A CHANGE OF PITCH? THE REMAKING OF WHISTLEBLOWING

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Whistleblower: ˈ(h)wɪsəlbloʊ(ə)r. A person who informs on a person or organisation regarded as engaging in an unlawful or immoral activity. See also: whistleblowing: ˈwɪs(ə)lbləʊɪŋ.

The two words that make up whistleblowing, whistle and blowing, are both of German origin. The word itself seems to be in the style of a typical German compound noun. The French term is altogether more etymologically interesting: *dénonciateur* for a man or *dénonciatrice* for a woman. At first blush, this might seem rather harsh. After all, to denounce someone is thought commonly to mean to declare publicly that someone is wrong or even evil, perhaps by declaring someone to be a traitor. The English word *denounce* would appear to carry with it a sense of censoriousness and, possibly even, negative moral value.

That would, however, be to fall into *erreur*. The root of the English denounce and the French *dénoncer* is the Latin verb *denuntiare*. This means nothing other than to announce officially or to give official information. This itself draws from the Latin noun *nuntius*, meaning reporter or messenger.

So does the law treat whistle-blowers – as messengers bringing information rather than as angry referees setting themselves up over others, furiously calling others to order.

History

It is worth recalling the history of whistleblowing becoming a protected act. Parliament passed the Public Interest Disclosure Act 1998 ('PIDA'). In a debate during the passage of the Bill, government minister Lord Borrie stated:

> *The purpose of this Bill is to give a clear signal to people in places of work up and down the country that if they suspect wrongdoing, the law will stand by them provided they raise the matter in a responsible and reasonable way. Where a worker is aware of fraud, a price-fixing cartel, the sexual abuse of a child in a home or a danger to health, safety, or the environment, or some other malpractice, this Bill provides welcome and much needed guidance.*

> *If today a worker feels unable to raise the matter with his immediate manager, for whatever reason, he may well feel that the only options are to stay silent or to blow the whistle in some underhand way, perhaps by leaking information anonymously to the media. Once this Bill is enacted and taken to heart by the British people, which I am sure it will be, there will be a much improved chance that concerns about dangers to the public interest will be raised and addressed within the organisation itself. Where there are good reasons why such concerns cannot be raised and resolved internally, the Bill sets out a tight structure whereby the concern can be raised outside the organisation, thereby protecting the public interest.*

What is whistleblowing?

This is a term of law. It was originally defined in PIDA as being *any disclosure of information, which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following*, going on to list *inter alia*, that a criminal offence had been committed, that a person had failed to comply with a legal obligation to which they were subject or that the health or safety of any individual had been, was being or was likely to be endangered.

The case of *Parkins v Sodexho* [2002] IRLR 109 held that a breach of a legal obligation could relate to an employer's breach of contract. Parliament replied by amending PIDA to state now that a qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker, *is made in the public interest* and tends to show one or more of the enumerated matters. The Explanatory Notes to the amending Act make clear that this was to address *the possibility that any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure [which] has led to claims being lodged at employment tribunals that would not otherwise have been brought and is contrary to the intention of the legislation.* Note, the disclosure does not actually have to be in the public interest. Rather, the whistle-blower must have a reasonable belief that it is.

How this affects public authorities is less clear. In relation to the police, for instance, a potential failure with respect to excessive working hours, use of suitable work equipment or the promotion of inappropriate persons may have a private *and public* element. The private element may be where a police officer wants themselves or a person they represent to be preferred. However, a suggestion as to a selected person's unsuitability may affect public safety. There may be a question as to what degree the seriousness of the wrongdoing affects

a reasonable belief that its disclosure is in the public interest. Conversely, there may be an issue of publicly funded authorities behaving (im)properly *per se*.

There is currently a question as to what extent a whistle-blower can show as a matter of *fact* that they have a reasonable belief that the matter is in the public interest where their predominant motive is personal interest: see *Bachnak v Emerging Markets Partnership (Europe) Ltd* (UKEAT/0288/05/RN) and *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4. It is likely that motive will not affect the belief. The amendment requiring belief in the public interest was accompanied with removal of the requirement of good faith (at the stage of establishing liability). This focuses on the act of *whistleblowing* rather than the *whistle-blower* who does it. See also *Chesterton Global Ltd v Nurmohamed* [2015] ICR 920. There, a whistle-blower reasonably considered a disclosure to be in the public interest despite its arising out of the terms of his personal contract of employment and where the person most affected by the act being disclosed (the manipulation of accounts) was the whistle-blower himself in the form of his commission payments. The matter is on appeal to the Court of Appeal.

Relying heavily on *Chesterton*, the EAT overturned the strikeout of a whistleblowing claim in *Morgan v Royal Mencap Society* [2016] IRLR 428. Simler J stated, at paragraph 26, that it was reasonably arguable that an employee could consider health and safety complaints to be made in the wider interests of employees generally, even where the whistle-blower was the principal person affected, *"it is reasonably arguable that an employee may consider health and safety complaints – even where they are the principal person affected – to be made in the wider interests of employees generally. Whether that is so in a particular case is a question of fact. In my judgment, there are disputed facts on the question of public interest in this case that were not capable of determination without hearing the evidence and without resolving one way or another those factual disputes. In all those circumstances, I am driven to conclude that the employment judge erred in law in striking out this case on the basis of legal argument only and without resolving the potential factual disputes."*

Insofar as there were disputed questions of fact on the question of public interest, strike-out of the claim was inappropriate. It remains to be seen what will be the decision of the Court of Appeal on *Chesterton* and any effect that this has on *Royal Mencap Society*.

For all of that, there is no actual definition of what is or amounts to the public interest. An initial disclosure by a police constable or police sergeant may well be. The situation may become less clear in circumstances where the disclosure is then investigated and considered either by professional standards or in a Gold Group but where the officer's repeated making of the same disclosure to others in the force whether his managers, other officers, potentially the PCC may become relentless and harassing.

A whistle-blower's having a reasonable belief that a disclosure is in the public interest does not fit it into the enumerated categories. Analysing whether a disclosure is a qualifying disclosure involves two considerations – the subjective belief that the disclosure is in the public interest and an objective test as to whether it falls within one of the categories. A police officer's stating that a particular force policy is likely to be ineffective or that there is gross mismanagement may well fall outwith the definition of a qualifying disclosure – even if making it is otherwise in the public interest.

Also unclear is how ERA s43B hangs together with s43H. Section 43B defines a qualifying disclosure for Part IV of the Act – and does so requiring that the worker have a reasonable belief that the disclosure is made in the public interest. Section 43H refers to disclosures of exceptionally serious failures. A qualifying disclosure is made in accordance with section 43H if the worker reasonably believes the information disclosed is substantially true, he does not make it for personal gain, the relevant failure is exceptionally serious and it is reasonable for him to make the disclosure. It seems odd that a tribunal would have to be satisfied of the whistle-blower's subjective belief that the disclosure was in the public interest before determining whether objectively it was exceptionally serious.

Should a lacuna be interpreted in light of Convention law?

In *Heinisch v Germany* [2011] IRLR 922, the European Court of Human Rights held that the public interest in making known information about serious shortcomings in the care provided by state-owned care homes was so important that it was protected by article 10 – freedom of information. The whistle-blower's dismissal had, therefore, been a violation of article 10. The court stated that employees owed their employer a duty of loyalty, reserve and discretion, such that disclosure should first be made to the person's superior or other competent authority or body. Only in the last resort should a disclosure be made to the public. Similarly, in *Rubins v Latvia* [2015] IRLR 319, the dismissal of a university professor who criticised the management of his state-financed university, such matters covering matters of public interest, was contrary

to article 10. His dismissal would have a serious chilling effect on other university employees and would discourage them from raising criticism.

There are two ways to view this. One the one hand, Convention rights operate at a high level of abstraction. One should first seek the protection of rights in common law and analyse whether it satisfies the protections conferred by the Convention rather than resorting to the Human Rights Act 1998 as a tort statute: see *R (Sturnham) v Parole Board* [2013] 2 AC 254 [29]. On the other, where there is a potential lacuna in PIDA over overly strict interpretation of its terms, the relevant enactments should be read in such as way as to be compatible with article 10.

In *Day v Lewisham and Greenwich NHS Trust* (2016) UKEAT/0250/15, a specialist registrar made disclosures about patient safety to the trust that employed him and then to Health Education England ('HEE'). He claimed that HEE subsequently treated him detrimentally. HEE was not his employer and the Claimant argued that he should be granted a remedy by reading PIDA in conformity with article 10. The EAT rejected the submission, stating that this was not a lacuna but a deliberate absence of protection, well within the margin of appreciation, *"The appeal to art 10, whether made part of EU law by route of the Charter, does not assist. In neither Germany nor Hungary had the State provided any legislative protection against mistreatment of those who blew the whistle. It is well within the margin of appreciation to be accorded to a member state that it should enact careful and detailed provisions as the UK Parliament has done in enacting Pt IV of the Employment Rights Act. Forensically attractive though it may be to describe an absence of protection in particular circumstances as a "lacuna" it is better viewed in this case… as Parliament carefully delineating the extent to which protection against detriment for whistle blowing should be afforded…"*

It remains an open question whether disclosures by police officers which are otherwise in the public interest but which fail to fall within the enumerated categories will attract the protections of article 10. The decision in *Day* would suggest not – however it may depend upon the seriousness of the issue and the degree of mismanagement.

What qualifies as a disclosure

It is well known to say that a disclosure involves the conveying of information, of facts. That much was stated in *Cavendish Munro Professional Risks Management v Geduld* [2010] IRLR 38. For example, information would be "the detention of detainees is routinely not being

reviewed every six hours" whereas a mere allegation would be "we are not complying with PACE." Further to this, it has been said that the requirement is that facts be conveyed rather than mere opinion. In *Goode v Marks & Spencer* (2010) UKEAT/0442/09, a worker breached confidentiality, writing to a newspaper about possible changes to a pension scheme. This was not a qualifying disclosure where he had done no more than vented his highly adverse opinion of the proposals and where the only information disclosed was that he was unhappy about it.

This effect of these decisions has, however, been limited by later cases. In *Western Union Payment Services UK Ltd v Anastasiou* (2014) UKEAT/0135/13, the EAT stated, *"the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive."* Here, the expression of the facts concerning sales figures and an opinion as to future performance (or an expected lack thereof) amounted to the provision of information.

More recently, *Cavendish* has been deprecated in *Kilraine v LB Wandsworth* [2016] IRLR 422. The Claimant, who was dismissed in September 2011, alleged that this was because of her having made four protected disclosures. It was suggested that these disclosures were, in fact, unfounded allegations that she had made against colleagues. At first instance, the employment tribunal found that none of four disclosures qualified as such and that two of them did not involve the giving of information.

The EAT (Langstaff J) stated, *"I would caution some care in the application of the principle arising out of Cavendish Munro. The particular purported disclosure… was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."*

A consequence of this will be the increased difficulty in striking out cases – as noted in *Royal Mencap Society* above.

Causation – who has to know?

A dismissal of an employee is automatically unfair if done for the principal reason that they made a protected disclosure. Ordinarily, this will require analysis of the reason given by the manager making the decision to dismiss. It is not clear, however, what to do where they have reached their decision as a result of being misled by another manager who has engineered the situation. In *Co-operative Group Ltd v Baddeley* [2014] EWCA CIv 658 [42], Underhill LJ left open the possibility that in such a case, the motivation of the manipulator could, in principle, be attributed to the employer, *"There was some discussion before us of whether that approach [analysing the decision maker's mind] was applicable in all cases or whether there might not be circumstances where the actual decision-maker acts for an admissible reason but the decision is unfair because (to use Cairns LJ's language) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation – for short, an Iago situation. [Counsel] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct."*

Slightly differently, in *Ahmed v City of Bradford MDC* (2014) UKEAT/0145/14, a manager wrote the Claimant a negative reference, on which his subsequent employer relied in good faith. The EAT held that the fact the recruiting manager did not realise he was being misled by the reference did not sanitise the effect of the reference or exonerate the new employer from a decision that ultimately was significantly influenced by an infected reference that came into existence as a result of a protected disclosure.

The passage above in *Baddeley* has been relied upon recently by the EAT in *Royal Mail Group Ltd v Jhuti* [2016] IRLR 854 – but the result is not without difficulty. Here, a new employee made protected disclosures to her manager, who tried to persuade her to retract it and then made her working life very difficult. He misled another manager who reviewed the Claimant's position and subsequently dismissed her on the basis of inadequate performance. Mitting J held that the Claimant's own manager's actions, reasons and motivations should have been considered when determining whether the principal reason for dismissal was the Claimant's making protected disclosures. Relying on the passage above from *Baddeley*, he held at

paragraph 41, *"A man can manipulate what a person believes as to his reason just as well as he manipulates what a person believes as to the fairness of decisions which flow from having that reason… I am satisfied that, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them."*

The possible difficulty with this decision is that it takes an opposite approach to that of discrimination – where a Claimant must show that the person subjecting them to the detriment is also the person who is the discriminator. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, Underhill LJ rejected any suggestion of composite liability for a discriminatory act, stating, *"…it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow."* The case of *Jhuti* is on appeal to the Court of Appeal.

Police officers, the Code of Ethics and the Standards of Professional Behaviour

In the Code of Ethics at section 10, police officers are positively required to report, challenge or take action against the conduct of colleagues that has fallen below the standards of professional behaviour. It further states at 10.4 that, *"the policing profession will protect whistleblowers according to the law"* and at 10.5, *"nothing in this standard prevents the proper disclosure of information to a relevant authority in accordance with Public Interest Disclosure Act 1998"*. The Standards of Professional Behaviour state at paragraph 2.17 that reporting any breach of the Standards should be considered a qualifying disclosure under s43B(1)(b) – that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

This confers no positive duty on constabularies to protect whistle-blowers, save that a failure in this respect may result in a claim based on being subjected to a detriment or constructive dismissal. Further, detrimental treatment of a police officer due to whistleblowing should be seen as a potential conduct matter, recorded pursuant to PRA sch 3 para 11 and potentially investigated as misconduct. The Standards of Professional Behaviour state at paragraph 2.31,

"An officer who knowingly takes action as a reprisal against a police officer or member of staff who has made a protected disclosure, or their family members or other close associates, should be considered to have breached the Standards of Professional Behaviour. Such a breach would constitute a recordable conduct matter."

Less clear is how public disclosures should be treated. The Code of Ethics at section 7.1 states that officers, *"must not disclose information, on or off duty, to unauthorised recipients."* PIDA may, however, protect such unauthorised disclosures. Further, the Standards of Professional Behaviour state at paragraph 2.23 that the duty of confidentiality does not prevent an officer making a protected disclosure to others, including the media, but that, *"disclosing names of victims or informants or risking current investigations and prosecutions may result in serious harm and therefore the circumstances will be rare in which such a disclosure would be considered reasonable."*

A police officer may make a qualifying disclosure pursuant to ERA section 43C where it is made to their employer, which for the purposes of the legislation is the Chief Constable and includes an officer under the chief's direction and control. Often overlooked, however, is the prospect of a disclosure to the PCC pursuant to section 43F.

ERA section 43F provides that a qualifying disclosure is made pursuant to that section where the worker makes the disclosure to a person prescribed by an order made by the Secretary of State and reasonably believes that the relevant failure falls within a description of matters of which that person is so prescribed and that the information disclosed is substantially true. The relevant authorities for this part include the IPCC and the PCC. Note that section 43F does not require the disclosure to refer to an exceptionally serious failure – or for a police officer first to comply with internal disclosure policies or section 43C.

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