

**WHISTLEBLOWING**  
**DEVELOPMENTS AND OPPORTUNITIES**  
**WHICH WAY IS THE WIND BLOWING?**

**Introduction**

1. Before turning to look at some significant developments in the law over the past year it is worthwhile to bear in mind the policy behind the introduction of the statutory protections for whistleblowers.

2. The Public Interest Disclosure Act, 1998 came into force on 2 July 1999 with its long title stating its purpose as:

*“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.”*

3. The Act was stimulated by a public policy concern to ensure that malpractice could more easily be brought to light and to protect those who did so. The public purpose underpinning the Act is clearly and helpfully described by Dame Janet Smith as part of her consideration of whistleblowing in Chapter 11 of her 5<sup>th</sup> Report of the Shipman Inquiry:

*“11.10 The raising of genuinely held concerns about issues of public importance is to be encouraged. The public interest may be served in many different ways, such as the prevention or detection of crime, by the prevention of accidents or by the protection of the public purse.....*

*11.24 The PIDA offers protection from dismissal and victimisation to workers who raise genuine concerns about “malpractice” in the workplace. This protection forms part of employment legislation but the PIDA had a far broader underlying purpose than the extension of employees’ rights to protection from victimisation. It was seen as a valuable tool to promote openness and good governance. It was intended to help to ensure that organisations responded to disclosures by addressing the concern raised (“the message”), rather than by focussing attention on the person who had raised that concern (“the messenger”). It was envisaged that the PIDA would make*

*it more likely that organisations would resist the temptation to cover up serious malpractice. According to PCaW, these wider implications for governance and their relevance across all sectors of the workplace meant that legislation received broad support from the Confederation of British Industry and other key professional groups.”*

3. In ALM Medical Services v. Bladon [2002] IRLR 807, in the first appeal to reach the Court of Appeal, Lord Justice Mummery described the policy behind the act as follows:

*“The self-evident aim of the provisions is to protect employees from unfair treatment (i.e. victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees. There are obvious tensions, private and public, between the legitimate interest in the confidentiality of the employer’s affairs and in the exposure of wrong...”* (at para 2).

### **The statutory protection**

4. In summary, the structure of the statutory protection is that it defines a “qualifying disclosure” which is potentially protected (s.43B) and a “protected disclosure” (s. 43A) as a qualifying disclosure which is made in accordance with the requirements set out in sections 43C to 43H. It is important that careful attention is given to the requirements of these litigation gateways as to obtain the protection of the Act it is necessary to bring a Claimant within the specific terms of both qualifying and protected disclosures. It should be noted, for example, that in respect of protected disclosures the requirement of “good faith” is required under sections 43C; 43E; 43F; 43G and 43H. This requirement is considered in more detail as paragraphs 19-23 below.
5. As it is now a little more than eight years since the Act came into force it is an opportune time to review its effect. Since the Act came into force there has been a steadily growing number of applications to the

Employment Tribunal: 1999-2000: 157; 2000-2001: 416; 2001-2002: 528; 2002-2003: 661; 2003-2004: 756; 2004-2005: 869; 2005-2006: 1034 (statistics obtained from the Public Concern at Work website: [pcaw.co.uk](http://pcaw.co.uk)).

## **THE CASE LAW**

6. In 2007 there have been a number of judgments in both the Court of Appeal and the EAT which have had a significant effect on the law applicable to whistleblowers. Before turning to look at the detail of those cases it is useful to revisit an early authority on the statutory regime which adopted a broad interpretation of the requirement of a qualifying disclosure under section 43B(1)(b) of the Employment Rights Act, 1996 (“ERA”). It is often relied on by whistleblowing employees.
7. In **Parkins v. Sodhexo Ltd [2002] IRLR 109**, the EAT considered the meaning of section 43B(1)(b):
  - “(1) *In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following---*
  - “(b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.”.*
8. The Claimant, Mr Parkins, claimed that he was dismissed after complaining about lack of adequate on-site supervision which he maintained gave rise to a breach of his contract of employment on health and safety grounds. He argued that this breach of his contract of employment fell within the words “*any legal obligation*” under the above section. He applied for interim relief and the Employment Tribunal refused his application on the grounds that the contract of employment could not found an allegation of failure to comply with a legal obligation under 43B. The EAT upheld the Claimant’s appeal, holding that a legal obligation which arises from a contract of employment falls within section 43B(1)(b). It considered that the statutory provision was “*very broadly drawn*”(at para 16) and there was no reason to distinguish a

legal obligation which arose from a contract of employment from any other form of legal obligation.

9. The EAT in Parkins further held that

*“...what has to be shown is first a breach of the employment contract as being a breach of a legal obligation under the contract. Secondly, there must be a reasonable belief that this has, is, or is likely to happen on the part of the worker. Thirdly, there must be a disclosure of that which is alleged to be the reason for dismissal. In other words, where it is a breach of contract of employment the worker is bound to make his case on the basis that the reason for dismissal is that he has complained that his employer has broken the contract of employment.”* (at para 15)

10. It will be appreciated that issues concerning the breach of an individual's contract of employment may well involve matters of a relatively private matters between himself and his employer rather than a issue which has the public interest attached to it. Nonetheless, the Court took a broad approach to interpretation of a qualifying disclosure within the section. From an employee's point of view, it provides a potentially very effective cause of action provided the requirements of paragraph 15 of the Judgment can be fulfilled. It is often relied on.

**Babula v. Waltham Forest College [2007] IRLR 346 CA**

11. Babula again concerns an issue of interpretation of the requirements of a qualifying disclosure under section 43B(1)(b) ERA (see above at para 7.) The Court of Appeal overturned a previously relatively restrictive interpretation adopted by the EAT in Kraus v. Penna [2004] IRLR 260. In Kraus the EAT held (at para 29 of the Judgment) that there could be no qualifying disclosure if the legal obligation referred to as part of the definition did not actually exist. It was not sufficient that a worker held a reasonable belief that a legal obligation existed:

*“The worker's “reasonable belief” under section 43B(1) relates to the information which he is disclosing and not to the existence of a legal obligation which does not exist. In other words if the employers are under no legal obligation, as a matter of law, a worker cannot claim the protection of this legislation by claiming that he reasonably believed*

*that they were. His belief and the reasonableness of it in our view relates to the factual information in his possession, namely what he perceives to be the facts and the basis on which he considers it reasonable to rely on them.....If there is no obligation to which they actually are subject the worker's suggestion that he reasonably believed they were cannot render the disclosure a protected one with ss 43A and B...."*

12. From the public policy point of view of effective statutory support for whistleblowers the interpretation of the law as adopted in Kraus was an obviously restrictive approach. Whilst there could be a mistaken but reasonable belief as to the facts of a Claimant's disclosure Kraus excluded from the definition a disclosure made on a mistaken but reasonable belief as to the existence of the legal obligation. The legal obligation was required to exist for a right of action to exist.
  
13. That position has now been helpfully rectified by the Court of Appeal in Babula:
  - "73. ...the construction of ERA s.43B(1)(b) set out in paragraph 29 of its judgment, which both the chairman and Judge Clark followed, is not, in my judgment a correct statement of the law, and should not be followed....
  77. ...what the whistleblower must show is a "reasonable belief" that the disclosure tends to show that a criminal offence is likely to be committed, or that a person is likely to fail to comply with any legal obligation. In other words what remains relevant is the whistleblower's reasonable belief, and not whether or not it turns out to be wrong. The use in the statute of the word "likely" does not, in my judgment, import an implication that the whistleblower must be right, or that, objectively, the facts must disclose a likely criminal offence or an identified legal obligation." (per Lord Justice Wall)
  
14. In coming to his view Lord Justice Wall also took some note of the purpose of the statute (at para 80).

**Bolton School v. Evans [2007] IRLR 140 CA**

15. In Bolton a distinction is drawn between the protection afforded to a disclosure within the meaning of the Act and the conduct of an employee leading up to that disclosure which does not attract the protection.
16. The Claimant, Mr Evans, was concerned about the security of a new school computer system. He hacked into the system to demonstrate his concerns were valid. At a disciplinary meeting the headmaster issued the Claimant with a written warning. The Claimant argued that he had acted in good faith having genuine concerns about the security issues and that he was being disciplined for drawing his employer's attention to breaches of the Data Protection Act 1998. His internal appeal was dismissed. The Claimant resigned and claimed that he had made a public interest disclosure and that he had been subjected to a detriment as a result.
17. The Employment Tribunal upheld his complaint. It held that he had made a qualifying disclosure that he reasonably believed that the information disclosed tended to show that the employers had failed or were likely to fail in their obligations under the Data Protection Act, 1998 and that the disclosure was made in good faith. The Tribunal did not accept that Mr Evans's conduct in breaking into the computer system should be seen as distinct from the actual disclosure of information. The Tribunal saw it as so interrelated with the disclosure that it should attract the same protection.
18. The School appealed. The EAT upheld the School's appeal. At paragraph 68 of the EAT's judgment the following distinction was drawn as to the ambit of the Act's protection:  
*"...Putting it simply, it seems to us that the law protects the disclosure of information which the employee reasonably believes tends to demonstrate the kind of wrongdoing, or anticipated wrongdoing, which is covered by s.43B. It does not protect the actions of the employee*

*which are directed to establishing or confirming the reasonableness of that belief. The protection is for the whistleblower who reasonably believes, to put it colloquially if inaccurately, that something is wrong, not the investigator who seeks either to establish that it is wrong or to show that his concerns are reasonable.”*

19. In summary, before the Court of Appeal it was argued on behalf of the Claimant that there was a need to give a wide meaning to the concept of a qualifying disclosure taking into account the purpose of the Act to protect individuals who make certain disclosures of information in the public interest and the wide wording of section 43B(1)(b) involving “any disclosure”.
  
20. In the leading judgment of the Court of Appeal Lord Justice Buxton did not accept the broad approach. He did not accept that Parliament intended to add a special meaning to the word “disclosure” and the normal meaning of the word should be applied. The protection of the Act did not extend to conduct of an employee leading up to disclosure:  
*“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 to the word disclosure....The question of whether the conduct for which the employee was disciplined was indeed “disclosure” accordingly remains a question for the normal meaning of the word. Nor did the ET think otherwise. It did not reach its conclusion by construing the word disclosure, but rather introduced a straightforward policy determination that the Act should extend not only to the disclosure itself but also to the conduct of the employee leading up to that disclosure.”*
  
21. Whilst Buxton LJ added a note of caution for Tribunals (see below) it is thus clear that conduct of whistleblowers outside the act of disclosure will not be protected by the Act:  
*“18. ...I agree that the tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure, in this case there is no reason to attribute ulterior motives to the employer.”*

**Cumbria County Council v. Carlisle Morgan [2007] IRLR 315**

22. Cumbria deals with the important issue with widespread implications of whether an employer can be vicariously liable for the acts of a whistleblower's fellow employees in response to a protected disclosure. Unlike the Discrimination statutes dealing with Race, Sex and Disability there is no express reference to such vicarious liability concerning whistleblowing in the ERA.
23. The Claimant brought a claim that she had made protected disclosures and as a consequence she had been subjected to detriment contrary to section 47B of the Act. Section 47B provides:
- “(1) A worker has the right not to be subjected to any detriment by any act, or any failure to act, by his employer done on the ground that the worker has made a protected disclosure.”*
24. The Tribunal held that the Claimant had made protected disclosures and that as a result of those disclosures she had been subjected to verbal harassment and threats from a fellow employee. The Tribunal further held that the employer was vicariously liable for the actions of the fellow employee. The employer on appeal argued that the Tribunal erred in finding the employers vicariously liable for the actions of the Claimant's fellow employee. It was argued that the principle of vicarious liability does not apply in the context of the ERA and that since a fellow employee could not be directly liable for subjecting an employee to a detriment under section 47B the employer could not be vicariously liable.
25. The EAT rejected the employer's appeal. Although the legislation in relation to whistleblowing does not make express provision for vicarious liability (unlike the Race Relations, Sex and Disability Discrimination Acts) it was accepted that the applicable test for vicarious liability is as set out in Majrowski v. Guys and St Thomas' NHS Trust [2006] IRLR 695:

*“...A wrong is committed in the course of employment only if the conduct is so closely connected with the acts the employee is authorised to do that for the purposes of liability of the employer to third parties the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment...”*

26. The EAT was satisfied that the test used by the Tribunal was the correct test and the conclusions it reached were open to it. It expressed one reservation:

*“42. ....On the other hand the absence of words such as those to be found in s.41 of the Sex Discrimination Act 1976, s.33 of the Race Relations Act, 1976 and s.58 of the Disability Discrimination Act 1995 may mean that there are cases where under s.47B an argument is open to the employer under the “close connection” test which would not be open in a claim under the Discrimination Acts.”*

**Arthur v. London Eastern Railway Ltd [2007] IRLR 59 CA**

27. The application of the time limits in section 47B detriment cases is dealt with by the Court of Appeal in Arthur in a way that is relatively helpful to Claimants. In particular, section 48(3) provides that:

*“An employment tribunal shall not consider a complaint under this section unless it is presented---*  
*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or.....”*

28. The employment tribunal held, without hearing any evidence, that section 48(3) was limited to circumstances in which there was “a *significant degree of linkage between events*”. The EAT rejected the Claimant’s appeal and accepted the approach adopted by the Tribunal.
29. The Court of Appeal upheld the Claimant’s appeal and remitted the matter to the employment tribunal for a full merits hearing on all the acts and failures relied on by the Claimant and then to decide whether, as a fact, they were part of a series of similar acts (or failures) the last of which occurred after 14<sup>th</sup> April 2004 (at para 37).

30. The case provides very helpful guidance on the approach to adopt to cases in which strike out applications are made in whistleblowing cases relying on the time limits under section 48(3). Firstly, the Court of Appeal's view is that section 48(3) requires a broader approach to interpretation than that adopted by the ET and the EAT:

*"31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it....It may not be possible to characterise it as a case of an act extending over a period within 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them.....There must be some relevant connection between the acts in the three month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a "series" and (b) being acts which are "similar" to one another."*

31. Two further points of importance to litigators should be noted. Lord Justice Mummery observed that
- "..In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and acts outside the three month period...It is necessary to look at all the circumstances surrounding the acts..."* (at para 35).

Thus if strike-out applications are being dealt with at a pre-hearing review evidence will be needed to support a Claimant's reliance on s.48(3)(a).

32. Furthermore, Lord Justice Mummery went on:

*"..It will in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions, on the basis of the evidence: see, for example, Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96 (particularly at paragraphs 48 and 49) regarding the approach to multiple acts alleged to extend over a period."* (at para 36).

33. In cases where a number of acts are relied on it will be both attractive and persuasive to a Tribunal to be directed to Lord Justice Mummery's views in resisting a strike-out application in respect of those acts which are beyond the three month time limit and having all the circumstances considered at a full merits hearing rather than hearing evidence at the interlocutory stage.

## **Kuzel v. Roche Products Ltd [2007] IRLR 309 EAT**

34. Kuzel addresses the issue of where the burden of proof lies in a claim of unfair dismissal under section 103A of ERA where conflicting reasons are advanced. Section 103A (which is silent on the burden of proof) provides:
- “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.”*
35. It is settled law that if the employee raises the 103A reason and has less than one year’s service he must establish that the protected disclosure was the employer’s reason (or principal reason) in order to establish the Tribunal’s jurisdiction to hear his complaint: see Smith v. Hayle Town Council [1978] IRLR 413 CA (para 26 Kuzel).
36. However cases where the employee has one year’s service the EAT in Kuzel held that the guidance given by the Court of Appeal in Maund v. Penwith District Council [1984] IRLR 24CA is applicable. In particular, it held that it is not at any stage for the employee with qualifying service to prove the section 103A reason. Rather, applying Maund, provided that the employee has discharged the evidential burden that raises some doubt upon the reason for dismissal i.e. has raised a prima facie case that the section 103A reason is the applicable reason, the onus is then on the employer to prove his reason.
37. A rejection of the employer’s reason combined with the employee having raised a prima facie case that the applicable reason is a s.103A reason entitles the Tribunal to infer that the 103A reason is the true reason. It is not required to do so. It remains open to an employer to satisfy a Tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the Tribunal finds that the reason which had been advanced by the employer is not the reason. (see paragraph 47 of the Judgment). In practice, the likelihood

of an employer being able to persuade a Tribunal that the protected disclosures were not the reason for dismissal in circumstances where the reason which had been advanced by that employer is rejected by the Tribunal, is very unlikely.

38. The EAT rejected the submission that the reversal of the burden of proof applicable in discrimination cases as set out by the Court of Appeal in Igen v. Wong [2005] IRLR 258 should apply if the Tribunal rejects the employer's reason (see paras 38 to 47 Judgment):

*"43. Section 103A does not provide expressly for the burden of proof. We derive no direct assistance from the fact that in ordinary unfair dismissal the burden of proving a potentially fair reason for dismissal lies on the employer, but we think that it informed the Court of Appeal's guidance in Maund which we regard as binding on the EAT and employment tribunals. The alteration to the burden of proof in discrimination statutes does not, in our view, alter that approach."*

### **In good faith**

39. There is a continuing debate as to whether the requirement for a protected disclosure "*in good faith*" is a necessary or appropriate statutory requirement given the purpose of the whistleblowing provisions.
40. In respect of bringing a Claimant within the meaning of protected disclosures, as indicated above (para 4) with the exception of 43D all require the Claimant to make the disclosure "*in good faith*": ss 43C; 43E; 43F; 43G and 43H.
41. The issue of good faith has been considered by the Court of Appeal in Street v. Derbyshire Unemployed Workers' Centre [2004] IRLR 687.
42. The Employment Tribunal in Street held that the Claimant had not made protected disclosures as they had not been made in good faith but instead had been motivated by personal antagonism towards her fellow employee. The EAT upheld the Tribunal's approach holding that

it was not the purpose of the Act to allow disclosures to be made to advance personal antagonism its purpose was to promote the public interest. The Court of Appeal endorsed the EAT's reasoning (at para 47). The Court ruled that Employment Tribunals should only find that a disclosure was not made in good faith

*"...when they are of the view that the dominant or predominant purpose of making it was for some ulterior motive."* (at para 56).

43. The Court added some further guidance to employment tribunals in the approach to be adopted when assessing a Claimant's "good faith":  
*"The Tribunal would also have to keep in mind what is common-place in such a context, that a failure or refusal by an employer to remedy a perceived failure of duty and/or injustice to a worker is often likely to engender in him an understandable resentment or antagonism that may grow if the matter is not remedied quickly. That, in itself, should not necessarily be regarded as negating good faith if, when making the disclosure, the worker is still driven by his original concern to right or prevent a wrong."* (at para 55)
44. Thus the fact that some resentment on the part of the person making the disclosure may have arisen in response to the way a particular issue has been responded to or dealt with will not necessarily lead to a lack of protection provided that the evidence is that the person's essential motivation remained that of wishing to bring to light a wrongdoing (and thus act in the public interest).
45. Nonetheless, it is apparent that the possibility of a whistleblower's motivation being examined in detail in the context of the need to find "good faith" raises the possibility of deterrence to their willingness to make what may be important disclosures. Is it really a necessary part of the Act to have such an examination of a worker's motivations when making a disclosure?
46. This issue was considered in the Fifth Report of the Shipman Inquiry. Chapter 11 of that report contains some important contributions to the debate on the part of Dame Janet Smith:  
*"11.32 Such qualifying disclosures become protected disclosures provided they are made "in good faith". The*

*question whether or not a protected disclosure is made “in good faith” is a question of fact for the employment tribunal to decide. There is no statutory definition of the phrase, although the Court of Appeal has recently held (in the case of Street v. Derbyshire Unemployed Workers’ Centre) that “in good faith” requires that the predominant motivation for the making of the report was the public interest. A person whose predominant motive is, for example, personal dislike would not be entitled to the protection of the PIDA, even though the information disclosed was truthful and accurate and was about the commission of a serious crime. If, therefore, a member of the practice staff employed by Shipman had reported concerns about his conduct, she would not have enjoyed the protection of the PIDA if her main reason for making the report had been personal dislike of Shipman. This is despite the overwhelming public interest in the disclosure that he might be murdering patients. I shall discuss this problem further below.....*

“11.108 .....I think that there should be public discussion about whether the words “in good faith” ought to appear in PIDA. In my view, they could properly be omitted. The three tiered regime of the PIDA, with its incrementally exacting requirements, should afford sufficient discouragement to those minded maliciously to raise baseless concerns. I think it would be appropriate also if the preamble to the PIDA made it plain that the purpose of the PIDA is to protect persons disclosing information, the disclosure of which is in the public interest. That would serve to focus attention on the message rather than the messenger. The public interest would be served, even in cases where the motives of the messenger might not have been entirely altruistic.

47. Given that a worker has to hold a “reasonable belief” that the disclosure of information they make tends to show one of the matters set out at s.43B(1)(a)-(f) in order to make a “qualifying disclosure”, is an examination of the motive for making the disclosure which inevitably arises in respect of “good faith” a relevant or necessary additional consideration given the important public purpose of the Act?

## **Remedies**

48. It should not be overlooked that interim relief applications can be pursued in cases where it is alleged that the reason for dismissal is that an employee has made a protected disclosure: s.128 Employment Rights Act, 1996.
49. Under section 124(1A) unlimited compensation can be awarded for a dismissal contrary to s.103A or 105(6A) ERA i.e. for a reason that an employee made a protected disclosure.
50. As regards section 47B detriment claims, under section 49(2) ERA:  
*“The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to (a) the infringement to which the complaint relates, and (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.”*
51. See in respect of a 47B claim: Virgo Fidelis Senior School v. Boyle [2004] IRLR. The EAT in Virgo Fidelis confirmed, amongst other things that Vento principles apply to assessments of injury to feelings in whistleblowing detriment cases in addition to aggravated damages and in appropriate circumstances exemplary damages. In Virgo Fidelis an award of £25,000 was made for injury to feelings with a further £10,000 for aggravated damages.

## **Generally**

52. It is always worthwhile in cases being litigated to apply the practical advice of Lord Justice Mummery in ALM Medical Services:  
*“...I would suggest that there should be directions hearings in protected disclosure cases in order to identify the issues and ascertain what evidence the parties intend to call on those issues.”* (at para 22 Judgment).

53. Sources of support and assistance: in addition to the membership and advice available via a trade union it may be helpful to note that Public Concern at Work have a help line ([helpline@pcaw.co.uk](mailto:helpline@pcaw.co.uk); tel: 0207 7404 6609).

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