

# BREAKFAST BITES: WHISTLEBLOWING UPDATE

Douglas Leach  
Geraint Probert



# INTRODUCTION

## Welsh public sector organisations

- National Procurement Service Panel Agreement:  
*“...pre-approved Barristers that have been rigorously assessed”*
- “Funnelling tool” at:

<https://www.sell2wales.gov.wales/Access/Login.aspx>

- **Julian Allsop and Suzanne Staunton** also on panel



# INTRODUCTION

- “Quick Guide” to using NPS Panel Agreement available
- Contact Carla Lavender (Category Manager) at NPS for further details:

Email: [NPSProfessionalServices@gov.wales](mailto:NPSProfessionalServices@gov.wales)

tel: 0300 025 3871



# PUBLIC INTEREST?

***Chesterton Global Ltd v Nurmohamed [2017]*  
*IRLR 837 (CA)***

- Estate agent, new commission system
- Raised with directors, discrepancies in accounts for local office
- Said he believed profitability artificially suppressed
- Said he believed earnings of 100 managers under new scheme affected by this (including C)
- C dismissed

# PUBLIC INTEREST?

ET:

- Allowed s.103A claim
- C genuinely believed accounts manipulated; belief reasonable
- Accepted C told director over 100 managers' pay affected
- “[A] section of the public, rather than simply the individual concerned”
- “[A]nybody who relied on the accounts” discounted as not in C's mind at time

# PUBLIC INTEREST?

CA: Underhill LJ

- Question under s.43B(1) is:
  - (a) whether worker believed it was in public interest
  - (b) whether that belief was reasonable
- Necessary belief is simply that disclosure is in public interest: detail of reasons why is not important

# PUBLIC INTEREST?

- Can be justified after the event by matters not in mind at the time
- BUT: if no credible reasons given for having belief *at the time disclosure made*, ET may well find belief not actually held
- ET might also reject reasons at time as inadequate, but find belief reasonable on different grounds given later

# PUBLIC INTEREST?

- Public interest does not have to be predominant motive for C's disclosure
- Underhill LJ: might not have to be motivated by it *at all* (although odd if totally absent)
- No point trying to define “public interest”: fact sensitive question

# PUBLIC INTEREST?

## Rival submissions:

- R: Personal interest not in public interest just because 99 others in same boat
- PCAW: In public interest if in anyone's interest besides C
- C:
- (a) numbers affected
  - (b) nature of interests affected
  - (c) nature of wrongdoing
  - (d) ID of wrongdoer

# PUBLIC INTEREST?

## Underhill LJ:

- Not just about numbers
- Where disclosure is re individual contract, other features may be present in public interest (eg doctors)
- Larger numbers will often mean increased likelihood of other features

# PUBLIC INTEREST?

## ET reasoning?

- Force in view that ET decided on numbers alone
- BUT: made other findings about effect of manipulation on **accounts**
- If ET erred, error was immaterial

# PUBLIC INTEREST?

A case in point

***International Petroleum Ltd v Osipov (EAT, 19.7.17)***

*“I ask the Directors of the Company to restore proper corporate governance ... as required by Public Company Law, Corporate Constitution, Stock Exchange Regulations and other applicable legislation ... I am eager to continue performing my functions as CEO ... for the benefit of [IPL Ltd] and all of its shareholders”*

# S.43K WORKER

***Day v Health Education England and ors [2017]*  
*IRLR 623 (CA)***

- C had training contract with London Deanery (taken over by Health Education England)
- Allocated to Lewisham & Greenwich NHS Trust where he did his work; employed there
- Made disclosures re staffing levels at LGNT, affecting patient safety
- Detriments by HEE. Claims v HEE & LGNT

# S.43K WORKER

## S.43K(1)(a):

*“(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 which-*
  - (i) he is or was introduced or supplied to do that work by a third person, and*

# S.43K WORKER

*(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”*

S.43K(2): “Employer” is party substantially determining terms under s.43K(1)(a)(ii)

- **NB:** not simply an NHS issue –  
of general application (eg agencies)

# S.43K WORKER

HEE: took preliminary point that C not a worker of it and HEE not “employer”. Strike out

ET: Agreed no reasonable prospects v HEE

EAT: Dismissed appeal. If he was worker of LGNT under s.230(3), could not also be worker of HEE. LGNT substantially determined terms, not HEE

# S.43K WORKER

Elias LJ

- If individual determines terms himself, not within s.43K (IR35 situations in mind?)
- Employer is whoever substantially determines terms, whether end-user or introducer
- Don't have to choose: either or both parties may substantially determine terms

# S.43K WORKER

Here:

- S.230(3): being ‘ordinary’ worker of LGNT doesn’t prevent C being worker of HEE at same time
- Anyone with part-time job elsewhere would otherwise be excluded
- S.43K(1) is simply saying that can’t be worker under both provisions vs *same party*

# S.43K WORKER

- “*worker*” includes an individual who as against a given respondent is not a worker as defined by s.230(3)”
- EAT wrong to say HEE did not substantially determine terms
- ***McTigue v University Hospital Bristol NHS Trust [2016] IRLR 742 (EAT)*** approved

# S.43K WORKER

“Substantially determined ...”

- EAT had erred in asking which of two parties had determined terms. Who played greater role?
- Had not examined whether HEE had done so, as well as LGNT. Remission inevitable for further findings.
- Contractual terms only? Elias, *obiter*, says no: practice is what matters.
- Cf: ***Sharpe v Bishop of Worcester [2015] IRLR 663***

# **Whistleblowing Update**

## **Geraint Probert – Guildhall Chambers**

# Stigma damage

***Small v Shrewsbury and Telford NHS Trust  
(CA)***

Stigma

Loss of future prospects

E.g. ***Chagger v Abbey National***



Does Tribunal have a duty to consider?



# Stigma damage (2)

***Small v Shrewsbury and Telford NHS Trust (CA)***

Protected Disclosure detriment - succeeded

Evidence of stigma/prospects loss

Claimant can claim damages for: **damages for the disadvantage in the labour market**

Not pleaded

Does Tribunal have a duty to consider?



# Stigma damage (3)

***Small v Shrewsbury and Telford NHS Trust (CA)***

CA: Yes

Important emphasis on Tribunal taking points for itself

Arise “as a matter of course”

Irrespective of whether raised by parties

Claimant’s evidence



# Stigma damage (4)

Applying:

***Small v Shrewsbury and Telford NHS Trust  
(CA)***

**How does Chagger work?**

Evidence support



Evidence against



# Detriment: causation

***Greater Manchester Police v Bailey (CA)***

Victimisation case

Inextricably linked to and arises out of a protected act

Is it done ***because of*** the protected act?

Causation test



# Detriment: causation (2)

## *Greater Manchester Police v Bailey (CA)*

Causation test

Victimisation and whistleblowing

Not “but for” test

What was the reason for the decision?



# Detriment: causation (3)

## ***Greater Manchester Police v Bailey (CA)***

On the facts ...

Secondment

Terminated (more than 2 years)

But for, yes ... but

*“...there is no escaping the fact that his treatment*

*was 'because of' his having done a protected act”*



# Detriment: causation (4)

## ***Greater Manchester Police v Bailey (CA)***

So, causation in detriment (and victimisation) cases:

Because of ...

Reason for decision

Material reason / factor

Cf. Protected Disclosure dismissal (s.103A ERA 1996)



# Employer's belief ...

## ***Beatt v Croydon Health Services NHS Trust (CA)***

Whistleblowing dismissal case

S.103A ERA

Bitter feuding in department

“dysfunctional”

Sister Jones suspended

Patient died



# Employer's belief ... (2)

## ***Beatt v Croydon Health Services NHS Trust (CA)***

Cardiologist (C)

Timing of suspension

Various disclosures by C

- E.g. lack of specialist staff

Hospital management view:

- Gratuitous
- Without merit
- Manipulative

So, disciplinary against C = dismissal



# Employer's belief ... (3)

## ***Beatt v Croydon Health Services NHS Trust (CA)***

Principal reason for dismissal was PD (ET)

Appeal points ...

Hospital's belief that disclosure

- Bad faith
- Not in public interest

What impact did this have?



# Employer's belief ... (4)

## ***Beatt v Croydon Health Services NHS Trust (CA)***

CA: none (irrelevant consideration)

Objective analysis (s.103A ERA)

Otherwise, what protection?



1. Disclosures = protected (objective)
2. Reason for dismissal = disclosures
3. Dismissal = automatically unfair

# Employer's belief ... (5)

## ***Beatt v Croydon Health Services NHS Trust (CA)***

But, what about another way ...

### Toxic atmosphere

- Personality difficulties
- SOSR



### Or, manner in which disclosures raised

- *Panayiotou v Chief Constable of Hampshire Police*
- ***Martin v Devonshires Solicitors***

# Any Questions?

