EAT reviews “state of mind” element of s43B in Bibescu v Clare Jenner Limited t/a Jenner’s

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Introduction

1. This is a summary of the EAT’s judgment in the case of *Bibescu v Clare Jenner Limited t/a Jenner’s* [EA-2022-001112-TH] heard before the Honourable Lord Fairley, President of the EAT on 10 February 2026.

Employment Tribunal

2. The Claimant, and Appellant in the EAT, had been employed from November 2018 to June 2020 by the Respondent as an accountant. The Claimant brought claims of automatic unfair dismissal contrary to s103A ERA 1996, whistleblowing detriments contrary to s47B ERA 1996 and automatic unfair dismissal for health and safety reasons contrary to s100(1)(d) ERA 1996.

3. In 2019 Ms Jenner, who was the Respondent’s principal throughout the Claimant’s employment raised concerns to the Claimant about the quality of her work and discussions resulted in Ms Jenner discussing the quality of the work with a sub-contractor, Mr Grimes. He was asked to peer review the Claimant’s work, which the Claimant was not happy with. Ms Jenner continued to reiterate concerns about the Claimant’s work in April and May 2020. Following a period of home working, on 26 May 2020 the Claimant returned to the office and was given a verbal warning by Ms Jenner about the standards of her work. A meeting was set up for 8 June 2020 as the Claimant continued to be unhappy that Mr Grimes had peer reviewed her work.

4. Before the meeting, the Claimant discovered that Mr Grimes was disqualified from being a director, through checking Companies House, but appeared to be a director of a company associated with his wife and was also not a member of an accountancy

professional association. Those matters were raised to another employee of the business (Ms Silcox) and Ms Jenner in the meeting on 8 June 2020. Following the meeting the Claimant was given instructions to complete work on two client files. Friction continued between the Claimant and Ms Silcox and Mr Grimes. The Claimant's employment was terminated through a letter on 11 June 2020.

5. There was a lengthy List of Issues but the relevant issues for the subsequent EAT hearing were as follows:

   a. Whether the Claimant made a protected disclosure to Ms Silcox and Ms Jenner about Mr Grimes on 8 June 2020, in that she told them that he was disqualified from being a director and was not a member of the professional association

   b. What was the reason for dismissal on 11 June 2020

6. The Tribunal found that whilst the Claimant had made a disclosure of information, it was not in the public interest but "in the interests of the Claimant" [para 48, ET Judgment]. It also found that the information was widely available to the public and that the information was provided to present negative information about Mr Grimes. Further they found that the information did not satisfy the criteria in s43B(1)(a)-(f), specifically (a), (b) or (f) being the criminal offence, breach of legal obligations or concealment grounds. The Tribunal did not dispose of the s47B detriments claim in its judgment, but given its findings on the lack of a qualifying protected disclosure, it would have necessarily fallen away. The reason for dismissal was found to be the Claimant's performance and inability to work with Mr Grimes.

7. The Claimant's claims in respect of dismissal under s103A and s100 were dismissed. The Judgment, which was reserved and sent to parties in September 2022 following a Final Hearing in August 2022, did not determine the complaint in respect of whistleblowing detriment.

8. The appeal to the EAT related to the s103A and s47B claims.

Employment Appeals Tribunal

9. At paragraph 5 and 6 of the EAT's judgment, the history of the matter proceeding through the EAT was set out. In summary, the Claimant's appeal had been listed for a preliminary hearing to determine if there were any arguable grounds of appeal and that hearing was adjourned on two occasions at the Claimant's request. Following

receipt of amended Grounds of Appeal, a full hearing was fixed for 10 February 2026. There were 8 grounds of appeal, with grounds 1-6 relating to the conclusions on whether the Claimant had made qualifying protected disclosures and grounds 7-8 challenge the decision on the reason for dismissal.

10. On the issue of whether or not a qualifying protected disclosure had been made, the EAT distilled the issues down as follows:

> *"The appellant submit[ed] that the Tribunal took into account irrelevant factors that (a) she did not use the word "whistleblowing" in her interactions with Ms Silcox and Ms Jenner on 8 June 2020; and (b) the respondent did not appear to realise at that time that she was providing information that qualified for protection (ground 1). She also argues that the Tribunal erred in its approach to the question of whether she had a genuine belief, reasonably held, (a) that the disclosure was made in the public interest (ground 2) and (b) tended to show one of the matters set out on section 43B (grounds 3 to 6)" [para 27, EAT judgment].*

11. On the issue of the dismissal, the Claimant's assertions were that the decision was perverse and that the Tribunal had "*failed to have regard to the different test of causation between s103A and s47B ERA*" [para 28, EAT judgment].

12. The EAT remarked that it was unfortunate that the Claimant's detriment complaint had not been dealt with in the operative part of the written reasons.

13. The EAT found that on the reason for dismissal, the Tribunal had made "clear and unequivocal findings of fact" on the reason for dismissal and that it was "plainly open to it on the evidence, and there was ample material to support it" [para 32, EAT judgment]. The grounds in respect of the dismissal were dismissed.

14. Turning to the detriments claim, the EAT said as follows:

> *"35. On the question of the public interest element of the section 43B(1) test, the Tribunal required to make factual findings about whether, whatever may have been her motives, the claimant genuinely considered that that her disclosures were in the public interest (**Chesterton**). The focus at this first limb of the test should have been entirely upon the claimant's state of mind (**Parsons**). If, at the time of making the disclosures, the claimant genuinely believed them to be in the public interest, the next question for the Tribunal would have been whether such*

*a belief was reasonable for someone in the particular position of the claimant (**Korashi**).*

36. On the first limb of the test, however, it is unclear what the Tribunal concluded about the claimant's state of mind. Its reasons appear to focus exclusively upon the issue of her motive. Even if the Tribunal considered that the claimant's sole motive was to discredit Mr Grimes, it was still incumbent upon it to make a clear finding as to whether or not she genuinely believed that the disclosures she made were, in any event, in the public interest. If, on the other hand, the Tribunal thought that the claimant never even considered the public interest, it needed to say so in terms. Unfortunately, it did not do either of those things.

37. On the second issue, the way in which the Tribunal expressed itself at ET § 49 suggests that it substituted its own view of reasonableness for an assessment of reasonableness from the perspective of the claimant. In light of **Korashi**, that was an error of law."

…

39. On the question of whether the claimant reasonably believed that the information tended to suggest any of the matters referred to at section 43B(1)(a) to (f), I also agree with the appellant that a very similar error of law is apparent in the Tribunal's reasons at ET § 50. Nothing in that paragraph suggests that the Tribunal considered the claimant's state of mind at the material time. It made no finding at all about what she believed. Instead, ET § 50 appears to record only the Judge's opinion as to whether any of the things referred to in the section had actually been proved to have happened. That was, again, a material error of law".

15. The EAT concluded that the Tribunal's findings on s43B were material errors of law and, resulting from that, the Tribunal "did not go on to make any factual findings about whether the Claimant had suffered the claimed detriments or, if so, whether such detriments were "on the grounds of" one or more of those protected disclosures.

16. Determination of the detriments claims (namely all elements of the pleaded s47B claim) were remitted to another tribunal.

Conclusion

17. This is a helpful summary of the approach to be taken in determining the various elements of the test under s43B, which Tribunals frequently need to grapple with. Specifically, Tribunals will need to focus on the Claimant's state of mind when looking at the first limb of the test and if, at the time of making the disclosures, that Claimant genuinely believed the disclosure(s) to be in the public interest, the Tribunal must then consider whether such a belief was reasonable for someone in the particular position of the Claimant to hold. The Tribunal below focused exclusively, in the EAT's view, on motive.

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