



# Whistleblowing Update

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**Old Square Chambers**

# Whistleblowing – the legislative background (sorry)

s.47B ERA 1996 - Detriment

**(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.

# Whistleblowing – the legislative background (sorry)

s.103A ERA 1996 – Dismissal

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.

# Whistleblowing – the legislative background (sorry)

s.43B ERA 1996 – 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 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.

# Whistleblowing – the legislative background (sorry)

s.43K ERA 1996 – Extension of meaning of “worker”

- (1) For the purposes of this Part “worker” includes an **individual who is not a worker** as defined by section 230(3) but who—
- (a) works or worked for a person in circumstances in which—
- (i) he is or was introduced or supplied to do that work by a third person, and
- (ii) the **terms on which he is or was engaged** to do the work are or were in practice **substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.**

# Whistleblowing – the legislative background (sorry)

s.230 ERA 1996

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means **an individual who has entered into or works under** (or, where the employment has ceased, worked under)—

(a) a **contract of employment**, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the **individual undertakes to do or perform personally any work or services for another party to the contract** whose status is **not** by virtue of the contract that of a **client or customer** of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

# Whistleblowing – the legislative background (sorry)

s.43K ERA 1996 – Extension of meaning of “worker”

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(ii) the **terms on which he is or was engaged** to do the work are or were in practice **substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.**

# Whistleblowing – recent decisions

## Who can bring a claim?

Legislative provisions: ss.43K and 230(3) ERA 1996

***Day v Health Education England*** [2017] EWCA Civ 329

Dr Day failed in the EAT – 2 reasons

Court of Appeal disagreed with the EAT on both reasons

# Whistleblowing – recent decisions

## Who can bring a claim?

Legislative provision: s.230(3) ERA 1996

***Gilham v Ministry of Justice*** [2017] IRLR 23

- Office holders and not workers.
- No contract of employment
- No contract to undertake to do or perform personally any work or services.
- Cannot bring WB claim.
- NB Not a judgment that office holders cannot have parallel contract.

# Whistleblowing – recent decisions

Other recent worker status cases (not WB):

- ***Pimlico Plumbers Ltd v Smith*** [2017] EWCA Civ 51
- ***Dewhurst v CitySprint UK Ltd*** ET Case: 2202512/2016
- ***Uber B.V. and others v Aslam and others*** [2017] IRLR 4
- ***Lange v Addison Lee Limited*** ET Case: 2208029/2016

But also

- ***Independent Workers' Union of Great Britain v RooFoods Limited T/A Deliveroo*** Case No: TUR1/985

# Whistleblowing – recent decisions

## What qualifies for disclosure?

Legislative provision: s.43B(1)(b)

***Eiger Securities LLP v Korshunova*** [2017] IRLR 115

Tribunal should identify the source of the legal obligation C believed that R was subject

And how R failed to comply with it.

Doesn't need to be precise, but more than general belief.

# Whistleblowing – recent decisions

## Does employer's belief alter whether disclosure is protected?

Legislative provision: s.103A

***Beatt v Croydon Health Services NHS T*** [2017] EWCA Civ 401

CoA upheld C's appeal. One must separate the questions of:

- (a) Whether the making of the disclosure was the reason (or principal reason) for dismissal; and
- (b) Whether the disclosure was protected.

The former takes into account the facts and beliefs of the decision-maker. The latter is an objective determination for the tribunal and beliefs irrelevant.

# Whistleblowing – recent decisions

## lago cases

Legislative provisions: ss.103A and 47B

***Royal Mail Group Ltd v Jhuti*** [2017] EWCA Civ 1632

CoA confirms conventional wisdom applies and it is the motivation of the dismissing manager that matters.

lago gets away with it under dismissal provisions.

However, s.47B. Maybe.

# Whistleblowing – recent decisions

## What qualifies as ‘in the public interest’?

Statutory provision: s.43B ERA 1996

***Chesterton Global Ltd v Nurmohamed*** [2017] EWCA Civ 979

Reform introduced to prevent personal contractual disputes qualifying.

Absolute rules cannot be laid down.

Not “was the disclosure in fact in the public interest”, but “could it reasonably be believed to be”

CoA would not rule that personal interests could never qualify.

Look at all the circumstances and look for factors that make it reasonable to regard it as in the public interest as well as personal.

# Whistleblowing – recent decisions

## Stigma damages

***Small v Shrewsbury & Telford NHS Trust*** [2017] EWCA Civ 882

Tribunals should be live to ‘stigma’ damages, even if C has not pleaded it.

Not required to consider it always as a matter of course, but should be live.

# Thank you

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