WHISTLEBLOWING AMENDMENTS
HAVE THE CHANGES MADE A DIFFERENCE?

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Introduction

1) The introductory text to the Public Interest Disclosure Act 1998 defined 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."*

2) Given this very clear aim, it is perhaps surprising that the phrase "*public interest*" does not appear in the definition of a disclosure. The only express limitation is a requirement that the disclosure be made in *"good faith*", save where it was made in the course of obtaining legal advice.

3) Judicial authority has significantly widened the scope of the protection, leading some to claim that it had lost its public interest focus. This has resulted in various amendments introduced by the Enterprise and Regulatory Reform Act 2013 ("ERRA").

4) This debate seeks to test whether those amendments will materially reduce the number of whistleblowing claims that can succeed.

Legislation Pre-ERRA

5) Section 43B of the Employment Rights Act 1996 ("ERA"), defined a qualifying disclosure as:

> *"…any disclosure of information which in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-*"

6) The section goes on to provide a list of six categories that qualify for protection. These can be summarised as follows:

   a) Criminal offences;
   b) Breach of a legal obligation;
   c) Miscarriage of Justice;
   d) Endangering the health and safety of any individual;
   e) Environmental damage; and
   f) Concealment of the above.

7) Notably, each of the categories adopts a similar formula that does not require the thing to have actually occurred. Instead, the disclosure need only show that it has, is or is "*likely*" to occur. Moreover, cases relying on health and safety are removed one step further as the likelihood is not that someone is harmed but that they are endangered. This distinction was specifically noted in ***Shaw v Norbrook Laboratories (GB) Ltd***[1]. It is therefore clear the categories have a very wide reach.

8) Causing particular shock at the time, the EAT in ***Parkins v Sodexho Ltd***[2] further broadened the scope for disclosures tending to show breaches of a legal obligation. Mr Parkins had been employed for just over 3 months. He disclosed that he was not supervised whilst using a buffing machine and that this amounted to a health and safety risk and a breach of a legal

[1] UKEAT/0150/13 [2014] All ER (D) 139 (Mar)
[2] [2002] IRLR 109

obligation. He was subsequently dismissed. In relation to the breach of a legal obligation, the Tribunal concluded:

> *"…we do not consider that an allegation of breach of an employment contract in relation to the performance of duties comes within the letter or spirit of the statutory provision."*

9) Given the public interest purpose, this would seem to have been a fair reading of the intention behind the Act. The EAT however, disagreed. It concluded:

> *"…we can see no real basis for excluding a legal obligation which arises from a contract of employment from any other form of legal obligation. It seems to us that it falls within the terms of the Act. It is a very broadly drawn provision."*

10) This paved the way for a claims based upon grievances relating to the employee making the disclosure. Given the implied duties of cooperation and trust and confidence it was not difficult to frame this in the context of a legal obligation. Moreover, whilst the disclosure must identify the breach in mind, there is no requirement this specify any legal principle. Indeed in ***Evans v Bolton School***[3] the EAT - with whom the Court of Appeal agreed - held that from the disclosure it would have been "*obvious*" that it could "*give rise to a potential legal liability*".

11) Yet further, appellate decisions confirmed that the question of reasonable belief was a subjective one. In ***Babula v Waltham Forest College***[4] the Court of Appeal went as far as to conclude that providing the worker's belief was reasonable, it mattered not whether that belief turned out to be wrong, or whether it actually amounted to any wrongdoing.

12) The effect of ***Parkins v Sodexho*** was however marginally ameliorated by two important clarifications; first to the meaning of "*good faith*" and secondly to the phase "*disclosure of information*".

13) In ***Street v Derbyshire Unemployed Workers' Centre***[5] the Court of Appeal considered what was necessary to find bad faith. It held the question related not to the truth of the disclosure but to the motive of the worker: if they had an *"ulterior motive*" then they did not act in good faith. Similarly in ***Bachnak v Emerging Markets Partnership (Europe) Ltd***[6] the EAT concluded:

> *The statutory protection is afforded to those who make disclosures in the public interest; thus where the predominant purpose is the employee's personal interest, or in the case of* ***Street****, personal antagonism against a manager, the disclosure will not be made in good faith.*

14) In ***Cavendish Munro Professional Risks Management Ltd v Geduld***[7] the EAT concluded that the word "*information*" required the worker to disclose facts and not mere allegations. A distinction was therefore drawn between "*You are not complying with health and safety requirements*" and "*The wards have not been cleaned for two weeks*". Only in the latter was there a disclosure of fact. This provided a key pillar of defence for many Respondents who faced claims based on limited disclosures such as "*I have been bullied*." Of itself the dividing line is not entirely clear and heavily fact dependant, (as recognised by the EAT in ***Western Union Payment Services UK Ltd v Anastasiou***).[8]

15) Notwithstanding the limitations from ***Street*** and ***Geduld***, it is clear PIDA, as interpreted by the appellate Courts, had a very wide remit. Certainly it was not terribly difficult for a worker to come within its protection. This caused the government sufficient concern to legislate and seek to reverse ***Parkins v Sodexho***.

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[3] [2006] IRLR 500
[4] [2007] ICR 1026
[5] [2005] ICR 97
[6] EAT/0288/05/RN
[7] [2010] ICR 325
[8] UKEAT/0135/13

ERRA 2013

16) The ERRA made 4 key amendments to the whistleblowing provisions, namely:

a) Insert a "*public interest*" requirement;
b) Make "*good faith*" an issue of remedy, not liability;
c) Codify and amend the rules for vicarious liability; and
d) Amend the extension of "*worker*" provision (s.43K).

17) This debate focuses on the first two amendments.

18) By s.17 ERRA, s.43B ERA is amended so that the provision now reads:

> *"…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-"*

19) However, by virtue of s.24(6), the amendment only applies to disclosures made after 25th June 2013. It is important to note this is the date the disclosure has to be made not the date the detriment occurred.

20) As yet there is no statutory provision or appellate authority defining what is meant by *"made in the public interest*" within the meaning of the ERA. It would however, be inaccurate to say we are without any authority. The concept of "*public interest*" already has a sufficient body of law in other areas, most notably in relation to the defence of fair comment in the field of defamation. Given the parallels, we are likely to see the same or substantially similar approach taken to the ERA.

21) However, like many authorities that define difficult concepts, it often does not take us much further. The leading case is ***London Artists v Littler***[9] in which Lord Denning stated:

> *"Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment."*

22) Of particular note, in ***Littler*** Lord Denning referred to the case of ***South Hetton Coal Co v North Eastern News***[10]. This concerned a colliery company who owned most of the cottages in a village. These were described as insanitary. In that case Lord Esher, Master of the Rolls, said that it was "*a matter of public interest that the conduct of the employers should be criticised*."

23) The issues that arise are undoubtedly going to be fact specific. The debate will focus on the question of whether this amendment will materially reduce the number of cases that can succeed.

24) By s.18, the requirement for *"good faith*" was removed from ss.43C, 43E, 43F and 43G. As noted above, there was no such requirement under s.43D. This therefore removes the requirement for a worker to make the disclosure in good faith in order to succeed.

25) In its place s.18 has inserted s.49(6A). This states where "*it appears to the tribunal that the protected disclosure was not made in good faith*" the Tribunal may reduce any award it makes by no more than 25%. The application of this is straightforward. The effect will be one of the key points of the debate.

[9] [1968] EWCA Civ 3, [1969] 2 QB 375 (CA)
[10] (1894 1 Q.B. 133)

The Debate

26) This will debate the motion:

"The amendments in respect of the elements of public interest and good faith introduced by ss.17 and 18 ERRA will materially reduce the number of claims which can succeed under s.47B ERA."

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