Dray Simpson v Cantor Fitzgerald: Whistleblowing Masterclass Revisited

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Summary

1. The Judgment from the Court of Appeal handed down on 27 November 2020 in *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601 revisits the wide ranging issues of various fundamental whistleblowing concepts across its 7 grounds of appeal. It provides nothing by way of new law, but the judgment and the earlier EAT judgment provide a useful summary and discussion about key components of whistleblowing legislation and are a comprehensive read for any employment lawyer.

2. The appeal was unsuccessful, with the appellant's advocate commended for their "ability to make bricks without straw". The spread of issues considered by the 7 grounds of appeal were:

    i. Rule 62 and the need to adequately provide reasons.

    ii. When can a protected disclosure be made by a composite collection of more than one disclosure?

    iii. The meaning of 'information'.

    iv. The relevance of trade knowledge to 'reasonable belief'.

    v. The meaning of 'reasonable'.

    vi. The 'public interest' test.

    vii. Reason for dismissal and tainted decisions.

3. Points of particular interest are the affirmation that the 'tainted decision' doctrine applied by the Supreme Court last year in *Jhuti* is difficult to apply outside of *Jhuti*'s facts (ground 7) and the analysis of when an error of law becomes a material one and therefore will lead to a successful appeal (ground 1). The EAT's earlier and now affirmed decision is also of use, looking often in more detail at certain concepts such as when posing a question can amount to a disclosure (ground 3).

4. My earlier article analysing the EAT judgment provides further useful background to the law and facts (Whistleblowing Masterclass).

The Facts

5. The Claimant worked as a Managing Director on the Respondent's Emerging Markets Desk during a relatively short period of service at just over 10 months between February and December 2015. During his employment, he claimed to have made a number of protected disclosures, identified as 37 separate communications by the Tribunal, and covering a range of financial irregularities and breaches of FCA rules.

6. He was suspended in November 2015 and by 1 December 2015 a decision had been made to dismiss him, with his employment ending on 31 December 2015. He contended that the principal reason for his dismissal was one or more of the protected disclosures.

7. The matter was heard in April 2017 by a Tribunal presided over by EJ Prichard sitting in East London. All of the disclosures were held not to be protected disclosures, the relevant motivation was not found and therefore the claim failed.

8. His appeal to the EAT was based on 7 grounds and he was represented by Leading Counsel. The appeal was heard by Choudhury P and all 7 grounds failed.

9. In the CoA, the same seven grounds of appeal were pursued and when granting permission to appeal, the CoA observed this was "with some hesitation" [17].

Ground 1: Tribunal failed to direct itself properly as to the applicable law

10. This general ground focused on a failure to comply with Rule 62 of the Employment Tribunals Rules of Procedure 2013:

> "62. Reasons
>
> the Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural …

…

(5) in the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to the findings in order to decide the issues…"

11. The issues for this ground were to what extent had the Tribunal failed to comply with r.62 by failing to set out its legal reasoning and to what extent did this amount to an actionable error of law. The discussion and conclusions on this ground are of broader application than only to whistleblowing cases and will be useful to practitioners when considering whether to appeal, as well as to Tribunals themselves when promulgating judgments.

12. The Tribunal had failed to set out in its judgment the relevant legislative framework or a "brief summary of the most relevant authorities" [32]. The CoA noted this was "very unusual", echoing the earlier EAT's observation that "it is regrettable that the Tribunal did not clearly set out the relevant legal provisions and principles to be applied; had it done so, this ground of appeal might have been avoided" [23].

13. This was a failure to follow the Tribunal Rules because "Failure by an ET to set out even a brief summary of the relevant law is a breach of Rule 62(5) of the ET Rules" [CoA 29].

14. However, this did not simply mean that there had been an error of law and the appeal would succeed. As the CoA observed, "It is an error, but the real question in my view is whether the error is material". The Court here relied upon the EAT's decision in *Chief Constable of the Thames Valley Police v Kellaway* [2000] IRLR 170 that the failure to set out the relevant legal position "does not amount to an automatic ground of appeal" [29].

15. "The point of Rule 62, headed "reasons", is to enable the parties to know why they have won or lost.", the CoA summarised [31] and that is the issue parties should consider when a judgment is received and an appeal contemplated.

16. Applied here, "it is really not difficult to understand why Mr Simpson lost" [64] and the CoA continued its deference to the fact finding role of the Tribunal that had analysed the "utterly fanciful" suggestion that dismissal was due to a protected disclosure. This ground therefore failed.

Ground 7: Reason for Dismissal

17. The CoA jumped ahead to this ground as its conclusions would cut through the other grounds, i.e. if the reason for dismissal was not a PID then it did not matter if a PID was made. The same could be said the other way but the CoA nevertheless analysed this ground second.

18. The analysis is interesting as it considers last year's Supreme Court judgment in *Royal Mail v Jhuti* [2020] ICR 731, not available when *Simpson* was in the EAT. *Jhuti* considered the concept of a tainted decision, e.g. when a person compiling an investigation report is motivated by a PID but the decision maker is not. The SC held that in such a case, the tainted motivation of the PID could be treated as the reason for dismissal, but the SC also sought to emphasise the limits of how broadly this concept could be applied.

19. Since the SC in *Jhuti*, practitioners have been eager to see, and test, how far these limits lie. In *Simpson*, the "alleged manipulators" of the decision to dismiss did not play "any part in the disciplinary decision, and nor did they play any role in any formal investigation…this is not a situation, for example, where either [person] prepared or assisted in the preparation of a formal report which formed the basis for [the] decision" [38].

20. On that basis, the CoA held that the situation in *Jhuti* did not arise and it made no "difference in the present case whether the test is one of manipulation of [decision maker] or one of the construction of an invented reason to conceal a hidden reason" [38].

21. Like other cases since *Jhuti*, *Simpson* therefore reinforces the narrow application of the 'tainted decision' concept in whistleblowing law. Ultimately here, the concept did not apply because of facts permissibly found by the Tribunal, which the CoA was not willing to overturn.

Ground 2: Failure to look at the composite picture or aggregate the disclosures

22. This ground dealt with a relatively uncommon argument that the collective effect of various disclosures amounts to a protected disclosure even if on their own the disclosures do not have this status. This is a perfectly valid argument but is entirely fact dependent. As summarised by *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540

at [22] and approved by the EAT in *Simpson*, "two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact" [31].

23. The CoA emphasised that this ground, like many, failed because it sought to disturb permissible factual findings. The ground was described as "arid" because none of the disclosures were found to be PIDs on their own or in combination and moreover, none motivated the decision to dismiss [44].

24. The EAT's analysis in *Simpson* may provide analysis more useful to practitioners beyond this case's specific facts. The EAT explained that there was scale of when aggregation is appropriate, contrasting the simplicity of the embedding of communications in *Norbrook* with the large number of communications relied upon in *Simpson* [32-33]. As often, a focused and precise claim is likely to improve the chances of success rather than a broad scatter gun approach.

Ground 3: Error in considering 'allegation vs information'

25. It was unambiguously and authoritatively established in *Kilraine v Wandsworth London Borough Council* [2018] ICR 1850 that in considering the meaning of "information" in s.43B(1) ERA, there should be no rigid distinction applied between 'information' and 'allegations'. This ground contended that the Tribunal had failed to follow that principle, evidenced by the fact that *Kilraine* (by then heard by the EAT but not the later CoA judgment) had not been mentioned in the judgment.

26. Like the EAT, the CoA rejected this ground and focused on the factual findings made. The Tribunal had found that the Claimant did not have the subjective belief required, as well as objective, "they made findings of lack of genuine, let alone reasonable, belief, which they were entitled to reach and which make the arguments of law somewhat academic" [55]. The Tribunal's failure to cite any law was problematic but the CoA concluded "I do not consider that if they had had the benefit of the judgment of this court in *Kilraine* it would have altered their findings in any material respect".

27. Again, the EAT's judgment is likely to be more useful to practitioners because its analysis goes beyond an affirmation of the facts. The EAT re-affirmed that sufficient factual content and "specificity" is needed to constitute information [39] and considered a number of examples suggested by the appellant as errors.

28. A particularly useful analysis is provided of a query provided by the Claimant, which it was argued "was merely the preface to the provision of information" [42] and therefore

did amount to information. The EAT accepted that a query is not precluded from providing information if containing the required content but a distinction was drawn between a clear example of information in:

> "On 1 January 2019, I saw employee X manipulating and falsifying data to enhance the employer's year-end results. I consider this to be fraudulent conduct. Do you agree?"
>
> vs.
>
> ""On 1 January 2019 I saw employee X access the year-end results. Could you let me know if that raises any concerns?"

This second hypothetical was said by the EAT to "probably" lack sufficient content to amount to information [42].

Ground 4: Failure to take into account insider knowledge

29. A key component of whether a disclosure is 'protected' within the meaning of s.43B is the reasonable belief of the worker, notably as to what the disclosure 'tends to show' and whether it is in the public interest. In assessing reasonableness, "the specialist knowledge and expertise which a person well-versed in the particular industry or activity would have" [54] can be a relevant factor, per *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 at para. 62.

30. This point of insider knowledge "works both ways" though, *Simpson* reminds us. "Just as someone with experience in the field has information and insight which should be taken into account in his favour, so too he should know better than (say) a lay person who happened to overhear a conversation, whether it does tend to show that something is amiss." [57].

31. For Mr Simpson, the contrary views of colleagues damaged the reasonableness of his view. Moreover, the CoA once again dismissed this ground because of the deference that an appellate tribunal has to allow to the fact finding role of the first instance Tribunal [58].

32. The relevance of colleagues' views may be a particularly important issue in assisting the Tribunal's view of reasonableness and in this respect parties should remember that the assessment of a Claimant's beliefs may not rest solely on evidence produced by the Claimant but the whole circumstances, including witness evidence from a Respondent.

Ground 5: Misapplication of the reasonable belief test

33. The CoA dealt with this ground in one paragraph, again emphasising that permissible findings of fact had been made and the absence of a genuine belief on the Claimant's part was fatal to his case, regardless of whether any such belief was reasonable.

34. Again, practitioners may find the EAT's judgment of more use as it analyses the law in more detail. For example, that a worker's belief does not have to be accurate, "his belief may still be reasonable even though it turns out to be wrong", per *Babula v Waltham Forest College* [2007] ICR 1026, and analyses the factual findings made that do not expressly refer to reasonableness [70].

Ground 6: Misapplication of the Public Interest Test

35. The leading case regarding public interest remains *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837 and the CoA unsurprisingly found this decision of the CoA to provide an accurate summary of the law. After quoting *Chesterton*, the CoA in *Simpson* again dedicated just one paragraph to the dismissal of this ground.

36. The CoA relied on its observation that "the ET repeatedly found that Mr Simpson's real complaint was about being deprived of the commission which he thought was rightfully his". This reliance could be seen as problematic as it suggests an erroneous focus on the Claimant's motivation for making a disclosure rather than his belief as to what that disclosure shows. "Whilst the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant, or indeed any part of the motive in making it.", per *Ibrahim v HCA International Ltd* [2018] (UKEAT 0105/18/1309, Unreported, September 2018) at para. 24.

37. However, the CoA in *Simpson* continued to explain that the Tribunal had not found there was "information which in the actual and reasonable belief of the claimant tended to show malpractice", as is the correct focus under the legislation. On that basis and again deferring to the fact-finding role of the Tribunal, this final ground was dismissed.

Conclusion

38. *Simpson* does not re-invent the wheel of whistleblowing law but it does provide a useful summary and affirmation of various key concepts from a senior appellate court. The case affirms the current position of the law and provides a reminder of fundamentals and issues for both sides of a claim to consider.

39. The judgment is also useful as guidance for how to assess appeals and their chances of success. In many examples, the Tribunal had not made express reference to concepts or terminology from legislation or case law. Nevertheless, the CoA's focus was on what difference this made and whether in substance the Tribunal had nevertheless correctly applied the law. An absence of express references by a Tribunal is therefore not fatal and the wider circumstances and effect of a judgment should be a focus in consideration of an appeal's merits.

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