Dray Simpson v Cantor Fitzgerald: Whistleblowing Masterclass

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Summary

1. The Judgment from the EAT President handed down on 21 June 2019 in *Dray Simpson v Cantor Fitzgerald Europe* (UKEAT/0016/18/DA, Unreported) provides a wide-ranging analysis of various fundamental whistleblowing concepts across its 7 grounds of appeal. It provides a useful summary, affirmation and discussion about key components of whistleblowing legislation and a very useful read for any employment lawyer.

2. The 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.

The Facts

3. 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.

4. 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.

5. 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 entirety of the claim failed.

6. 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, as outlined in turn below.

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

7. This general sounding 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…"

8. The discussion and conclusions on this ground are perhaps most useful to Tribunals rather than representatives through the explanation of the extent to which a judgment needs to provide detail to set out the required reasons and specifically the importance of setting out a clear statement of the applicable legal principles.

9. The ground was focused on the failure to set out a separate section detailing the applicable principles. Although the ground of appeal failed, the Tribunal's judgment did not emerge unscathed and the EAT highlighted [23]:

> "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. The failure to set out at least a summary of the relevant legal provisions and principles is more likely to invite a challenge to the judgment. Tribunals should, in all but the most straightforward of cases, endeavour to set out such a summary."

10. Despite this observation, the EAT emphasised that "the mere failure to set out a separate section on the legal principles does not, of itself, give rise to an error of law." [24] and that "substantial compliance" [24] with Rule 62 is required rather than "slavish compliance with the structure of the rule which would suggest separate sections in the judgment dealing with each of the constituent parts of the rule" [22].

11. In more detail, the EAT rejected the suggestion that failure to comply with Rule 62 will only amount to an error of law where there is some other error of law as a consequence [26]. Instead, a failure to establish substantial compliance was enough.

12. In this case, there had been substantial compliance and thus this ground failed.

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

13. This ground deals 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 Choudhury P in *Simpson*, "two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact" [31].

14. Choudhury P observed that there was a scale of when aggregation is appropriate, beginning with when, for example, "just two communications are relied upon, the second of which refers back to (or 'embeds' within it) the earlier one containing information within the meaning of s.43B" [32], as was the case in *Norbrook*.

15. However, for the Claimant here "the situation is far more complex" [32] and the judgment specifically highlights the large number of separate alleged communications as a barrier. Although the suggestion was made on behalf of the Claimant that all of the 37 should have been considered, this argument failed for lack of specifics as to which should be taken together to amount to a protected disclosure and when there was 'crystallisation' to satisfy the statutory terms. In those circumstances, the Tribunal's omission to consider an aggregation of the 37 communications was not an error of law.

16. The Judgment on this point is a useful reminder for Claimants that the principle of aggregation can be applied and provides an affirmation of the principles of *Norbrook*. If this argument is relied upon, a focused and specific reliance on disclosures will increase the likelihood of success. This will improve the chances of establishing a protected disclosure but also assist an argument on causation and the need to be able to link a detriment or dismissal to the making of a specific protected disclosure [33].

Ground 3: Error in considering 'allegation vs information'

17. 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 and not the later CoA judgment) had not been mentioned in the judgment.

18. In re-affirming that sufficient factual content and "specificity" in particular is needed to constitute information, as well as the ubiquitous guidance that the assessment "is a matter for evaluative judgment by the Tribunal in light of all the facts of the case" [39], the EAT considered a number of examples suggested by the appellant as errors.

19. 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].

20. Although the Tribunal's judgment was "not satisfactory" in some aspects such as failing to provide clear conclusions on some aspects, these did not materially affect the outcome of the case and this ground of appeal failed.

Ground 4: Failure to take into account insider knowledge

21. 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, there explained in the example of a surgeon and their knowledge beyond that of a lay observer.

22. Those principles were repeated in *Simpson* and the EAT explored the further point that the insider knowledge point "cuts both ways" because the view of a worker with specialist knowledge may not be reasonable if they fail to apply their specialist knowledge to properly consider all of the material available before making a disclosure [55]. In this respect, the views of others working in the industry may be relevant and "there is no error of law in the Tribunal having regard to the views of others in the organisation in assessing whether the belief was reasonable" [70/ground 5].

23. For Mr Simpson, the contrary views of colleagues damaged the reasonableness of his view. Moreover, this ground of appeal was defeated to a large extent because of the deference that an appellate tribunal has to allow to one of first instance in the latter's

primary role of fact-finding. The facts found by the Tribunal as to reasonableness did not get near to the "high hurdle" [64] of perversity and therefore the ground was dismissed.

24. 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, have to be considered.

Ground 5: Misapplication of the reasonable belief test

25. This ground overlapped with ground 4 and considered the fundamental point that in holding a reasonable belief under s.43B, a worker's belief does not have to be accurate. As was stated in *Babula v Waltham Forest College* [2007] ICR 1026 by the CoA and applied by the EA in *Simpson*:

> "there is no requirement upon him to demonstrate that his belief is factually correct; or, to put the matter slightly differently, his belief may still be reasonable even though it turns out to be wrong".

26. A disclosure does of course have to satisfy the test of reasonableness. The EAT considered a number of examples where the Tribunal had not made express findings by the word 'reasonable' but had instead made other findings that were held to demonstrate that reasonableness had been assessed [70]. For example:

    a. The tribunal's finding that "there is nothing here suggesting any regulatory breach" was a satisfactory statement that the disclosure did not have sufficient factual content and specificity so as to be a reasonable belief.

    b. The Tribunal's reference to the Claimant's accusations as being "speculative" or "based on assumptions" was held by the EAT as "simply another way of stating that belief was not based on reasonable grounds or lacked sufficient factual content and detail".

    No error of law was therefore found and the ground therefore dismissed.

Ground 6: Misapplication of the Public Interest Test

27. This ground contended that the Tribunal had erred by "treating motivation rooted in self-interest and money concerns as necessarily precluding any finding that the Claimant believed the disclosure to be in the public interest" [71]. It provides a useful analysis of how to balance self interest balances with public interest.

28. The EAT began with "the starting point" of *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731 as the leading case on the meaning and application of 'public interest'. Despite *Chesterton*'s status, the Tribunal did not refer to the case in its judgment but the question was whether its approach was nevertheless correct in substance.

29. A number of the Tribunal's findings were scrutinised [76], including:

    a. "If this disclosure really was about underpaid commission, it could hardly be a qualifying disclosure. It was not in the public interest, but was made for self-interest". On this point, the EAT stated that a disclosure made about personal gain such as underpaid commission with no other factors that may indicate public interest ("such as an allegation that the underpayment of commission affected others or was a deliberate practice designed to conceal unlawful conduct") then it was "unlikely" to engage the public interest and in that respect, the Tribunal had committed no error.

    b. "Once again, too, it primarily involves the claimant's own commissions which are never going to pass the 'public interest' test". Here, the EAT found that despite the word "never", this was not applying a general rule that a disclosure about commission could not engage the public interest, but in the circumstances that this disclosure was "vague and unexplained", this one could not.

Ground 7: Reason for Dismissal

30. This ground considered an alleged failure by the Tribunal to make a finding as to who dismissed the Claimant. It covers a number of principles, including that of 'tainted decisions' from *Royal Mail Group Ltd v Jhuti* [2018] ICR 982, recently considered by the Supreme Court and for which judgment is awaited.

31. As a basic point of what facts were found, the EAT held that the Tribunal was clear that this was a case involving a sole decision maker and therefore the more complex questions about the manipulation of the decision maker's mind by others did not arise [82-84].

32. Furthermore, the EAT highlighted that even if there was a manipulated decision, the reasoning of *Jhuti* is:

> "where a manipulator is a Claimant's line manager or colleague and where that person does not (as in the present case) have responsibility for the dismissal, the motivation of that line manager or colleague cannot be attributed to the employer" [86]

33. Complications may arise if there is a formal investigation or someone particularly senior is involved (see the obiter comments of *Jhuti* at paras. 62 and 63) but that did not arise on these facts. *Jhuti* was in any event heard this month in the Supreme Court and judgment is awaited.

34. It was held by the Tribunal here that it was "utterly fanciful" to claim the principal reason for dismissal was one or more protected disclosure and the EAT held that this finding was entirely supported by the facts found. This ground was also therefore dismissed and along with it the entire appeal.

Conclusion

35. This case provides a useful analysis of key whistleblowing concepts. It affirms the current position of the law and provides a reminder of fundamentals and issues for both sides of a claim to consider.

36. The judgment is also useful as guidance for how to assess appeals and their chances of success. In many examples, the EAT found that the Tribunal had not made express reference to concepts or terminology from legislation or case law. Nevertheless, the EAT'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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