Whistleblowing developments: 2021 in review

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The authors consider notable whistleblowing judgments from the first nine months of the year. They examine the important themes that emerge and offer an opinion on the direction of travel of UK whistleblowing law.

The beginning of the new legal term is a good time to take stock of recent whistleblowing developments.

Recent judgments

Interim relief: open justice and discrimination interplay

A worker in *Queensgate* brought a claim for automatic unfair dismissal under PIDA. He claimed to have made several protected disclosures, detailing serious allegations of fraud, homophobia, sexism and racism. He applied for interim relief and his employer sought an order preventing the publication of any aspect of the proceedings under Rule 50 of the Employment Tribunal Rules of Procedure 2013 (SI 2013/1237) on the basis that it would suffer serious reputational damage. The tribunal declined to grant the order and the EAT confirmed the decision, finding that 'the principle of open justice supported the determination that such hearings should be in public' (para 117). *Queensgate* demonstrates how interim relief applications can be used tactically to apply pressure where an employer risks reputational embarrassment. Whether or not this is the right approach is a different question entirely.

In *Steer*, a worker claimed unfair dismissal on the basis of direct sex discrimination and/or victimisation, and claimed entitlement to interim relief under the ERA 1996 and the EA 2010. The EAT found that the unavailability of interim relief breached Article 14 ECHR (prohibition of discrimination), but was unable to grant it under the EA 2010 as doing so would amount to 'quasi-legislation'. The EAT was equally unable to declare incompatibility with the HRA 1998, and granted leave to appeal to the Court of Appeal. It found that the unavailability of interim relief for employment discrimination claims did not breach the ECHR, and suggested that the matter should be decided by Parliament. While the position in the UK remains unchanged, in the Republic of Ireland, the incoming Protected Disclosures (Amendment) Bill 2021 will take the leap and extend interim relief to detriment ('penalisation') claims, which could cover forms of discrimination.

Twin issues: causation and separability

A worker in *Watson* refused to return to work after making protected disclosures in relation to financial irregularities. The employer tried to negotiate his return, as the absence was damaging the business. Upon refusal, the worker was dismissed. Subsequently, the EAT upheld the tribunal's finding that the dismissal was not automatically unfair, on the basis that the employer's decision to dismiss the worker was unrelated to the protected disclosures, and related instead to their decision to resign instead of helping to resolve the financial irregularities. Indeed, the whistleblower's conduct before and after disclosure was separable from the protected disclosures, which must be the principal reason for dismissal.

In *Kong*, a worker made a number of protected disclosures relating to a new investment product her employer was offering to investors, including by way of a draft audit report to the head of legal. The report resulted in a confrontation in which the head of legal felt her competence was being questioned. This led to a complaint and, ultimately (because of her behaviour), the worker's dismissal. The tribunal rejected a claim for automatic unfair dismissal, and held that the principal reason for the worker's dismissal was not her whistleblowing, but her behaviour and the breakdown of the relationship with the head of legal. The EAT upheld the decision, and separated the latter two reasons from the whistleblowing, finding that although both the worker's behaviour and the relationship breakdown were connected

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to, and indeed caused by, the protected disclosures, they were separable from the protected disclosures. *Kong* illustrates how the issue of separability can lead to the demise of substantially strong whistleblowing claims. Permission to appeal is being sought.

Public interest, private purposes

A solicitor in *Dobbie* claimed to be victimised and was dismissed for making protected disclosures to the firm contending that a client had been overcharged for legal supervision and working hours. The EAT disagreed with the tribunal's decision that the solicitor's disclosures were in the private interest of the client, and that they did not satisfy the public interest test. The EAT found that a disclosure of information relevant to only one person can be a matter of public interest, such as in the case of a one-off error in the medical treatment of a patient, or in the case of *Chesterton* (in which Protect, formerly Public Concern at Work, intervened). In *Dobbie*, the disclosures could have advanced the general public interest in solicitors' clients not being overcharged, and solicitors complying with their regulatory requirements. The case was remitted to a fresh tribunal.

Dobbie contrasts starkly with the Scottish case of *Gibson*, where a worker was found by the tribunal to have been unfairly dismissed under s.100(1)(e) ERA 1996 for making protected disclosures about the lack of Covid-19 workplace precautions. However, the worker's dismissal claim under PIDA was rejected on the basis that his concerns related to the health and safety of his own father, and not to that of the public. His disclosures were therefore not found to be in the public interest. Nevertheless, the tribunal conceded that 'the point [was] arguable' (para 20). Conceivably, had the worker had a secondary 'more public' concern (such as regulatory compliance in *Dobbie*) in relation to health and safety, perhaps the tribunal would have found the public interest test to be satisfied.

No detriment in witness statements

In *Aston*, several police officers blew the whistle on incidences of perversion of the course of justice, and professional misconduct. Thereafter, one of the whistleblowers claimed that a senior colleague's witness statement, given in separate tribunal proceedings, in which he criticised the whistleblower amounted to detriment. The EAT held that judicial proceedings immunity (JPI), which gives a person absolute immunity from any action brought on the grounds that their evidence is vexatious, prevented witness statements from amounting to detriment for the purposes of whistleblowing claims. The EAT noted that JPI may benefit malicious witnesses, but echoed Auld LJ in *Heath*, that such is the price to pay 'to protect the integrity of the judicial process and hence the public interest' (para 17). *Aston* highlights the importance of ascertaining detriment before bringing a claim under PIDA.

ECtHR: 'vital, new, and previously unknown'

In the Luxleaks case of *Halet*, the ECtHR found that the Luxembourgish courts did not violate Article 10 ECHR (freedom of expression) by convicting a worker for disclosing confidential tax documents to a journalist, in the aftermath of similar disclosures by a colleague. The ECtHR considered the *Guja* principles in determining whether the worker was a whistleblower, the fifth of which is whether the public interest in receiving the information weighs more than the harm caused to the employer by the disclosure. The ECtHR found that it did not, as there had been 'no compelling reason … to disclose the confidential documents' (para 105) since they had not provided any 'vital, new, and previously unknown' information (para 109). The latter principle requires whistleblowers to evaluate the contribution of their wider disclosures to public debate – a near-impossible task, as this hinges on how the journalist presents the information, and the degree of knowledge of, and public interest in, the information disclosed by the whistleblower at that point in time. It can also result in first-come-first-served whistleblowing protection: if two whistleblowers independently make comparable disclosures, only the first whistleblower is protected. *Halet* has been accepted for review by the Grand Chamber, which will provide a rare opportunity to reverse the previous ruling.

Comment

New cases, old issues

Among others, these cases are testament to the ever-growing need to reform PIDA. Not only does PIDA exclude too many vulnerable groups from its scope, it also does

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not go far enough to protect groups that fall within it. Despite inventive litigation tactics to level the playing field (*Queensgate*), the odds are still stacked against whistleblowers. For many, establishing detriment (*Aston*) and causation (*Kong* and *Watson*) are major hurdles.

Kong, the latest case on separability, is surprising in the wake of *Sinclair*, where dismissal for causing upset and friction by implementing new safety measures was found automatically unfair under s.100(1)(a) ERA 1996, with the EAT explaining that 'it would wholly undermine that protection if an employer could rely upon the upset caused by legitimate health and safety activity as being a reason for dismissal that was unrelated to the activity itself' (para 22, p.11). Detriment and dismissal claims in the context of health and safety are very similar to those related to whistleblowing. In *Kong*, although the behaviour and relationship breakdown clearly originated from the protected disclosures, they were deemed sufficiently separable to justify a fair dismissal. If permission to appeal is granted, Protect will seek permission to intervene.

Meanwhile, the application of the *Chesterton* public interest test continues to yield unpredictable results (*Gibson* and *Dobbie*). None of these issues are new, and all illustrate the need for clarity on how whistleblowing protection works in practice.

Interplay with human rights and the common law

While scope for the ECtHR's dangerous 'vital, new, and previously unknown' requirement for whistleblowing protection (*Halet*) to make its way into UK common law is limited, the requirement is disappointing news for whistleblowers seeking remedy before the ECtHR. The right to receive and impart information, enshrined in Article 10 ECHR, is deeply rooted within democratic society. As such, it is increasingly argued that raising concerns about wrongdoing in the workplace amounts to protected expression under the ECHR, and any detriment suffered as a result is prohibited. Fundamentally, this interplay is explained by human rights, and the common law's inherent flexibility, stepping in where PIDA fails to protect whistleblowers. Take *Gilham*, for example, in which Protect intervened. The Supreme Court upheld Protect's argument that the absence of whistleblowing protection under PIDA for judges infringed Article 14 ECHR, read with Article 10. Similarly, in *Rihan*, the common law gave rise to a novel duty of care on organisations to provide ethical working environments, where PIDA failed to safeguard a whistleblower. PIDA's need of reform is self-evident when judges consistently use both the common law, and the ECHR, to circumvent its shortcomings.

Appetite for regulation

Elsewhere, this year has seen a stronger appetite for regulation. Regulators, such as the FCA, are increasingly strict in their regulation of 'cultures' within organisations. Regulators heavily depend on whistleblowers to detect wrongdoing, but external whistleblowing disclosures only receive straightforward protection under PIDA if the recipient

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is 'prescribed' – and many existing regulators are not. It will be crucial that the raft of incoming regulators (including the Single Enforcement Body, the Building Safety Regulator, the Office for Environmental Protection, and the Audit, Reporting and Governance Authority) are recognised by the Government as 'prescribed persons' for the purposes of PIDA.

With the imminent implementation of the EU Whistleblowing Directive across the channel and no mention of an Employment Bill in the Queen's Speech, the UK risks being left in the dust. Protect (*protect-advice.org.uk*) launched its 'Let's Fix Whistleblowing Law' campaign earlier this year, calling on Parliament to reform PIDA and bring the UK once again to the global forefront of whistleblowing.

Three main reforms are sought:

- protection of more people: many groups of people are excluded from whistleblowing statutory protection;
- standards for employers: all employers should be required to meet standards for whistleblowing and follow recognised procedures; and
- better access to justice for whistleblowers: changes are needed to reduce the burden whistleblowers face at the tribunal in order to enforce their legal rights.

At the time of writing, Michael Szlesinger was on a six-month secondment to Protect. The views expressed in this article are those of the authors.

KEY:

Queensgate	*Queensgate Investment LLP v Millet* UKEAT/0256/20/RN
PIDA	Public Interest Disclosure Act 1998
Steer	*Steer v Stormsure Ltd* [2021] EWCA Civ 887
ERA 1996	Employment Rights Act 1996
EA 2010	Equality Act 2010
ECHR	European Convention on Human Rights
Watson	*Watson v Hilary Meredith Solicitors Ltd* UKEAT/0092/20/BA
Kong	*Gulf International Bank (UK) Ltd v Kong* [2021] 9 WLUK 125
Dobbie	*Dobbie v Paula Felton t/a Feltons Solicitors* UKEAT/0130/20/OO
Chesterton	*Chesterton Global Ltd v Nurmohamed* [2018] ICR 731
Gibson	*Gibson v Lothian Leisure* ET/4105009/2020
Aston	*Chief Constable of Greater Manchester Police v Aston* UKEAT/0304/19/RN
Heath	*Heath v Commissioner for the Metropolis* [2005] ICR 329
ECtHR	European Court of Human Rights
Halet	*Halet v Luxembourg* (14227/04) [2021] ECHR
Guja	*Guja v Moldova* (14227/04) [2008] 2 WLUK 257
Sinclair	*Sinclair v Trackwork Ltd* UKEAT/0129/20
Gilham	*Gilham v Ministry of Justice* [2019] UKSC 44
Rihan	*Rihan v EY Global Ltd* [2020] EWHC 901 (QB)