WHISTLE BLOWING IN THE TIMES OF COVID

Introduction

1. Whistleblowing claims have very much become a regular part of the employment law arsenal and can sometimes feel like a bit of "kitchen sink" claim. This webinar seeks to focus on the applicable law, and how to deal with such claims that may arise during the Covid 19 pandemic. It will not focus on s 44 or s 100 of the ERA (Health and safety detriments and dismissal) which have been widely covered elsewhere.

The Beginning

2. The Public Interest Disclosure Act 1998 came into force on the 2nd July 1999. It is a short act of Parliament. It consisted entirely of amending provisions to existing legislation, and in particular to the Employment Rights Act 1996, providing the frame work for whistle blowing claims.

3. It may be a short act of Parliament but it had big ideas. It was introduced as a private member's bill in the light of disasters such as the Zeebrugge ferry disaster and the Clapham train disaster, both events where blowing the whistle may have prevented the disaster occuring. The long title gives an idea of what the 1998 Act set out to do:

"An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes."

4. The 1998 Act aimed to achieve these laudable aims by introducing specific rights into the Employment Rights Act 1996, including the right not to suffer a detriment for making a protected disclosure (section 47B of the ERA) and the right not to be unfairly dismissed for making such a disclosure (section 103A of the ERA) and following the changes, a right not to be subject to a detriment by colleagues (section 47B(1A)).

The Statutory Framework

5. Section 43B of the ERA provides that a protected disclosure is a qualifying disclosure:

43B.— Disclosures qualifying for protection.

(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][2] 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, is being or is likely to be deliberately concealed."

By Whom

6. The protection applies to "workers" within the meaning of section 230(3) of the ERA. This can include a member of an LLP: see Clyde & Co LLP v Bates Van Wilnkelhof [2014] IRLR 641. Even Judges can avail themselves of the protection as it has been found necessary to interpret the ERA provisions to include them despite the lack of a necessary contractual relationship because to do otherwise was discrimination on grounds of status in violation of Article 14 of the ECHR: see Gilham v Ministry of Justice [2020] IRLR 52. However, not so for the poor rector in the Bishop of Worcester's diocese who was found not to have a contract in existence: see Sharpe v The Bishop of Worcester[2015] IRLR 663.

The What - Disclosure of Information v Allegation

7. There has been much caselaw on what qualifies as a qualifying disclosure in the above categories. In the useful case of Geduld v Cavendish Munro Professional Risks Management Ltd[1], the Employment Appeal Tribunal held that there must be a disclosure of information rather than just making an allegation. There was a distinction between communicating information and making an allegation. In that case, a solicitor's letter alleged that their client, a shareholder, had been unfairly prejudiced by the company. The EAT said:

"24. Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that: "you are not complying with health and safety requirements." In our view this would be an allegation not information. 25. In the employment context, an employee may be dissatisfied as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position."

8. In the case of Goode v Marks & Spencer Plc[2], a case about proposed changes to an enhanced redundancy payment scheme, the EAT held that the expression of an adverse opinion (in this case that G was 'disgusted' with proposals), about the employer's proposal, could not amount to the conveying of information.

[1] [2010] ICR 325
[2] [UK EAT/0442/09/DM]

9. In Western Union Payment Services v Anastasiou[3], the EAT looking at *Cavendish Munro* and *Goode*, observed:

   "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 particular case will always be fact-sensitive."

10. In Kilraine v London Borough of Wandsworth [4] the Court of Appeal approved the EAT holding that the tribunal had been justified in rejecting the employee's claim of having suffered a detriment as a result of making a protected disclosure, and applying *Cavendish Munro* stating:

    "I would caution some care in the application of the principle arising out of Cavendish Munro…the dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but it is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information."

11. In Eigger Securities LLP v Korshunova[5], the EAT Before finding that an employee had made a qualifying disclosure an employment tribunal should have identified the source of the legal obligation to which the employer was subject, and set out how it had been breached. It was not sufficient merely to point to actions which the employee believed were morally wrong. In that case, the EAT held that the employee had stated that it was wrong for her manager to trade from her personally designated computer without making it clear that she was not the person making the trade. If the statement had stopped there it might have been no more than an allegation of wrongdoing. However, she went on to tell her manager what her clients thought of his behaviour. That was new information and an

[3] EAT 21 February 2014
[4] [2018] IRLR 846 – Court of Appeal decision.
[5] [2017] I.R.L.R. 115

example of a situation in which allegation and information were intertwined, as in the case of *Kilraine* applied. The tribunal had not erred in concluding that the employee had disclosed information within the meaning of s.43B(1)

12. The legal obligation does not even in fact to exist. The test is the objective reasonableness of the employee's belief which is in issue, as made clear in the Babula case[6] at paragraphs 75 to 77. The Court of Appeal held that there was no implication in section 43B(1)(b) that the whistleblower is likely to be right or that objectively, the facts must disclose a likely criminal offence or an identified legal obligation. In that case, B, an American and a business studies lecturer, was told by his students that his predecessor had divided his class into Islamic and non-Islamic students, and had told his students that he wished a September 11th incident would occur in London. B believed this to a threat to national security and at least a threat to incite racial hatred. He contacted the CIA and FBI and informed his college that he had done so. This disclosure led to a series of acts which B alleged caused him to resign and claim constructive unfair dismissal on the ground that he had made a protected disclosure. The claim was struck out for having no reasonable prospects of success on the basis that the facts showed an incitement to religious, not racial, hatred and that this was not a crime at the time.

To whom

14. A qualifying disclosure must be made to one of the category of persons specified by:

i. disclosure to the employer - S.43C(1)(a)
ii. disclosure to the person responsible for the relevant failure - S.43C(1)(b)
iii. disclosure to a legal adviser - S.43D
iv. disclosure to a Minister of the Crown - S.43E
v. disclosure to a prescribed person - S.43F

[6] Previous caselaw of Kraus v PennaPlc [2004] IRLR 260 disapproved.

vi. external disclosure in other cases not to persons in (i) to (iv)- S.43G – only if the worker reasonably believes the information to be substantially true, does not make the disclosure for the purposes of personal gain and it is reasonable to make the disclosure.

vii. disclosure of exceptionally serious failures – s 43H – to the press - only if the worker reasonably believes the information to be substantially true, does not make the disclosure for the purposes of personal gain and it is reasonable to make the disclosure and the failure is of an exceptionally serious nature.

15. The right not to be subject to a detriment is contained in section 47B:

47B.— Protected disclosures.

(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.

[

(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.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B)."

16. Where the detriment is a dismissal, section 103A applies:

"103A. Protected disclosure.
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

The 2013 Amendments

17. In 2013, to stem the tide of "kitchen sink" type whistle blowing claims relating to an individual's contract of employment resulting from the Parkins v Sodexho Ltd [2002] IRLR 109 that a breach of an individual's contract of employment could amount to a beach of a legal obligation, the requirement that the worker reasonably believes that the disclosure is made in the public interest was inserted into section 43B by the Enterprise and Regulatory Reform Act 2013.

Public Interest

18. Indeed, the way the post-2013 caselaw has developed is exactly as predicted and the "public interest" threshold has been relatively easily overcome.

19. In the Chesterton Global Ltd (Trading as Chestertons) and another v Nurmohamed[7] the Court of Appeal considered the "public interest" test. Mr Nurmohamed alleged that Chestertons were manipulating its accounts, affecting his bonus/commission of 100 senior managers and made disclosures about this to Chestertons.

20. The Court of Appeal held that the essential point was that to be in the public interest the disclosure had to serve a wider interest than the private or personal interest of the worker making the disclosure. T relevant factors to be weighed in the tribunal's analysis included the numbers in the affected group, the nature of the interests affected and the extent to which they were affected, the nature of the wrongdoing, and the identity of the alleged wrongdoer. The number of people sharing the interest was not determinative, such that the fact that at least one other person shared the interest was insufficient in itself to convert it into a matter of public interest, and, conversely, it was wrong to say that the fact that it was a large number of people whose interests were served by the disclosure of a breach of the contract of employment could never, in itself, convert a personal interest into a public interest not become in the public interest merely because it serves the private interests of s number of other workers as well.

21. The test is therefore not numerical but depends on the character of the interest served. All the circumstances of the case must be considered including (i) the numbers where interests are served by the disclosure; (ii) the nature of the interest affected and its importance; (iii) whether the matter complained or was deliberate and (iv) the identify to the alleged wrongdoing.

22. In Underwoood v Wincanton plc [8], Mr Underwood was dismissed after he made disclosures together with colleagues, to his employer about the unfair distribution of overtime work to drivers. He claimed that he suffered a detriment and had been automatically unfairly dismissed because he made a protected disclosure. The tribunal struck out the claim, holding that the "public interest" element was not present: the complaint was made by several workers who had a shared grievance about an aspect of

[7] [2017] IRLR 837
[8] Employment Appeal Tribunal 27th August 2015 unreported

their employment contracts. The EAT held that had been too narrow. He was wrong to conclude that the public interest element could not be met where the disclosure concerned a small number of employees of the same employer.

> *"To my mind, what leaps from the page, is firstly the importance of the matter being assessed in a factual context, secondly the fact that the Employment Appeal Tribunal has held that the public interest requirement may be met by a relatively small group of persons, and thirdly, that those persons may constitute employees of the same employer who have the same interest in the matter as that raised by the Claimant personally."*

23. In Morgan v Royal Mencap Society[9], the EAT held that an employment judge had erred in striking out an employee's claims based on protected disclosures at a preliminary hearing without hearing any evidence. Her disclosures were in effect complaints about cramped working conditions, which she asserted represented a danger to her health and safety and aggravated an existing knee injury. She stated that she reasonably believed that the disclosures were made in the public interest because her former employer was a charity and that the public should know how it was treating its employees/ The EAT held that the tribunal had failed to take the facts at their highest. Whilst the employee's disclosures were about her own predicament, she also asserted a belief that others might be affected by the working conditions. It was reasonably arguably that an employee might consider health and safety complaints to be made in the wider interests of employees generally, even where they were the principal person affected. Whether that was so in a particular case was a question of fact, and not capable of determination without hearing the evidence.
24. Conversely where the worker 'reasonably believes' that the complaint is in the public interest even though she is mistaken and it relates solely to her personal contractual circumstances.

[9] [2016] IRLR 428

Causation and standard of proof

23. There is a significant discrepancy between the test for causation in a protected disclosure resulting in dismissal and one which causes detriment, namely, the protected disclosure being a "material factor" in a detriment case and being the "sole or principal reason" in a dismissal case: Fecitt & Ors v NHS Manchester [2012] ICR 372) and Salisbury NHS Trust v Wyeth[10]. In the Wyeth case, the EAT set out a helpful summary of the difference in approach between a "detriment" claim and an unfair dismissal claim.

24 A shorthand way of describing the difference is to say that the detriment protection mirrors the language of discrimination protection whereas section 103A mirrors that of unfair dismissal. The distinction was made rather more fully by Elias LJ in Fecitt and Ors v NHS Manchester [2012] IRLR 64 CA . In considering the correct approach for section 47B purposes Elias LJ opined:

"43. … liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. … Igen [that is a reference to the discrimination case on the burden of proof of Igen Ltd v Wong [2005] IRLR 258 CA] is not strictly applicable since it has an EU context. However, the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing."

25 Turning, then, to the protection against dismissal, he continued:

44. I accept … that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ

[10] Employment Appeal Tribunal 12th June 2015 unreported

cautioned in Kuzel v Roche Products Ltd [2008] IRLR 530 at paragraph 48, in the context of a protected disclosure claim:

'Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs the risk of complicating rather than clarifying the legal concepts.'

45. In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."

26 Moreover, when asking what was the reason or principal reason for a dismissal, that is a "reason why" question, which is not the same as a "but for" test, see as put by HHJ Peter Clark in the case of Arriva London South Ltd v Nicolaou [2012] ICR 510 :

The reason why question must not be confused with the "but for" test. … In short, whereas the but for test may be appropriate in "criterion" cases … it is the reason why question which prevails in circumstances where the employer's mental processes (conscious or subconscious) are in issue. The latter question arises in the present case."

In practice

24. In Blackbay Ventures (Trading as Chemistree) v Gahir[11] the EAT gave guidance as to the approach that should be taken by tribunals when considering whistleblowing claims:

"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

[11] [2014] ICR 747

1. Each disclosure should be identified by reference to date and content.

2. The 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 or as the case may be should be identified.

3. The basis on which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases, 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 as here for the employment tribunal 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 check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course 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.

6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the "old" law whether each disclosure was made in good faith; and under the "new" law whether it was made in the public interest.

7. 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 on 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.

8. The tribunal under the "old" law should then determine whether or not the claimant acted in good faith and under the "new" law whether the disclosure was made in the public interest."

Whistle blowing in the time of Covid

25. There are many examples of where whistle blowing may be a useful tool for concerns arising out an employer's handling of the Covid 19 pandemic or a worker is concerned that the workplace is not Covid-secure (in so far as any workplace can be). As we search for a way out of the current lockdown, whistle blowing claims may increase.

26. If you are not an employee and cannot rely upon s 44 or s 100 of the ERA, protection arising out o for such concerns can still be found under the normal whistle blowing provisions of the ERA and the right not to be subject to a detriment (s 47B) or dismissed (s 103A) for making a protected disclosure under section 43B. Such a protected disclosure could include a refusal to work together with a complaint about the working conditions if it complies with the requirements of section 43B and disclosure of information (could because such claims are better brought under s 44 or s 100 for "serious and imminent" health and safety cases).

27. Such claims (both detriments and dismissals) are likely to fall broadly within the following categories:

i. Protected disclosures about the employer's conduct during the Covid-19 pandemic, such as asking a furloughed employee to work whilst on furlough. This could amount to a fraud or a breach of the legal obligations under the Coronavirus Job Retention Scheme and could therefore fall within s 43B(1)(a) criminal offence has been committed or (b) breach of legal obligation. Such claims may say that the person who made the protected disclosure was dismissed for redundancy as a result of making those claims and that the protected disclosure was the real reason.

ii. Protected disclosures about workplace not being Covid-secure e.g a lack of handwashing facilities or a lack of social distancing. It is likely that the vast majority of the workforce will not be eligible for the first rounds of vaccinations against Covid so the obligation remains on employers to provide a safe system of work in so far as they can, including the carrying out of risk assessments. The relevant breach of legal obligations may be those employer's contained within the Management of Health and Safety at Work Regulations 1999 including safe system of work (reg 4) and duty

to risk assess and review (reg 3). Such cases would also fall within s 43B(1)(d) that the health and safety of any individual has been or I likely to be endangered.

iii. Protected disclosures arising out of the employee's actions. For example, a clinically vulnerable disabled employee not being willing to return to the workplace and may allege a failure to make reasonable adjustments by requiring them to return to work, or an employee who will not take the Covid 19 vaccination because of health and safety concerns and whose employer wants all employees to be vaccinated (see Pimlico Plumbers reported "No jab,no job" approach).

28. Are the above situation potentially going to pass the "public interest" test? Yes, potentially. As seen from the above case law it is a low bar. For example, it is arguably in the public interest to know which well known companies have been committing furlough fraud or are not providing safe workplaces or are forcing employees into the office.

29. What can a respondent do in such circumstances to defend themselves? Assume that a complaint may retrospectively be treated as a protected disclosure and treat it accordingly.

30. So make sure that the complaint is dealt with fairly and in accordance with procedure. Most importantly, ensure that there is a contemporaneous paper trail of the employer's response to the protected disclosure, and any actions that flow from it so that should it go further.

31. In every whistle blowing case, once the fight has been had about whether it is a protected disclosure of not, the case is always won or lost on causation. Therefore as always it is about the paper trail and showing a non-discriminatory, non-whistle blowing reason for the treatment, particularly in relation to cases falling within (i).

32. In terms of cases that fall within (ii), the best approach is a partnership working approach with employees to any plans to return to the workplace. Share risk assessments, and plans to make the office as Covid secure as possible and invite comments, and listen to comments, and adapt accordingly.

33. In terms of cases which may fall within the third category, the best advice has to be avoid the situation if at all possible: if someone is clinically vulnerable, and likely to be a disabled

person, the sensible advice is not force anyone back into the office but to continue remote working which is perhaps the only upside of the pandemic which has shown us that it is possible in many more areas where previously home working would have been refused.

34. In terms of the more controversial, "no jab, no job" scenario. Although it is fair to say that vaccines are regarded by everyone as an important part to the return to some sort of normal, equally important is an individual's right to medical autonomy. It is going to be a brave employer that risk putting in place a policy that could potentially discriminate against a particular group because there are many legitimate reasons why a particular group may be not want to take up the vaccine. The affected groups may include disability, in relation to allergies, pregnant women, even religious belief or race.

35. In theory, "no jab, no job" could be worded as a reasonable management request and dismissal could follow but it would be a brave employer to be the first employer to do it. As stated earlier, employers are not in a position to provide the vaccine themselves at the moment so it would in any event be in a position to enforce such a policy properly. Further, the same concerns can be met by more proportionate steps that interfere less with an individual's human rights. For example, perhaps requiring regular negative Covid tests to attend premises where there are vulnerable persons, such as care homes, or hospitals.

36. If an employee is dismissed following a Covid-related protected disclosure, they could apply for interim relief to be reinstated or paid until the hearing[12]. It only applies to employees and they must apply with 7 days of being dismissed. Respondents will be given little time to get together their case but should endeavour to present the evidence to show that the dismissal was for a non-protected disclosure reason.

37. Even if the protected disclosure appears to be a material factor in the detriment or the dismissal, an employer will want to rely upon the fact that the reason for the treatment was the manner in which the protected disclosure was made rather than the protected disclosure itself.

[12] See excellent talk by my colleague, Cath Urquhart on interim relief.

38. In Martin v Devonshires Solicitors the EAT held that there will be cases where an employer has dismissed an employee in response to the doing of a protected act, but it was for some feature which could properly be treated as separable from the act itself:[13]

"We prefer to approach the question first as one of principle, and without reference to the complex case law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 a m. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. (What is essentially this distinction has been recognised in principle—though rejected on the facts—in two appeals involving the parallel case of claims by employees disciplined for taking part in trade union activities: see Lyon v St James Press Ltd [1976] ICR 413 ("wholly unreasonable, extraneous or malicious acts": see per Phillips J at p 419 C - D) and Bass Taverns Ltd v Burgess [1995] IRLR 596 .) Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would

[13] [2011] ICR 352

certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.

39. In Woodhouse v West North West Homes[14] the EAT declined to follow Martin and warned:

"distinctions between complaints and the manner of making complaints should only be drawn in clear cases that the instant appeal was factually well short of the kind of exceptional circumstances exemplified by the factual matrix of the Martin case itself."

40. In Panayiotou v Chief Constable of Hampshire[15]., in which Mr Panayioutou had become completely unmanageable, the EAT shifted away from Woodhouse:

"As a matter of statutory construction, section 47B did not prohibit the drawing of a distinction between the making of a protected disclosure and the manner in which the employee went about the process of dealing with it. There was a distinction between the disclosure of information and the way in which it was disclosed. An employer might be able to say that the fact that the employee disclosed particular information played no part in a decision to subject him to a detriment, but the offensive or abusive way in which he conveyed the information was unacceptable. That distinction accorded with existing case law: see Bolton School v Evans [2007] ICR 641 . It was permissible to separate out consequences following from a disclosure and the making of the disclosure itself, and that was not altered by Woodhouse .

[14] [2013] IRLR 773
[15] [2014] IRLR 500

The Employment Appeal Tribunal in Woodhouse suggested that in such cases it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In his Lordship's judgment, there was no additional requirement that the case should be exceptional. In the context of protected disclosures the question was whether the factors relied on by the employer could properly be treated as separable from the making of protected disclosures and, if so, whether those factors were the reason why the employer acted as he did. A tribunal would bear in mind both the importance of ensuring that the factors relied on were genuinely separable and the observations in Martin v Devonshire Solicitors [2011] ICR 352 , para 22. The tribunal had drawn a distinction between the fact of making the disclosures and other features of the situation which were related to but separable from the fact the claimant had made protected disclosures. It was permissible for it to do so."

Conclusion

41. Whistle blowing claims in the times of Covid are going an important weapon in the employment lawyer's arsenal, although decided cases at an appellate level are likely to take some time due to the backlog in tribunal cases.

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