WHISTLEBLOWING CLAIMS:

THEIR USES AND ABUSES

Paul Goulding QC & Catherine Callaghan

Blackstone Chambers

INTRODUCTION

1. In 2008, employment tribunals received some 1,700 claims involving whistleblowing allegations. This is a fertile area for present and future employment litigation. The economic climate is conducive to whistleblowing claims. Compensation is uncapped. Allegations of wrongdoing in business attract publicity.

2. The purpose of this paper is three-fold:

   2.1. to consider recent developments in whistleblowing law and practice;

   2.2. to examine *Parkins v Sodexho* (often relied upon as authority for the proposition that a complaint of breach of a claimant's employment contract is a qualifying disclosure), and ways of avoiding its apparent effect; and

   2.3. to suggest some practical tips for winning whistleblowing cases from the perspective both of claimants and respondents.

RECENT DEVELOPMENTS

3. Whistleblowing claims have assumed increasing importance in recent years. They are often high-value, high-profile and highly demanding. Some of the legal concepts have become fairly well settled following a series of well-known cases such as:

   3.1. *Bolton School v Evans* [2007] ICR 641 (CA) on the meaning of disclosure of information;

   3.2. *Babula v Waltham Forest College* [2007] ICR 1026 (CA) on the need for a reasonable belief that the information disclosed tends to show a relevant failure;

   3.3. *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97 (CA) on the meaning of good faith; and

   3.4. *Kuzel v Roche Products Ltd* [2008] ICR 799 (CA) on the burden of proof (see further below).

4. However, there are four recent developments in law and practice which merit particular consideration, namely:

4.1. the availability of interim relief in whistleblowing cases;

4.2. whether a post-employment protected disclosure can give rise to claim;

4.3. whether the wrongdoer can be a party other than the employer; and

4.4. the Government's proposal that whistleblowing claims should be forwarded to the relevant regulator so that the underlying allegations can be investigated where appropriate by the regulator.

We shall consider each issue briefly in turn.

(1) Interim Relief in Whistleblowing Cases

5. The availability of interim relief in employment tribunals is not well-known and applications for interim relief are rare. However, it may be granted in unfair dismissal cases where the reason for dismissal is one of those giving rise to automatically unfair dismissal such as the activities of health and safety representatives, employee representatives under TUPE or s188 TULR(C)A 1992, and in whistleblowing cases.

6. There have been recent applications for interim relief in whistleblowing cases, and it is a potential area for increased litigation in the future giving rise to interesting legal and tactical issues.

Statutory provisions

7. The relevant statutory provisions are found in sections 128-132 of the Employment Rights Act 1996 (ERA).

8. The following are the main features of this jurisdiction arising from these statutory provisions:

(1) An employee who complains under section 103A ERA that the reason (or principal reason) for his dismissal is that he made a protected disclosure may apply to the tribunal for interim relief: s128(1).

(2) The application must be presented before the end of the period of 7 days following the effective date of termination (whether before, on or after that date): s128(2).

(3) The tribunal shall determine the application as soon as practicable: s128(3).

(4) Interim relief will only be granted where it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason (or principal reason) for dismissal is that the employee made a protected disclosure: s129(1).

(5) When interim relief is granted, the employer is asked whether it is willing to reinstate or reengage the employee and, in the latter case, the employee is asked whether he is willing to accept reengagement on no less favourable terms: s129(3)-(7).

(6) Where the employer is not so willing, the tribunal shall make an order for the continuation of the employee's contract of employment: s129(9).

(7) A contract continuation order is an order that the contract continue in force for the purpose of pay and other benefits from the date of termination until the determination or settlement of the complaint: s130(1).

Key issues relating to interim relief in whistleblowing cases

9. Three key issues have emerged in relation to interim relief applications in whistleblowing cases, namely

   (1) the test to be applied for the grant of interim relief;

   (2) the burden of proof; and

   (3) whether oral evidence is appropriate.

   Each issue will be briefly considered in turn.

The test to be applied for the grant of interim relief

10. The test to be applied is found in s129(1), namely whether

> "it appears to the tribunal that it is likely that in determining the complaint to which the application relates the tribunal will find that the reason (or, if more than one, the principal reason) for his dismissal is"

that specified in s103A, namely that the claimant made a protected disclosure.

11. Put simply, the test is whether it appears that the Claimant is likely to succeed in his claim. It will immediately be seen that this test is different from that applicable to the grant of interim relief in the High Court in (for example) restrictive covenant cases where the test is whether there is a serious issue to be tried, in which case the balance of convenience will determine the outcome. "Serious issue to be tried" is a lesser requirement than "likely to succeed".

Taplin v Shippam

12. How is likelihood of success to be measured for this purpose? The leading of authority is *Taplin v Shippam Ltd* [1978] ICR 1068. In that case, the alleged reason for dismissal was taking part in trade union activities. The statutory provision setting out the test for interim relief in that case was in broadly the same terms, for present purposes, as s129(1) ERA.

13. The EAT (Slynn J presiding) considered what likelihood of success meant for this purpose. It rejected "reasonable prospect of success", saying at 1074A-B:

> "We do not consider that Parliament intended that an employee should be able to obtain an order under this section unless he achieved a higher degree of certainty in the mind of the [employment] tribunal than that of showing that he just has a "reasonable" prospect of success."

14. It then rejected an alternative formulation of "balance of probabilities" at 1074D:

> "Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51 per cent probability of succeeding in his application."

15. The EAT went on to reject "real possibility of success" on the basis that the section required the employee to establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning: 1074D-E.

16. Slynn J concluded at 1074F as follows:

> "We think that the right approach is expressed in a colloquial phrase suggested to us by [counsel for the employer]. The [employment] tribunal should ask themselves whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal."

17. The phrase "pretty good chance" of success may be thought itself to be ambiguous, or even to place the bar rather low. However, further elucidation of the test was contained in the following important paragraph of the EAT's judgment at 1074G:

> "Although the chairman of the [employment] tribunal expressed the burden of proof differently from the way we have done we do not consider that there is any real difference of emphasis. He thought that "likely" meant more than "probable" and he regarded "probable" as being "51 per cent or more". Accordingly we are not satisfied that he erred in law in his interpretation of the section."

18. The test for likelihood of success may, therefore, be expressed as a "pretty good chance" of success, which means more than probable where probable is 51 per cent or more.

Is Taplin v Shippam binding in whistleblowing cases?

19. It may be argued that *Taplin v Shippam* is not binding on an employment tribunal hearing an application for interim relief in a whistleblowing case. The following points may be made in support of this argument:

    (1) In *Taplin*, the statutory provisions under consideration were those applicable to interim relief in trade union cases rather than those applicable in whistleblowing cases. These provisions in issue in that case required, as a condition for granting interim relief, a certificate showing that a union official considered there were reasonable grounds for supposing the reason for dismissal was inadmissible. Thus, the *Taplin* test cannot simply be transposed to whistleblowing cases where the statutory provisions are not identical.

    (2) The House of Lords has subsequently stated that the word "likely" is capable of a range of meanings and must take its meaning from the context: *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. Lord Nicholls suggested in that case at [12] that the word "likely" encompasses different degrees of likelihood varying from "more likely than not" to "may well".

(3) There may be public policy considerations as to why tribunals should not adopt too strict an approach to the test for interim relief in whistleblowing cases. Whistleblowing protection is in the public interest, and the legislation should be interpreted so far as possible to extend protection for whistleblowing.

20. Against these points, it can be said that *Taplin* was dealing with essentially the same statutory wording as s129(1), and the test in that case has subsequently been applied in other cases including *Kraus v Penna Plc* [2004] IRLR 260 at [19]-[24] (a whistleblowing case) and *BCCI v Ali (No 2)* [2000] ICR 1354 at 1377D-F.

21. In a recent whistleblowing case, Stratford Regional Employment Judge Lamb rejected the arguments at paragraph 19 above and applied the *Taplin* test when dismissing an application for interim relief.

The burden of proof

22. A separate question arises as to whether any party bears the burden of proof at the interim relief stage and, if so, which party does so. This requires consideration of the relevant statutory provisions and the leading whistleblowing case on the burden of proof, *Kuzel v Roche Products Ltd* [2007] ICR 945.

23. As stated above, the statutory test for the grant of interim relief is whether "it appears to the tribunal" that the claimant is likely to succeed at trial: s129(1).

24. The burden of proof in whistleblowing dismissal cases generally was considered in detail in *Kuzel*. In that case, the EAT (HH Judge Clarke presiding) suggested that the following questions should be answered in deciding whether the reason for dismissal was that the employee had make a protected disclosure:

(1) Has the claimant shown that there is a real issue as to whether the reason put forward by the employers, some other substantial reason, was not the true reason? Has she raised some doubt as to that reason by advancing the section 103A reason?

(2) If so, have the employers proved their reason for dismissal?

(3) If not, have the employers disproved the section 103A reason advanced by the claimant?

(4) If not, dismissal is for the section 103A reason. In answering those questions it follows:

(a) that failure by the employers to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under section 103A;

(b) however, rejection of the employers' reason, coupled with the claimant having raised a prima facie case that the reason is a section 103A reason entitles the tribunal to infer that the section 103A reason is the true reason for dismissal; but

(c) it remains open to the employers to satisfy the tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the tribunal is not that advanced by the employers;

(d) it is not at any stage for the claimant (with qualifying service) to prove the section 103A reason.

25. When *Kuzel* reached the Court of Appeal, Mummery LJ expressed himself as follows on the burden of proof at [2008] ICR 799, [58]-[61]:

(1) In making a finding as to the reason for the dismissal, it is for the Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

(2) If the employer fails to show that the reason for dismissal was the reason that he asserted it was, the tribunal may find that the reason was that asserted by the employee, but need not do so.

(3) The tribunal may find, on a consideration of all the evidence in the particular case, that the true reason for the dismissal was not that advanced by either side.

(4) There is no legal burden on the employee to prove that a protected disclosure was the reason for his dismissal.

26. In light of the statutory test and the decision in *Kuzel*, who bears the burden of proof at the interim stage? There is recent authority to support the proposition that the claimant bears the burden of proving likelihood of success at the final hearing: *Bombardier Aerospace v McConnell* [2008] IRLR 51 at [15].

Is oral evidence appropriate at an interim relief hearing?

27. The third key issue to emerge from recent interim relief hearings is whether oral evidence is appropriate, or whether the tribunal should decide applications on the basis of the written material alone.

28. There is no tribunal rule dealing with the admissibility of oral evidence at the hearing of an application for interim relief.

29. On the one hand, the arguments against oral evidence include the fact that the hearing should not be a mini-trial (which would consume a disproportionate amount of tribunal resources to the detriment of other litigants and contrary to the overriding objective), and that oral evidence is not permitted at an interim relief hearing in the High Court (save, perhaps, in exceptional circumstances).

30. On the other hand, it can be argued that limited cross-examination of the respondent's witnesses is essential to do justice to the claimant, given that the respondent will know the true reason for dismissal but will never admit that it was because the claimant made protected disclosures.

31. The better view is that the question whether oral evidence should be admitted at an interim relief hearing is a matter for the discretion of the tribunal depending on the facts of the particular case. In some cases, the tribunal might decide the application on the basis of the ET1 and ET3. In another, it might do so based on witness statements without cross-

examination. However, in other cases, cross-examination may be allowed, although this is likely to be limited.

32. In a recent case where the claimant argued that he was dismissed on grounds of whistleblowing rather than redundancy (as contended for by the employer), Regional Employment Judge Lamb allowed limited cross-examination of witnesses for the claimant and the respondent at a two-day hearing, on the second day of which he gave an extempore reasoned decision dismissing the application.

The pros and cons of interim relief applications in whistleblowing cases

33. An application for interim relief can be an astute, tactical step in whistleblowing litigation. However, it is not risk-free and should not be embarked on by claimants without full and careful consideration of the potential downside.

34. First, it is important to understand the limitations of the jurisdiction. Thus, where the apparent reason for dismissal is redundancy, the claimant can apply for interim relief on the basis that the redundancy was a sham and the real reason was his whistleblowing. However, interim relief is not available where the claimant alleges that, if the redundancy situation was genuine, the reason he was selected was his whistleblowing. Selection for redundancy on whistleblowing grounds results in automatic unfair dismissal pursuant to section 105(1) and (6A) ERA. But such a complaint does not give rise to interim relief under s128.

35. Secondly, an interim relief application can be a useful means whereby the claimant can test the strength of the respondent's case. An interim relief hearing is likely to take place within a relatively short period of time following dismissal. The respondent might not have had an adequate opportunity to prepare its evidence, and address the weaknesses in its case. If cross-examination is permitted, the claimant might be able to make some headway in identifying weaknesses in the respondent's case. Evidence given by the respondent's witnesses at the interim relief hearing might be contradicted by their better prepared evidence at the final hearing. In addition, the experience of giving evidence might be unsettling for the respondent's witnesses, making the respondent more disposed to settle the case.

36. But, thirdly, an interim relief application can have a detrimental effect on a claimant's case. In heavy cases, it is likely to be time-consuming, costly and stressful for a claimant to prepare a detailed witness statement, and instruct lawyers to present his case at an interim relief hearing. A claimant who loses that application may well suffer a serious setback, psychologically and financially, in terms of the ongoing litigation. It will be a rare case in which interim relief is granted.

(2) Post-Employment Protected Disclosures

37. In *Woodward v Abbey National Plc (No 1)* [2006] ICR 1436, the Court of Appeal decided an employee was protected against victimisation occurring after the termination of employment on the ground that she had made a protected disclosure during her employment. What the Court left undecided, however, was whether the protection

extended to the situation where both the protected disclosure and the victimisation occurred after the termination of employment.

The decision in *Woodward v Abbey National*

38. In *Woodward*, the claimant alleged that she made protected disclosures during her employment, and that she was victimized after it had ended. The victimization was said to include her employer's failure to provide a reference for subsequent job applications and its failure to make adequate efforts to find her further employment with Abbey when she subsequently re-applied for work. The employment tribunal dismissed the claim on the ground of lack of jurisdiction given that the alleged detriment had occurred after the termination of employment. The EAT dismissed the claimant's appeal.

39. The difficulty in the claimant's way was the decision of the Court of Appeal in *Fadipe v Reed Nursing Personnel (Note)* [2005] ICR 1760 (decided in 2001) in which it was held that ERA did not cover post-termination victimisation by reason of health and safety concerns having been raised during employment. It was accepted by the claimant's counsel that *Fadipe* was on all fours with *Woodward*.

40. However, in *Rhys-Harper v Relaxion Group Plc* [2003] ICR 867, decided after *Fadipe*, the House of Lords unanimously decided that the discrimination statutes (the SDA, RRA and DDA) should be interpreted as extending to acts of discrimination and victimisation against a former employee carried out by an employer after termination of the contract of employment.

41. In *Woodward*, the Court of Appeal considered whether *Fadipe* could stand in the light of *Rhys-Harper*. This required an examination of the speeches in *Rhys-Harper*, which was undertaken in detail by Ward LJ. He concluded that the reason for the majority in *Rhys-Harper* concluding that an ex-employee was protected was that the context and purpose of the Act in question compelled that conclusion and that Parliament could not have intended such a limited application: [50]. However, their lordships did not speak with one voice when it came to the test to be applied to decide whether or not relief should be provided, as summarized by Ward LJ at [53]:

    (1) for Lord Nicholls, the employment relationship triggers the employer's obligation not to discriminate in all the incidents of the employment relationship whenever they arise, provided the benefit in question arises between the employer or former employer as such and the employee or former employee as such;

    (2) for Lord Hope, the test was whether there is still a continuation of the employment relationship;

    (3) for Lord Hobhouse, the test was one of proximity: does the conduct complained about have a sufficient connection with the employment, or a substantive and proximate connection between the conduct complained of and the employment by the alleged discriminator;

(4) for Lord Rodger, one must look for a substantive connection between the discriminatory conduct and the employment relationship, with the former employer discriminating qua former employer;

(5) for Lord Scott, it depends on whether the relationship between employer and employee brought into existence when the employee entered into the employer's service is still in existence, or is still continuing notwithstanding the termination of the employment.

In other words, Lord Hope and Lord Scott seem to tie the application of the Act to the continuance of the employment relationship whereas the majority look for a connection (variously described) between the former employee as such and the former employer as such.

42. The Court of Appeal concluded that *Fadipe* cannot stand with *Rhys-Harper* and, thus, it was free to depart from *Fadipe's* case if it concluded it was right to do so. It did. If it is in the public interest to blow the whistle, and PIDA shows that it is, then he who blows the whistle should be protected when he becomes victimized for doing so, whenever the retribution is exacted: [68].

The issue left undecided by Woodward: post-employment protected disclosures

43. Despite the detailed analysis of post-employment detriment in *Woodward*, the Court of Appeal did not decide whether the statutory protection was afforded where the protected disclosure, as well as the detriment, occurred after the employment had terminated. Tantalisingly, Ward LJ touched on the point in passing at [67]:

> "…the employer points out that the right not to suffer detriment conferred by Part V manifestly relate to the retaliatory action by the employer being taken because of something done in the course of the employment, for example attending for jury service, taking maternity leave etc. That may be a good argument for saying that the action of the employee which provokes the retaliation must be some activity during the currency of the employment but it does not follow that the retaliation must likewise be so confined. There is no sensible reason for so confining it. (I emphasise "may be a good argument" because I would not want it to be thought that I am excluding a remedy for blowing the whistle after the contract of employment has terminated: this is an issue which does not arise on the facts of this case.)" (emphasis added)

44. Notwithstanding Ward LJ's remark that this further issue did not arise on the facts of *Woodward*, this was not correct. Following the Court of Appeal's decision, the *Woodward* case was remitted for re-hearing by an employment tribunal. One of the issues at that re-hearing was whether the tribunal had jurisdiction to hear a whistleblowing complaint when the protected disclosure, as well as the alleged detriment, occurred after the employment was terminated. It was argued for the employer that, for reasons referred to by Ward LJ in the passage cited in the preceding paragraph, such disclosures were not covered. The tribunal concluded that they were covered for a number of reasons: *Woodward v Abbey National Plc* 2200196/2003 (decision of 26 February 2009).

45. It seemed to the tribunal that it cannot have been Parliament's intention that, for example, an employee who blows the whistle the day before she is dismissed, and is then given a bad

reference for that reason is protected, but one who blows the whistle the day after, and is then given a bad reference for that reason is, purely because of that difference in timing, not protected.

46. Nor did the wording of the legislation constrain the tribunal to interpret it in that way. The meaning of a disclosure to an employer in section 43C imports the definition of employer in section 230(4), which includes former employer.

47. The tribunal held that, as in the case of post-employment detriment, there does need to be some sufficient connection between the disclosure and the former employment. Whatever the precise formulation of that test ought to be, the tribunal was confident that a disclosure which relates to matters which themselves occurred during the period of employment (and which the employee learned about while employed) must be in scope.

(3) Cases where the alleged wrongdoer is not the employer

48. Ordinarily, a whistleblowing claimant alleges that he made protected disclosures about alleged wrongdoing by his employer. But is protection afforded where the alleged wrongdoer was not the employer or a party connected to the employer? This question was answered in the affirmative by the EAT in *Hibbins v Hesters Way Neighbourhood Project* [2009] ICR 319.

49. The claimant language teacher read a local press report in which the police were asking for information about the identity and whereabouts of a named suspect in a rape case. The claimant identified the suspect as a student who had recently applied to join one of the courses run by the respondent. She provided information about the suspect to the police. The claimant alleged that she subsequently suffered detriments as a result of having reported the matter to the police, which she claimed was a qualifying disclosure.

50. The employment tribunal dismissed the complaint on the ground of lack of jurisdiction in that the alleged wrongdoer was not her employer whereas the legislation was so limited.

51. The EAT allowed the claimant's appeal. It concluded that the identification of the wrongdoer as "a person" (for the purpose of section 43B(1)(b)) expands the legislative grasp to include all legal persons without being limited to the employer. In other words, there is no limitation whatsoever on the people or the entities whose wrongdoings can be the subject of qualifying disclosures: [14].

(4) The Government's Proposal to send ET1s to the Regulator

52. On 3 July 2009, the Government launched a consultation on its proposal to allow employment tribunal whistleblowing claims to be forwarded by employment tribunals to the relevant regulator so that the allegations of the underlying issue can be investigated where appropriate by the regulator[1]. The consultation period closed on 2 October 2009[2].

[1] http://www.berr.gov.uk/files/file51554.pdf

[2] ELA has submitted a detailed response to the Government's consultation: http://www.elaweb.org.uk/medialibrary.axd?id=1046631569

53. The Government's proposed process is to allow employment tribunals to send copies of the ET1, or extracts from it (for example, the ET1 may have lots of other information not relevant to the PIDA claim) directly to the relevant regulator. The regulator would then assess the information and investigate if appropriate as part of their normal regulatory duties, procedures and processes. Only those claims accepted by the employment tribunal where PIDA is identified as a jurisdiction would be subject to this process. The relevant regulator would be identified from the list of prescribed persons under the PIDA legislation. It is proposed that the claimant's express consent be obtained, by the claimant ticking a 'yes' box on the ET1 to show that they are requesting the information to be sent. If the 'yes' box is not ticked then the information will not be sent.

54. In its response to the Government consultation, ELA has expressed a concern that if the claimant is allowed to decide whether or not the ET1 should be sent to the relevant regulator, this may be used improperly by claimants as a "bargaining chip" with which to secure a financial settlement from the respondent. It could be used as leverage by claimants to secure a higher settlement than they could otherwise expect to achieve as it would be in their gift to decide whether or not the claim could be passed to the relevant regulator, playing on the respondent's desire to avoid a costly and potentially damaging investigation.

55. In fact, whether or not the claimant's express consent is obtained, or whether this is done on the basis of implied consent, the mere fact that the ET1 could be sent on by the tribunal would give the claimant an additional basis on which to seek settlement. Such a regime could be said to be contrary to the overriding objective in that the parties will not be on an equal footing; the claimant will potentially have the upper hand from the outset. It could also lead to increased satellite litigation with requests for disclosure by one party of the other's communications with the regulator, or even for a stay of the tribunal litigation pending the outcome of the regulatory investigation. Undoubtedly, if the Government introduces such a procedure, it will have significant ramifications for whistleblowing litigation.

PARKINS v SODEXHO AND WAYS TO GET AROUND IT

The decision

56. In *Parkins v Sodexho Ltd* [2002] IRLR 109, the claimant was summarily dismissed within his first year of service with the Respondent. He therefore did not have the requisite length of service to found a claim for unfair dismissal. He brought a claim for automatic unfair dismissal, alleging that he had been dismissed because he had complained about lack of adequate on-site supervision. He claimed that this was a matter of health and safety which gave rise to a breach of his employment contract, and therefore involved a protected disclosure within the meaning of s.43B(1)(b) of ERA, as amended by PIDA.

57. An employment tribunal dismissed the claimant's claim for interim relief, holding that a breach of contract was not a failure to comply with 'any legal obligation' within the meaning of s.43B(1)(b). According to the tribunal:

> "While everybody is obliged to comply with contracts of employment, 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."

58. The Employment Appeal Tribunal allowed the claimant's appeal. In considering whether a legal obligation included a legal obligation arising out of the contract of employment, the EAT (Judge Altman presiding) held that the provision had been very broadly drawn and that there was no real basis for excluding a legal obligation which arises from a contract of employment from any other form of legal obligation: [16]. The EAT stated at [18]:

> "We find it difficult to define the spirit of this sort of legislation or to be confident that we know about it, but it certainly comes within the letter of the provision, on a literal interpretation. It seems to us that we do not need to go beyond that."

Subsequent consideration of *Parkins v Sodexho*

59. A number of subsequent EAT cases have considered and applied the reasoning in *Parkins v Sodexho.*

60. *Odong v Chubb Security Personnel*[3] concerned an allegation by a security officer that he had suffered a detriment by being removed from his posting at American Express because he had made a protected disclosure, namely, that he had refused to carry out what he considered to be an unlawful or unauthorized instruction by a fellow officer to carry out a temperature check in three rooms. The Tribunal concluded that his removal had nothing to do with an issue relating to health and safety or to a public interest disclosure, and therefore rejected his detriment complaint.

61. The EAT (Recorder Luba presiding) allowed the appeal, holding that the facts were capable of amounting to a protected disclosure within the meaning of s.43B(1)(b). The EAT expressly accepted the reasoning in *Parkins v Sodexho*, finding that "a breach of a term of a contract of employment is a sufficient breach, or a potentially sufficient breach, to come within section 43B(1)(b)": [21]. It found that the instruction potentially breached the claimant's contract of employment or alternatively, the instructing officer's own contract of employment, and therefore was given in breach of a legal obligation.

62. In *Fincham v HM Prison Service*[4], decided in December 2002, the claimant complained to her employer that she was being harassed by other members of staff. She claimed that this amounted to a protected disclosure within the terms of s.43B(1)(b), in that she had notified her employer that it had failed to comply with the implied term of trust and confidence in the claimant's contract. The EAT (Elias J presiding) agreed with the ruling in *Parkins v Sodexho* that a 'legal obligation' would include breaches of the contract of employment: [24]. The EAT implicitly accepted that, in principle, a breach of the implied term of trust and confidence could fall within the scope of s.43B(1)(b): [32]. However, the EAT upheld the Tribunal's finding that, on the facts of the case, the employee's complaint about the conduct

[3] EAT/0819/02/TM.

[4] EAT/0925/01RN & EAT/0991/01/RN.

of other employees did not of itself tend to show a failure to comply with the implied term of trust and confidence: [33].

63. The assumption that a breach of trust and confidence could attract the protection of s.43B(1)(b) found favour in later cases. For example, in *Douglas v Birmingham City Council*[5], decided in March 2003, the EAT (HHJ McMullen presiding) concluded that a classroom assistant's complaint to the Chair of Governors that the head teacher was not carrying out equal opportunities policies was a disclosure which related to the matters within s.43B(1)(b). The EAT found that the duty of trust and confidence requires that persons be not treated differently on account of their ethnic background, and therefore, an allegation that a head teacher was engaged in a practice which conflicts with that obligation indicated she was failing to comply or likely to fail to comply with a 'legal obligation' – both within equal opportunities policies which are incorporated into contracts of employment and anti-discrimination legislation: [36].

64. More recently, in the 2006 case of *Felter v Cliveden Petroleum Company*[6], which concerned the existence of legal obligations owed by one company to another, the EAT noted at [12] that Counsel for the Respondent reserved the right to argue on appeal that *Parkins v Sodexho* was wrongly decided, and that s.43B(1)(b) covers only statutory, not contractual, obligations. However, no appeal was pursued, and therefore *Parkins* arguably remains good law on the question of the construction of s.43B(1)(b).

Ways to avoid the effect of *Parkins v Sodexho*

65. Was *Parkins v Sodexho* correctly decided? The phrase "any legal obligation to which he is subject" is certainly wide enough on its face to include a legal obligation which arises under a contract of employment. The statutory language is not restricted in any way, and it is difficult to see a basis on which 'legal obligation' could be interpreted as referring to statutory obligations but not to contractual obligations.

66. But the EAT's literal interpretation of 'legal obligation' is plainly inconsistent with the purpose of the legislation which, as the preamble to the legislation makes clear, is to protect disclosures of information *in the public interest*. The decision in *Parkins v Sodexho* instead enables claimants to seek the protection of whistleblowing legislation for essentially private grievances. Given the breadth of the implied term of trust and confidence, it is possible to envision a wide number of complaints of mistreatment by an employer that could give rise to a qualifying disclosure for the purposes of the legislation.

67. How then is it possible for employers to avoid or ameliorate the effect of *Parkins v Sodexho*? We suggest that there are three possible ways:

    (1) To argue that the reasoning in *Parkins v Sodexho* is obiter, and therefore not binding;

    (2) To argue that the reasoning is wrong and should be overturned;

[5] EAT/0518/02ILB.

[6] EAT/0533/05/DM

(3) To rely on the requirement of good faith to ensure that the disclosure is in the public interest.

(i) Obiter comments

68. The EAT's finding in *Parkins v Sodexho* that a breach of contract falls within the scope of s.43B(1)(b) was not part of the ratio of the case. The issue on the appeal was whether the Tribunal erred in refusing interim relief under s.129 ERA. The EAT concluded that the Tribunal erred in failing to apply the correct test under s.129, namely, whether it was likely that the final Tribunal would find that the reason for dismissal was that the claimant made a protected disclosure. The EAT found that the Tribunal instead prejudged the issue that would have to be decided at the main hearing, by accepting as the reason for dismissal that which was put forward by the respondent, without having heard evidence on the matter. The ratio of the case is found in paragraph 29 of the judgment:

> "Accordingly, it seems to us that we must find that the employment tribunal erred in the question they asked themselves in reality, as to the reason for dismissal, by asking themselves what was the reason for dismissal and forming a judgment about it, rather than asking whether it was likely that the reason would be a qualifying reason at the final hearing."

69. The decision was set aside on that ground (as the EAT expressly noted in paragraph 30). The EAT's finding that the Tribunal erred in law in concluding that the contract of employment could not found an allegation of failure to comply with a legal obligation under s.43B was not a necessary part of the reasoning; it was merely obiter dicta.

70. It would therefore be possible for respondents to seek to argue that although the reasoning in *Parkins v Sodexho* might be persuasive, it is not legally binding on future Tribunals.

(ii) Reasoning incorrect

71. Alternatively, respondents could go further and seek to argue that *Parkins v Sodexho* was wrongly decided, on the basis that 'legal obligation' should be interpreted to exclude obligations arising out of an employment contract. This would, however, require an appeal to the EAT or the Court of Appeal.

(iii) Reliance on good faith

72. A third, and potentially more fruitful, route is to import a public interest test through the requirement of good faith rather than through the concept of a legal obligation.

73. Under sections 43C and 43E-H, it is necessary to satisfy the requirement of good faith in order to obtain the protection of the whistleblowing legislation. The leading authority on the good faith requirement is the Court of Appeal case of *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97. In that case, the claimant, who had worked as an administrator for the respondent centre, made a series of allegations of impropriety against the manager of the centre. An internal investigation concluded that her complaints were unfounded. Following disciplinary proceedings, the claimant was summarily dismissed for gross misconduct on the basis of her "unfounded and libellous" allegation and her refusal to

cooperate with the investigation. The claimant brought a claim maintaining that she was entitled to be regarded as unlawfully dismissed under s.103A.

74. The tribunal dismissed her claim, holding that in making the disclosure, she had lacked the good faith required under s.43C(1) or s.43G(1)(a), notwithstanding that she had reasonably believed in the substantial truth of her allegations, and that she had not made the disclosures for personal gain. The tribunal found that the concept of "good faith" required more than reasonable belief in the truth of the allegations, and required in addition a consideration of motive. It concluded that the claimant's allegations had been motivated by personal antagonism towards the manager. The EAT upheld the tribunal's holding and analysis.

75. Before the Court of Appeal, the claimant sought to argue that "good faith" meant nothing more than "honestly" or "with honest intention". Public Concern at Work supported this position as an interested party, and sought to argue that it would seriously damage the purpose of PIDA if ulterior motivation could deprive a disclosure of the quality of having been made in good faith.

76. The Court of Appeal held that, shorn of context, the words "in good faith" have a core meaning of honesty: [41]. In the context of the legislation, the concept of good faith had to mean more than reasonable belief in the truth of the allegation. However, Auld LJ noted that where a statement is made without reasonable belief in its truth, that fact would be highly relevant to whether it was made in good faith: [44]. Auld LJ considered that good faith must be concerned with motive. His Lordship stated that it was more in keeping with the declared public interest purpose of the legislation to hold that a tribunal should only find that a disclosure was not made in good faith when it was of the view that the dominant or predominant purpose of making it was for some ulterior motive, and not for a public interest purpose: [56]. Wall LJ, agreeing with Auld LJ, stated at [73] that:

> "I can see no more satisfactory way of reaching such a conclusion [that an applicant is not acting in good faith] than by finding that the applicant was not acting in good faith because his or her predominant motivation for disclosing information was not directed to remedying the wrongs identified in section 43B, but was an ulterior motive unrelated to the statutory objectives."

77. Where, therefore, a claimant has mixed motives, the effect of *Street v Derbyshire* is that the disclosure will not necessarily have been made in bad faith.

78. The subsequent EAT decision in *Bachnak v Emerging Markets Partnership (Europe) Ltd*[7] expanded on the *Street v Derbyshire* analysis. In *Bachnak*, the employee was found to have made disclosures primarily to strengthen his position in negotiations with the employer, and to put pressure on the employer not to dismiss him. HHJ Peter Clark held that the burden lies on the respondent to prove that the claimant acted in bad faith: [25]. Moreover, he held that where, as on the facts of *Bachnak*, the employee's predominant purpose was his or her personal interest, the disclosure will not be made in good faith: [24]. Hence, it is not necessary to demonstrate personal antagonism or malicious motivation to deprive a

[7] EAT/0288/05/RN.

disclosure of good faith; it will be sufficient that the employee does not act predominantly in the public interest, but rather for his or her personal interest.

79. The decisions in *Street* and *Bachnak* open up the possibility of defeating a whistleblowing claim where the employee is not primarily acting for a public interest purpose identified in s.43B. The effect of *Bachnak* is therefore to import, through the concept of good faith, a requirement that the disclosure is in the public interest. So, for example, where an investment banker complains to his manager that his discretionary bonus is too low, or a shop assistant lodges a grievance that she has been harassed by a fellow worker, it may be possible for the employer to argue that the employee was predominantly motivated by an ulterior motive, namely, his or her own personal interests rather than a statutorily recognized public interest, and therefore that the employee does not satisfy the requirement of good faith.

80. It would also mean that if the case of *Odong* were to be decided now, it would be possible to argue that the employee was not making a disclosure in the public interest, and therefore should not be able to obtain the protection of the whistleblowing legislation. On the other hand, the case of *Douglas* could be reconciled with HHJ Peter Clark's approach in *Bachnak* because the complaint in that case was essentially that the head teacher was failing to comply with equal opportunities policy or legislation, which does give rise to a public interest issue.

81. The concept of good faith can therefore provide a route by which tribunals can ensure that disclosures are made in the public interest, and to bypass the more troubling aspects of *Parkins v Sodexho*, while still giving effect to the broad meaning of 'legal obligation' in s.43B. We consider that, unless and until the Court of Appeal reconsiders *Parkins v Sodexho*, this is the most useful approach for respondents in whistleblowing cases.

WINNING WAYS: TIPS FOR CLAIMANTS AND RESPONDENTS

Tips for claimants

82. Whistleblowing claimants are in a unique position compared with claimants in other cases. The very nature of a whistleblowing claim is such that it will raise potentially highly sensitive and embarrassing matters about the inner workings of an organization, which an employer may well be keen to keep out of the public domain. There is arguably a greater imperative for employers to settle whistleblowing claims than any other claim, including discrimination claims.

83. On the other hand, Tribunals will be alert to the possibility that some claimants will bring whistleblowing claims precisely because of their potential for embarrassment, or in order to avoid the length of service requirements for ordinary unfair dismissal claims. There may therefore be a certain level of cynicism that will greet all whistleblowing claimants, which they will need to overcome.

84. Based on our experience, these are some of the practical considerations which commonly feature in the litigation strategy of claimants and their legal advisers :

(1) Make protected disclosures in writing. Where protected disclosures are said to have been made orally, there is a lot of room for dispute as to what was disclosed by the claimant. In such cases, the tribunal's conclusion as to whether there were protected disclosures will often be unpredictable and will depend on the performance of the claimant as a witness. However, if the claimant has made a qualifying disclosure in writing (such as by an email sent to relevant individuals), the scope for the respondent to challenge the fact of the protected disclosure is likely to be reduced or even eliminated. This can be a valuable tactic for employees, especially for those who have the benefit of legal advice whilst the dispute with their employer is ongoing.

(2) Be clear about the case from the outset: It is important for whistleblowing claimants, and their advisers, to understand their case from the beginning, and to check that they satisfy all of the requirements for a qualifying disclosure under s.43B, and that they made their disclosure(s) in accordance with s.43C-H. Whistleblowing claims need to be pleaded carefully and fully, to avoid costly and time-consuming requests for further and better particulars, and to ensure consistency in their case from the outset.

(3) Be alert to respondents' claims to privilege from disclosure: Often where protected disclosures have been made, the respondent has involved its legal advisers, both internal and external, in advising in relation to the protected disclosures. Sometimes, the responsible officer under an internal whistleblowing policy is also an in-house lawyer. This can present the respondent with potential difficulties in relation to the disclosure of relevant documents: Are the documents subject to legal professional privilege? If so, has the privilege been waived (especially where the claimant has seen them already during an internal investigation)? Can the respondent disclose and rely upon privileged documents in the employment litigation without thereby waiving privilege against the whole world? Can the tribunal sit in private so as to safeguard privilege? Appropriate and targeted applications by claimants for specific disclosure can cause difficulties for respondents in relation to the handling of such privileged material.

Tips for respondents

85. In general terms, the advice to employers on the receiving end of whistleblowing claims reflects some of the distinctive characteristics of such claims referred to above. Given the likely sensitive nature of whistleblowing allegations, it is important that respondents should be aware from the outset of the potential for adverse publicity. A respondent will be in a far stronger position if it is genuinely unconcerned about press interest. Even where media attention would be unwelcome, a respondent should always seek to convey the impression that it is unconcerned about press reporting of the case. Respondents would be well advised to be ready to respond to press enquiries, perhaps with the assistance of media advisers, who are often engaged on both sides in these cases.

86. As for particular tactics deployed by respondents, we make the following suggestions:

(1) Be cautious about requesting further information. When an ET1 is inadequately particularised, it is very tempting to serve a detailed request for further information. There are often sound arguments for doing so: it is important to understand clearly the claimant's case before witness statements are exchanged; it may well flush out his weaker points; it will put him to effort and expense. However, where the protected

disclosures are poorly or insufficiently particularized, it is worth pausing to consider whether a request for further information is truly in the respondent's best interests. Rather, might the exercise of responding to the request cause the claimant to focus on his case and plead it in a more sustainable and plausible way? There are other ways for a respondent to attack a badly pleaded whistleblowing claim. An application might be made to strike out parts of a witness statement that put forward a different case as to protected disclosures from the pleaded case. Progress can be made in cross-examining the claimant as to whether his pleaded case is different from the case he is seeking to advance at trial. Closing submissions can point to any discrepancies between the pleaded case and that put forward at the hearing.

(2) Consider admitting protected disclosures and fighting on causation. Another temptation for respondents is to fight every issue, including whether or not the claimant made protected disclosures, either at all or in a manner that satisfies the statutory requirements. An alternative approach is to admit that protected disclosures were made as alleged, but defend on the basis that the claimant suffered no detriment or, if he did, it was unrelated to the protected disclosures. An advantage of this approach is that less time is likely to be spent in tribunal, possibly in the presence of the media, in considering the alleged wrongdoing. It might also result in the focus being placed on the stronger aspects of the respondent's case. The obvious disadvantage is that it puts all the respondent's eggs in the causation basket. Where the alleged protected disclosures are dubious, it might be worth the challenge even at the price of ventilating alleged wrongdoing at a public hearing. It provides at least the chance of winning on the protected disclosure issue, as well as causation.

(3) Be sure to present the positive case for the claimant's treatment. As well as rebutting the claimant's case (that he made protected disclosures, that his mistreatment was because he made protected disclosures), it is important that the respondent presents its positive case as to why the claimant was treated as he was. There are, at least, three reasons for this. First, the tribunal will expect the employer to know the reason for the claimant's treatment ("the reason why" as in discrimination cases), and will look to it for cogent evidence on the point. Secondly, the burden of proof generally is on the respondent to demonstrate the reason for treatment (section 48(2) in a detriment case, and section 98(1) and 103A read with Kuzel in an unfair dismissal case). Thirdly, where the reason for the treatment is the claimant's poor performance or misconduct, a full pleading and comprehensive witness statements giving chapter and verse on the claimant's failings, will bring home to him what he will face if he goes through with a full hearing. This might improve the chances of an early and reasonable settlement.

paulgoulding@blackstonechambers.com

catherinecallaghan@blackstonechambers.com

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