v Emerging Markets Partnership (Europe) Limited EAT/0288/05, 27 January 2006) or from refusal to cooperate with an internal investigation (Street v Derbyshire Unemployed Workers’ Centre [2005] ICR 97 (CA)) or to set out sufficient information to enable the allegation to be investigation (Phipps v Bradford Hospitals NHS Trust EAT/531/02, 30 April 2003) or generally acting inconsistently with what would be expected of someone acting in good faith (Muchesa v Central and Cecil Housing Care Support EAT/0443/07, 22 August 2008). In each case there would be acts or failures to act, distinct from the ulterior motive, which if causatively relevant to the dismissal might be taken into account when assessing contributory fault, albeit whilst taking care to avoid double-counting.

For a discussion (though not in a whistleblowing context) of the role of contributory fault in constructive dismissal cases see Firth Accountants Ltd v Law UKEAT/0460/13/SM,

Chapter 10

See now the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237.

10.46

See also Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13/LA, 24 April 2013, in which the EAT stressed (at para 33) that the circumstances in which it will be possible to strike out a fact-sensitive protected disclosure claim are likely to be rare and that:

“In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.”

Para 15.43

As to the scope of the positive duty of disclosure of an employee who does not owe relevant fiduciary duties, see now Ranson v Customer Systems Plc [2012] IRLR 769 (CA) and Imam-Sadeque v Bluebay Asset Management (Services) Limited [2013] IRLR 344. The Court of Appeal emphasised that there is no general duty on employees to report a fellow employee’s misconduct or a breach of contract. Such a duty must arise of the terms of the employee’s contract of employment, the nature of the employee’s role and responsibilities. More controversially it was also suggested
by Popplewell J in *Imam-Sadeque* that the nature of the threat and the circumstances in which the employee becomes aware of it are also relevant. Popplewell J noted at [133] that a senior manager who becomes aware of a competitive threat to an aspect of the business for which he is responsible will normally come under such a duty, whereas a junior employee with such responsibility would not.

In *QBE Management Services (UK) Limited v Dymoke* [2012] IRLR 458, Haddon-Cave J stated that the working assumption should be that directors and senior employees ought to disclose (a) any action at all, if taken by others, that would lead to competitive activity, and (b) any action of their own, as soon as the irrevocable intention to compete is formed unless they resigned immediately. At least so far as concerns employees who do not owe relevant fiduciary duties, that statement must now be regarded as too broad in the light of the Court of Appeal’s decision in *Ranson*. Instead it would be necessary to consider carefully the specific contractual obligations of the employee, including those that can properly be implied in the light of the employee’s role and responsibilities, in order to ascertain whether by way of divergence from the general rule, a duty of disclosure arises. Equally however the approach in *Ranson* indicates that the earlier first instance decision of *Lonmar Global Risks Limited v West* [2011] IRLR 138 took too narrow an approach in suggesting that any positive duty of disclosure arose only where there were relevant fiduciary obligations giving rise to the duty.

See also *Thomson Ecology Ltd & Anor v APEM Ltd & Ors* [2013] EWHC 2875 (Ch) (24 September 2013) which considers contractual duties of disclosure in relation to competitive activity during gardening leave.