

Whistleblowing – Where Are We Now?

James Laddie KC

Employment Law Group (NI) Conference

28 March 2025

Introduction

- Who is covered?
- Protected disclosures
 - Qualifying disclosures
 - Protected disclosures
- Detriment claims
- Dismissal claims

Who May Bring a Claim?

- Under ERO, Art.67K, WB protection applies to an extended definition of “worker”; see also Art.67KA (extension to police officers)
- *Gilham v MoJ* [2020] IRLR 52 – WB provisions extended to cover a district judge via reliance on ECHR Arts.14 & 10; the relevant “*other status*” was held to be C’s of judicial office
- *C.f. Sullivan v Isle of White Council* [2024] IRLR 350 – job applicants fall outside the WB regime and could not rely on the ECHR

Protected Disclosures (1) - QDs

- Broad, 2-stage process: qualifying disclosure broadly relates to the quality of the information; if a qualifying disclosure is established, then further tests are imposed upon the worker's state of mind according to the identity of the recipient of the disclosure. See Art.67A-H
- Five steps in proving a QD:
 - Disclosure of information
 - C believes that such disclosure is in the public interest
 - C's belief is reasonable
 - C believes that the disclosure tends to show one of the matters in Art.67B(1)(a)-(f)
 - C's belief is reasonable

Protected Disclosures (2) - QDs

- Whether the disclosure is of information?
- See *Kilraine v London Borough of Wandsworth* [2018] ICR 1850
 - Held:
 - No rigid dichotomy between information and allegation
 - “The question in each case...is whether a particular statement or disclosure is a “disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]”...In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)”
 - This has since been relied on to strike out claimed PDs in numerous cases. See, e.g., *Twist DX Ltd v Armes* [2020] UKEAT/0030/20; *Carr v Bloomberg LP* [2022] EAT 49.

Protected Disclosures (3) - QDs

- Public interest: *Chesterton Global v Nurmohamed* [2018] ICR 731. Does it lower the bar for Cs? See Underhill LJ @ [36]:

“I am not prepared to rule out the possibility that the disclosure of a breach of a worker’s contract...may...be in the public interest, or reasonably so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect...tribunals to be cautious about reaching such a conclusion, because the broad intent behind [the introduction of the public interest test] is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection...even...where more than one worker is involved. But I am not prepared to say never.”

- This does allow for strike-out applications: see *Carr*

Protected Disclosures (4) - QDs

- Re reasonableness of belief: must take account of the characteristics of the worker making the disclosure: *Korashi v Abertawe Morgan* [2012] IRLR 4
- Re Art.67B(1)(b) cases (“breach of a legal obligation”):
 - insufficient to complain of a breach of a moral obligation, company policy etc: *Korshunova v Eiger Securities LLP* [2017] IRLR 115
 - except in obvious cases, the source of the legal obligation should be defined (at ET stage): *Arjomand-Sissan v East Sussex Healthcare NHS Trust* [2019] UKEAT/0122/17
- Pleading points:
 - Cs – less is more; identify the PDs that are (i) most likely to have led to detriment, and (ii) most likely to be proved as PDs
 - Rs – require Cs to provide further information including precision as to the words relied on as constituting the QDs

Detriment (1)

- A detriment claim must arise in an employment context:
Tiplady v City of Bradford School [2020] IRLR 230
- Detriment must be given a broad meaning, as in discrimination cases i.e. treatment will be a detriment if a reasonable worker would or might take the view that the treatment was detrimental; this would exclude unjustified grievances – see *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1226
- Tribunals have taken a purposive approach to timing when it comes to both PDs and detriments; liability for detriment may be imposed in relation to PDs made prior to employment – *MacLennan v British Psychological Society* [2024] EAT 166

Detriment (2)

- Art.70B(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
- Art.70B(1A) 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.
- Art.70B(1B) Where a worker is subjected to detriment by anything done as mentioned in paragraph (1A), that thing is treated as also done by the worker’s employer.
- Art.70(2) this Article does not apply where
 - the worker is an employee, and
 - The detriment in question amounts to dismissal (within the meaning of Part XI)

Detriment (3) – who is liable?

- *Timis v Osipov* [2019] ICR 655 – held that directors of an insolvent company could be liable for acts of detriment that amount to dismissal; also suggested that employers would be vicariously liable; this led to a critical pleading change – in almost every case, Cs should plead detriment (of dismissal) vs both an individual and the employer
- The question of whether, post-*Timis*, an employer may be vicariously liable for an employee's detriment of dismissal is now the subject of contradictory EAT decisions: *Wicked Visions v Rice* [2024] ICR 675 vs *Treadwell v Barton Turns Development Ltd* [2024] EAT 137.
- There is also a live question about whether *Royal Mail Group v Jhuti* [2020] ICR 731 applies in detriment cases (i.e. the attribution of the motivation of a manipulative manager to an innocent):
 - *William v Lewisham & Greenwich NHS Trust* [2024] ICR 1065 holds that *Jhuti* does not apply
 - *First Great Western v Moussa* [2024] IRLR 697 holds that an employer can be held to have imposed detriments without identifying any one person who was motivated by PDs

Dismissal claims (1)

- *Kong v Gulf International Bank (UK) Ltd* [2022] IRLR 854
 - C raised protected disclosures vs Head of Legal; questioned HoL's legal awareness; HoL complained; detriment claim vs HoL out of time; C dismissed by separate decision-makers for unreasonable conduct; ET held that, although C had behaved reasonably, decision-makers genuinely believed she had not; AUD claim failed
 - Discussion of separability: once the reasons for particular treatment have been evaluated, the tribunal must evaluate whether those reasons are separate from the PD or so closely connected with it that a distinction cannot fairly and sensibly be drawn; CA rejected contention that a C's behaviour must reach a threshold of seriousness before it can be distinguished as separable from the making of the PD itself
 - Whilst this is a case on its own facts, it is regarded as having rendered it easier for Eers to justify a dismissal for reasons closely related to the original PD

Dismissal claims (2)

- Interim Relief – see ERO, Arts.163-167
 - Increasing incidence of IR applications
 - Requirement that C is “*likely to*” succeed in an Art.134A AUD claim, so a v. high bar, especially at a preliminary stage
 - But in an appropriate case, an IR application may be strategically powerful, especially for settlement:
 - May catch R on the hop
 - Typically produces early disclosure
 - Brings the claim into the public domain: *Queensgate Investments LLP v Millet* [2021] ICR 863

ma
tr
ix

James Laddie KC

jladdie@matrixlaw.co.uk

Matrix Chambers
Griffin Building, Gray's Inn
London WC1R 5LN
DX400 Chancery Lane, London