Implications of whistleblowing reforms

Fighting or defending a whistleblowing claim will not be quite the same once the changes proposed by the Enterprise and Regulatory Reform Bill become law. Sally Robertson discusses the implications of the reforms in circumstances where a worker 'makes a disclosure in the public interest'.

Progress of the bill[1]

The House of Lords report stage of the Enterprise and Regulatory Reform Bill started on 26 February 2013. After the third reading, the bill will return to the House of Commons for consideration of the Lords' amendments. Once both Houses have agreed on the same version of the bill, it will receive royal assent. This could be before the Easter recess starts on 26 March 2013. The exact date is important because the commencement provision, now in clause 83(2)(b) brings the protected disclosure amendments (in clause 15 and in what are likely to become clauses 16 and 17) into force at the end of the period of two months beginning with the day on which the Act is passed. The changes apply only to qualifying disclosures made on or after the day the sections come into force (clause 19). The numbering of clauses is likely to change.

Whistleblowing amendments

As well as requiring would-be whistleblowers to have a reasonable belief that they are making a disclosure in the 'public interest' (clause 15), a late amendment – moved at the Lords report stage of the bill by the government adds a new clause – taking away 'good faith' as an issue for liability. Instead, consideration of 'good faith' will shift to the remedies stage. If it 'appears to the tribunal that the disclosure was not made in good faith', an award for detriment or dismissal may be cut by no more than 25 per cent.

The bill also extends the definition of 'worker' to include certain health professionals who had been omitted inadvertently. In another late change, the government proposes inserting new sub-sections into Employment Rights Act (ERA) 1996 s47B and s48. These should end the gap in protection exposed in *NHS Manchester v Fecitt and others and Public Concern at Work (intervener)* [2011] EWCA Civ 1190, 25 October 2011; [2012] IRLR 64 and give a remedy where colleagues victimise a worker for having blown the whistle. If the retaliation is by another worker, that worker must be acting in the course of his/her employment, but it is immaterial whether or not the employer knows or approves of the retaliation. However, if the retaliation is by an agent of the employer, then as long as the agent acts 'with the employer's authority', there is no restriction on where or how the victimising act is done, or deliberately not done. Statutory defences will be available to the employer and to an agent or co-worker.

Overview of the changes for whistleblowers

The proposed 'public interest' test comes in the first of the gateway tests facing the would-be whistleblower. To be protected at all, the disclosure must count as 'protected' under ERA s43A. This requires first, having made a 'qualifying disclosure' as defined in section 43B. The worker must have a 'reasonable belief' that the 'information' disclosed 'tends to show' a listed failure that has happened, is happening, or is likely to happen. The extra factor added by the bill is that the whistleblower's 'reasonable belief' includes a belief that the disclosure is 'made in the public interest'.

The second gateway is to have made the disclosure in accordance with the provisions of any of section 43C–43H. With 'good faith' shifted to the remedies stage, no extra test will face a worker who discloses wrongdoing to his/her employer, to a minister of the Crown (or the Scottish Executive) or in the course of getting legal advice. Disclosure to regulators requires a reasonable belief that the regulator is the right one and that the information and any allegation contained in that disclosure are 'substantially true' (ERA s43F(1)(b)(ii)). Disclosures to other bodies and to the wider public have further conditions: in essence, that contextualising the disclosure and its history makes that disclosure sensible.

What is added by the 'public interest' test?

The extra test is inserted in ERA s43B by clause 15(1) of the bill. With the amendment shown in bold, section 43B will define a qualifying disclosure as:

(1) … 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, is being or is likely to be deliberately concealed.

So what, if anything, does the extra 'public' dimension add? As each listed failure is already in the public interest arena, with no distinction made in the importance, scale or number affected by the matter, does the amendment import a more stringent test? As the new words are drafted so as to relate to each of the listed failures, they could be expected to add something to each (given the presumption that parliament does nothing in vain).

The *Explanatory Notes* to the bill suggest that clause 15 is not really meant to do anything except resolve the anomaly of the 'unintended consequence' identified in *Parkins v Sodexho Ltd* UKEAT/1239/00, 22 June 2001; [2002] IRLR 109, that 'any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure' (*Explanatory Notes* para 101).[2] It is to exclude 'the opportunistic use of the legislation for private purposes' (HC committee stage col 388, 3 July 2012).

Shifting the 'good faith' test to remedies is a response to lobbying by Public Concern at Work and others that adding a 'public interest' test while retaining 'good faith' as part of the first stage would create 'in effect, a double whammy of double public interest' (HL committee stage col GC264, 10 December 2012).

'Good faith' is generally seen as acting with the predominant purpose of furthering the public interest and not because of any ulterior motive: see *Street v Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964, 21 July 2004; [2004] IRLR 687 at paras 71–73. Mixed motives may be such as to remove good

faith, say if someone reports another's misdemeanour to get revenge, with vengeance the predominant purpose. However, gleefully gaining revenge is not incompatible with reasonably believing that making the disclosure is in the public interest. If a misdemeanour comes within ERA s43B(1)(a)–(f), is a real wrong and requires steps to be taken to remedy that wrong, there would be no reason to doubt the existence of a belief that disclosing the wrong so that it could be put right was in the public interest. That belief would also be reasonable. Why should glee lead to any, let alone a full 25 per cent reduction?

A hierarchical approach?

The 'public interest' does not exclude claims just because they are based on private contractual obligations. There are 'likely to be instances where a worker should be able to rely on breaches of his own contract where those engage wider public interest issues' (HC committee stage col 388, 3 July 2012). One example could be where a worker was wrongly required to work excessive hours, putting members of the public at risk. The minister also observed that the actual issue raised in *Parkins v Sodexho* could have been reframed as a health and safety one, 'with similar issues then arising in relation to disclosures of minor breaches of health and safety legislation, which are of no interest to the wider public.' This suggests that the government's thinking is in terms of a hierarchy of importance, with no protection for disclosures about minor breaches.

Arguing for a hierarchy of public interests, with protection denied for 'minor' wrongdoing, besides requiring specific provision that is missing from this amendment, arguably loses sight of the purpose of the protection. If there is a general public interest in maintaining respect for the law, where should the dividing line be drawn? As for individual contractual disputes with no overlap with statutory obligations, there is arguably also a general public interest that, say, a banker keeps his/her word. Civil society is built on law: the alternative is the Hobbesian 'state of nature'.

A hierarchal approach also misses the purpose of the legislation. If someone is victimised because s/he has blown the whistle, the disclosure was important enough to trigger retaliation and so should be protected. As Mummery LJ put it in *ALM Medical Services Ltd v Bladon* [2002] EWCA Civ 1085, 26 July 2002; [2002] IRLR 807: 'The self-evident aim of the provisions is to protect employees from unfair treatment (ie victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace' (para 2).

This protective approach towards whistleblowers has been translated into a relatively well established 'generosity in the construction of the statute and in the treatment of the facts': see *Boulding v Land Securities Trillium (Media Services) Ltd* UKEAT/0023/06, 3 May 2006 at para 24. As part of another line of authority, there is a clear emphasis on the need to take a purposive approach: see *BP plc v Elstone and another* UKEAT/0141/09, 31 March 2010; [2010] IRLR 558 at para 34.

As drafted, the bare reference to an undefined 'public interest' would not seem to permit salami-slicing public interest concerns according to how important the particular concern is objectively. Such an exercise would in any event be fraught. Instead, the focus is on what the worker making the disclosure thinks about it: his/her subjective view at the time s/he made the disclosure.

A 'reasonable belief'?

Given that the 'public interest' amendment is located within a well-established test, it is likely that that approach will be applied to the subjective test of whether the worker actually believed that disclosure 'is made in the public interest' and to the objective test of whether it is reasonable to hold that belief.

At issue under ERA s43B(1) is, first, whether the worker actually believes that the information s/he is disclosing meets one of these criteria. This is a subjective test: *Babula v Waltham Forest College* [2007] EWCA Civ 174, 7 March 2007; [2007] IRLR 346 at para 82. A belief may be held genuinely but be wrong. There is nothing in section 43B which requires a belief to be right: *Babula* at para 79. Moreover, section 43L(3) removes any doubt over whether or not it is possible to disclose something that is already known. In those cases, the disclosure is treated 'as a reference to bringing the information to his attention'.

But what if s/he had given no conscious thought to it at the time? Taking Slade J's example in *Cavendish Munro Professional Risks Management Ltd v Geduld* UKEAT/0195/09, 6 August 2009; [2010] IRLR 38 at para 24 of disclosing information that 'sharps were left lying around' in a hospital ward, it should be automatic to draw attention to the sharps because of the clear and obvious risk to safety. In this type of situation it is arguably reasonable to infer unconscious belief that the disclosure was made in the public interest.

The existence of a belief and that it 'tends to show' are both fairly low thresholds: *Korashi v Abertawe Bro Morgannwg University Local Health Board* UKEAT/0424/09, 12 September 2011; [2012] IRLR 4 at para 61. Control comes in the objective requirement that the belief be 'reasonable'.

The factual accuracy of the disclosed information will almost always be relevant as a tool when deciding whether or not the belief is a 'reasonable' one. In essence, if a worker is wrong, the mistake must be a reasonable one: *Darnton v University of Surrey* UKEAT/882/01, 11 December 2002; [2003] IRLR 133 at paras 29–30, and be based on the facts as understood by the worker (*Darnton* at para 33 and *Korashi* at para 62).

Factual accuracy is just one tool for addressing reasonable belief. The ways of demonstrating the existence of, or the lack of, a reasonable belief are not closed but depend on the full context. There was nothing inaccurate about the redundancy consultation document in *Goode v Marks and Spencer plc* UKEAT/0442/09, 15 April 2010. The problem lay in what was said to be believed about it. Another issue would be when anger, hyperbole or acting inappropriately hits the point at which, objectively, it is so far adrift from the relevant failure or the public interest in that failure that it negatives 'reasonable belief'. Irrationality, as in *Roberts v Valley Rose Ltd (t/a Fernbank Nursing Home)* UKEAT/0394/06, 31 October 2006, certainly passes that test.

Applying this approach to the reasonableness of a belief that making the disclosure was in the public interest, it is difficult to see it excluding anyone acting in good faith. To do so would require finding that securing compliance with a statutory or contractual obligation could objectively be said not to be in the 'public interest'. Or at least, to such an extent that it just would not be reasonable for the discloser to believe that the act of making a disclosure about the need to comply with the law was in the public interest. If truth and honesty are valued and of importance in a particular sector of the economy, it would be difficult to say that it would not be reasonable to hold a belief that making a disclosure about such failings was in the public interest.

In practice there are few absolutes. Application of ERA s43B is inevitably fact-sensitive. Contextualising the disclosure is essential. As Silber J observed in *Royal Cornwall Hospitals NHS Trust v Watkinson* UKEAT/0378/10, 17 August 2011: 'This issue has to be considered not in isolation, but in the context of the entire evidence, including the previous history, so as to ascertain the factual matrix against which the disclosure had been made' (para 72).

Contextualisation also requires considering what a worker in the claimant's shoes 'knows and ought to know about the circumstances of the matters disclosed' (*Korashi* at para 62). What might be reasonable for a lay observer to believe about the risk of a particular patient dying on the operating table could be entirely different from the view of an experienced surgeon. The latter 'is entitled to respect for his view, knowing what he does from his

experience and training, but is expected to look at all the material including the records before making such a disclosure' (*Korashi* at para 62).

The more safety-critical an environment, the more likely it is to be reasonable to believe that making a disclosure was in the public interest. That no one was affected cannot negate the risk. In some cases, 'the Oedipus effect' of the disclosure itself will prevent the risk materialising.[3]

Is it a disclosure of information?

What amounts to a 'disclosure' in the first place has tended to be left to the good sense of tribunals. In *Bolton School v Evans* [2006] EWCA Civ 1653, 15 November 2006; [2007] IRLR 140, Buxton LJ, in the context of considering whether a course of conduct (hacking into the school computer system) could be a disclosure, observed:

> *The legislation uses a common word, 'disclosure', and sets out in some detail the circumstances in which that disclosure will or will not be protected. There is no reason to think that parliament intended to add to that machinery by introducing some special meaning of the word disclosure* (para 14).

However, only information is protected: that is, facts, not allegations nor statements of position (see *Geduld* at paras 23–24). Other divisions of the Employment Appeal Tribunal have taken a more nuanced approach to 'information' (see *Freeman v Ultra Green Group* EAT/239/11 and *Royal Cornwall Hospitals NHS Trust v Watkinson* EAT/378/10).

In all cases, though, ERA s43B(1) must be read as a whole, so the reasonable belief is two-fold: that disclosing the information is in the public interest and that it tends to show the relevant failure. On either test, it is not easy to see the expression of disgust in *Goode* as conveying the requisite information.

Returning to Slade J's hypothetical example in *Geduld*, a gesture towards a heap of sharps and commenting 'you are not complying with health and safety requirements' conveys information. Adding 'the way this ward is run' before an allegation of non-compliance certainly conveys information about why there is a relevant failure – it refers to the factual situation in that ward and its management.

An unwelcome allegation of wrongdoing may not give specific information but is perhaps more likely to raise hackles in a potential victimiser than stating the obvious. If all that is said to a ward sister is, say, 'Mrs Jones ate nothing yesterday', would that be recognised as a disclosure at all? How much of the background facts must be spelled out, or understood, for the information to become at all sensitive? There is no requirement that the particular failure relied on be spelled out in the disclosure (*Bolton School* at para 41) but if someone is going to be aggravated to retaliate, a disclosure must surely be recognisable as such.

Perhaps a good way of addressing this is to view matters as on a scale. At the lowest end is the hypothetical *Geduld*-type information, so innocuous, or so much part of routine work that an employer might not realise a disclosure was being made – raising the inevitable question of how such a disclosure could ever be a reason for inflicting detriment. As one moves along the scale, the failure at issue would become increasingly obvious.

Retaliation: the reason why

Making a protected disclosure is not a shield against all that might go wrong. It protects only against victimisation, that is, getting back at the worker because s/he has blown the whistle. Pre-employment victimisation is not covered (see *Elstone* at para 37), unless inflicted by a former employer (*Miklaszewicz v Stolt Offshore Ltd* [2001] ScotCS 303, 21 December 2001; [2002] IRLR 344). Post-employment detriment is covered where it arises out of the 'employment relationship' such as refusing to provide a reference (*Woodward v Abbey National plc* [2006] EWCA Civ 822, 22 June 2006; [2006] IRLR 677). Post-employment disclosures, eg, to a regulator, with detriments arising still later, are not excluded: *Onyango v Berkeley (t/a Berkeley Solicitors)* UKEAT/0407/12, 25 January 2013.

Identifying the act, or deliberate failure to act, said to cause detriment is essential (*Harrow LBC v Knight* UKEAT/0790/01, 18 November 2002; [2003] IRLR 140, EAT, at para 5). Only then is it possible to identify the conscious or unconscious reasoning for deciding to do or not do that act (*Vivian v Bournemouth BC* UKEAT/0254/10, 4 February 2011 at para 80).

Dismissal is treated differently from other detriments. Where the detriment is dismissal, an employee has to turn to the automatically unfair dismissal regime. Under ERA s103A, the reason, or if more than one, the principal reason for the dismissal must be that the employee has made a protected disclosure. In all detriment cases, including workers whose contracts are ended because they have made a disclosure, section 47B gives a higher standard of protection (including that the burden is on the employer to show the reason for the treatment). It is sufficient if having made the disclosure is a factor in the reason why the worker was subjected to that treatment (see *Fecitt* above at paras 44–45).

Where protected disclosures form the backdrop to management decisions, capability or disciplinary proceedings, it may be difficult to isolate the reason why. With 'good faith' moved to remedies, employers are likely to focus on severing the 'real' reason from the context of having made a protected disclosure. In a proper case, an employer can take action against a worker who makes a protected disclosure in an unacceptable manner (*Martin v Devonshires Solicitors* UKEAT/0086/10, 9 December 2010; [2011] ICR 352) or who acts in an unacceptable way in relation to a protected disclosure (see *Bolton School* above). As with any 'ulterior motive' dismissal, a tribunal can find that, although the reason was related to the disclosure, it was not the only or principal reason for dismissal.

In contrast, if the whistleblowing was a material factor in the victimiser's or decision-maker's thinking, whether conscious or unconscious, the higher standard of protection for detriment claims means that claims of pre-dismissal detriment should be more likely to be successful. Yet even this is nuanced. *Vivian* and *Fecitt* (above) both show that if moving a whistleblower is to remedy a 'dysfunctional situation', a tribunal could find that was the decision-maker's reason, rather than the protected disclosures resulting in that situation. That particular scenario is resolved by the proposed addition to ERA s47B of subsection (1B), which treats a colleague's or agent's victimising acts or deliberate failures to act as 'also done' by the worker's employer.

The changes proposed in the bill are, at the time of writing, subject to parliamentary approval. The proposed insertion into ERA s47B of subsections (1A) to (1E) came too late to incorporate fully into this article. On coming into force, the package of changes will require a rethinking of the approach to whistleblowing protection.

With ordinary unfair dismissal compensatory awards capped at a maximum of one year's pay or £74,200, whichever is lower, the prospect of avoiding or recovering actual loss, even with a 25 per cent cut, is sure to encourage creative thinking.[4]

1 See: services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html.
2 Available at: www.publications.parliament.uk/pa/bills/lbill/2012-2013/0045/en/2013045en.htm
3 The term 'the Oedipus effect' describes situations where the act of prediction, in this example, whistleblowing, prevents what is feared coming about because action is taken to avert the problem. It is based on a wider view of the mythical Oedipus. This term was coined by Karl Popper in *The poverty of historicism*, Routledge Classics, 1957.
4 For in-depth exposition, see Bowers et al, *Whistleblowing: law and practice*, 2nd edition, OUP, 2012.

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