Whistleblowing update 2017
Causation and the public interest test?

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Main topics for today

- Causation – the reason or principle reason for the treatment/dismissal
- Recent trend for executive whistleblowing claims
- 2017 CA case – *Royal Mail v Jhuti*
- Lessons from some case studies
- *Chestertons* CA and the meaning of 'public interest'
- Practical tips and strategies for whistleblowing cases

Causation

- The reason for the treatment or dismissal
- Employer's mental processes (conscious or subconscious) behind the act or omission
- Motivation of individual manager – *Royal Mail v Jhuti*
- Not a "but for" test (*Arriva London South Ltd v Nicolaou* [2012] ICR 510)
- It is the making of the disclosure which is protected so it must be that which is the reason.
- Dismissal – sole or main reason test – *Jhuti* lost
- Detriment – some causative effect test – *Jhuti* won.

Harmeston v Co-op, EAT, 4 April 2017

Sacked Co-op chief loses £5.2m dismissal claim

Kath Harmeston claimed she had been dismissed before she could blow the whistle on malpractice
Peter Byrne/PA

Russell Jenkins
Last updated at 12:01AM, March 25 2016

The Co-operative Group has emerged victorious from a bitter legal battle with a former employee who claimed she was sacked because she was about to blow the whistle on a "feral institution where malpractice was rife".

Post a comment

THE TIMES

In a rare example of a company choosing to go through with a public battle with a self-styled whistleblower rather than settle, the Co-op insisted that Kath Harmeston, its former head of procurement, had been treated fairly.

Ms Harmeston, 50, was recruited with orders to slash costs but was ousted after ten weeks. She insisted before an employment tribunal in Manchester that she was

Co-operative Group boss says woman was sacked over 'performance issues'

20 January 2016 | Manchester

Two Key Types of Case

(1) Events which break the chain of causation e.g:

- relationship breakdowns
- workplace operations or staffing issues

(2) Matters separable from the disclosure e.g:

- the tone or manner of a complaint
- misconduct related to the disclosure
- unreasonable refusal to accept the outcome of a grievance

Breaking the Chain of Causation

- *Fecitt v NHS Manchester* [2011] ICR 476
  - It was the *"dysfunctional situation"*, arising as a result of the protected disclosures, which led the nurses to suffer detriments, not the disclosures themselves
- *Price v Surrey County Council* (EAT, 2011)
  - The employee's forced resignation came about "*not because of the making of her complaint as such, but because of the inadequacy in one important respect of the authorities' response to it.*"

Separable Features

- *Martin v Devonshires* [2011] ICR 352: is the reason for the dismissal “not the complaint as such but some feature of it which can properly be treated as separable.”
- only in “clear” cases - useful case for employers
- EAT tried to limtt it to exceptional cases: *Woodhouse v WNW* [2013] IRLR 773 but this was disapproved in *Panayiotou v Kernaghan* [2014] IRLR 500: Lewis J and by Simler P in *Shinwari v Vue* [2015] EAT
- Just be ‘cautious of spurious defences’

Case study: separable features

- *TS v Telecoms Co; HJ v Telecoms Co*

  - Victimisation claims based on protected acts
  - Both claimants had raised multiple grievances against managers
  - TS moved away from manager she complained about
  - HJ had specific grievance process designed for her

- Detriment because of protected act or manner of complaint?

Tips for dealing with causation issues

- Take care that upset with manner and substance of the complaint do not overlap
- Ensure the reasons for any act are noted at the time
- Plead causation arguments in the ET3, even if only in the alternative
- Do not rule out unattractive arguments
- Ensure witness evidence deals with separable features properly and carefully

Section 43B(1) ERA 1996

'In this part 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:*
…'

Chestertons v Nurmohamed

- C was employed as a Director of Sales, Mayfair Office.
- C was found by the ET to have raised three verbal qualifying disclosures under the amended section 43B ERA, 1996.
- Those disclosures raised concerns that the accounts had been incorrectly stated to the benefit of shareholders. This meant C was paid less.
- C asked his employers to investigate the accounts affecting approximately 100 senior managers.

Chestertons: ET Findings

- ET found that C: (1) had a reasonable belief that the disclosures were in the public interest. (2) was dismissed and suffered detriment because of raising those disclosures.
- No case law on point. ET's view was that where a section of the public is affected rather than simply the individual this might be sufficient to be in the public interest.
- Two groups identified – (a)100 senior managers; or (b) anybody who relied on the incorrectly stated accounts.

Chestertons: ET Findings

- C made disclosures in belief that it was in the interest of the 100 senior managers – this was a sufficient group to be in the public interest.
- That belief was reasonable.
- The fact C was concerned about himself did not mean it was not in the public interest. C had suggested R look at other central London office accounts.
- There was no bar to the disclosure being in the public interest because C relied on a breach of his own contract of employment.

Court of Appeal: The rival contentions

- Three positions advanced in CoA
  - *PCAW:* any disclosure which goes beyond the interests of the individual making the disclosure
  - *Chestertons*: interest must “extend outside the workplace”
  - *Nurmohamed:* more nuanced approach looking at “all the circumstances.”

Chestertons: CA decision

- Eschews bright-line rules
- Individual interest in disclosure does not rule out wider public interest. Are there features which make disclosure in wider public interest?
- Relevant considerations will include: (a) number whose interests are served; (b) nature of interest; (c) nature of wrongdoing; (d) identity of wrong-doer.

Striking Out: no public interest

- *Morgan v Royal Mencap Society* [2016] IRLR 428: C made disclosures about cramped working area which adversely affected her injured knee and caused her discomfort.
- *Underwood v Wincanton (2015):* C raised grievance about allocation of overtime
- Both cases struck out: no reasonable prospect of establishing “public interest”
- EAT allowed appeals: high threshold for striking out discrimination and whistleblowing cases; subjective belief and reasonableness were matters to be explored on evidence

International Petroleum v Osipov

- EAT, July 2017
- C makes disclosures to restore proper corporate governance "for the benefit of IPL and all of its shareholders“
- Simler P: Following *Chestertons* “the words ‘in the public interest’ were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications”. No more and no less.

What next?

- *Chestertons* opens the door to increased numbers of whistleblowing claims by introducing a low threshold to the public interest test.
- Closer to position pre-introduction of the public interest test.
- Reliance on terms and conditions of employment not a bar. May result in public interest being satisfied where one individual is affected depending on nature of the disclosure.

Practical tips

- Further and Better Particulars: Require C to ID interest and basis for reasonable belief
- Strike out unlikely to be sustainable. Take point as a preliminary issue? Deposit order only?

Case study 2

- *B & P v Retail PLC*
  - Managers responsible for safety and security of staff
  - Reported failings within their departments – only after serious incidents
  - PLC decides managers not fit to manage departments – complete loss of trust and confidence
- Dismissed for whistleblowing or fault?

Thank you

Any questions?

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