

# Whistleblowing: causation, guidance for complex cases and judicial proceedings immunity

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## *The Chief Constable of Greater Manchester Police V Aston & Others*

*UKEAT/0304/19/RN* (handed down on June 4<sup>th</sup> 2021)

[ ] paragraph number of the EAT's judgment

Parties are referred to as they were in the ET

## Introduction

1. In *GMP v Aston* we receive a helpful reminder of the approach to be applied in cases where there are multiple protected disclosures spanning a significant period and allegations of multiple detriments involving multiple perpetrators and multiple victims. The case also involves an alleged detriment consisting of evidence given in other tribunal proceedings which was subject to judicial proceedings immunity (JPI) and deals with the issue of whether evidence which is covered by JPI can amount to a detriment. Finally, where the issue of JPI had not been raised before the first instance Tribunal, the Appeal Tribunal considered whether it had to deal with this newly argued point (i.e. whether it was mandatory) or whether it had a discretion to consider the newly argued point (i.e. whether it was discretionary). The considerations when deciding whether or not to exercise the discretion are also set out.

## Background

2. The facts before the Tribunal were complex, as perhaps indicated by the 28 day length of hearing. A serving Police Sergeant was arrested in 2014 for shoplifting and assaulting a security guard. Matters mushroomed into allegations of perverting the

course of justice against the Sergeant and against more senior officers up to the rank of Chief Superintendent. Further allegations of police misconduct up to and including the level of Assistant Chief Commissioner were also made. The Counter Corruption Unit (CCU) and Professional Standards Branch (PSB) became involved and the case was referred to what was then the Independent Police Complaints Commission (IPCC) (now Independent Office of Police Complaints (IOPC)).

3. The Claimants were serving police officers tasked with undertaking an investigation of the matters. They discovered evidence that they believed raised issues of improper interference in the proceedings against the Sergeant and professional misconduct and criminal offences by 3 senior officers: an Inspector; a Chief Superintendent; and a Chief Inspector. They uncovered evidence that led them to have a reasonable belief that they had perverted the course of justice and were guilty of police misconduct by seeking to interfere with the prosecution of the Sergeant with a view to getting the charges dropped. Their actions had included lobbying the CPS and senior officers within the force. The First Claimant reported matters to his superiors, the CCU and PSB which in turn referred the matter to the IPCC. The First Claimant gave personal briefings and submitted a number of written reports.
4. Although the Sergeant's wife and her friend pleaded guilty to perverting the course of justice, the Sergeant was acquitted of all charges at trial. The CPS decided not to prosecute any other officer in relation to any other matter. Internal disciplinary proceedings were, however, commenced: Gross misconduct disciplinary charges were commenced against the Chief Superintendent and the Inspector; and misconduct charges were brought against the Chief Inspector for their behaviour and involvement in the Police Sergeant's prosecution.
5. In the words of the EAT, the disciplinary proceedings "fizzled out" [18]. The Chief Superintendent promptly resigned when the charges were downgraded (under the police rules an officer is not permitted to resign pending unresolved gross misconduct proceedings, but may do so when facing a lesser misconduct charge) which ended the disciplinary proceedings against him. The Inspector went off sick with stress and the proceedings were permanently stayed. The behaviour of the Chief Inspector was found to be misconduct for which 'management advice' was given.

6. The alleged detriment which attracted judicial proceedings immunity was then made in employment tribunal proceedings brought by the Chief Inspector. In a witness statement in Tribunal proceedings of her own the Chief Inspector criticised the First Claimant. She alleged, in her witness statement, that the First Claimant had been unprofessional when asking her questions so that he could compile her statement and that she had subsequently been interviewed in an unprofessional manner. The Chief Inspector gave evidence in her own Tribunal proceedings that was in accordance with her witness statement.
7. In total, the alleged protected disclosures made by the Claimants covered the 16 month period 2<sup>nd</sup> March 2015 to 7<sup>th</sup> July 2016. There were allegations of 26 detriments to which the Claimants were subjected on the ground of having made the protected disclosures. The Tribunal upheld 4 detriments.

### **The Legal Principles [36-7]**

8. Section 47B ERA 1996 provides:

“A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

By s.48(1A) “A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

...

(2) On a complaint under subsection... (1A)... It is for the employer to show the ground on which any act, or deliberate failure to act, was done.”

9. As set out in *Harrow LBC v Knight* [2003] IRLR 140 at para 16

“it is thus necessary in a claim under s.47B to show that the fact that the protected disclosure had been made, caused or influenced the employer to act (or not act) in the way complained of: merely to show that ‘but for’ the disclosure the act or omission would not have occurred is not enough..... [to] answer the question whether [the protected disclosure] formed part of the motivation (conscious or unconscious)” of the alleged statutory tortfeasor.

## A protected disclosure when it's your job to make disclosures?

10. The Tribunal at first instance correctly determined that a disclosure complying with s.43B ERA 1996 is still a protected and qualifying disclosure even if it is the job of a claimant such as a police officer to, for example, report criminal offences. It still attracts the protection of the ERA 1996 [22].

## The causation question between protected disclosures and detriments

11. The tribunal correctly directed itself on the relevant law in relation to detriment and causation and cited *Blackbay Ventures v Gahir* [2014] ICR 747.
12. At para [38] of the EAT decision in *GMP v Aston*, the Appeal Tribunal set out the suggested approach to where a number of disclosures are relied on, *per Blackbay* at para 98:

“It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.
2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.
3. The basis on which the disclosure is said to be protected and qualifying should be addressed.
4. Each failure or likely failure should be separately identified.
5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the tribunal adopts a rolled up approach it may not be possible to identify the date when

the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the “old” law whether each disclosure was made in good faith; and under the “new” law whether it was made in the public interest.
  7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.
  8. The tribunal under the “old” law should then determine whether or not the claimant acted in good faith and under the “new” law whether the disclosure was made in the public interest.”
13. The EAT also set out the approach to causation as appears in *International Petroleum Ltd v Osipov* UKEAT/0058/17, per Simler P, paragraphs 82-84,

“82. It is common ground that “s.47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer’s treatment of the whistleblower”: see *Fecitt v. NHS Manchester* [2012] IRLR 64, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer’s treatment of employees and workers.

83. The words “on the ground that” were expressly equated with the phrase “by reason that” in *Nagarajan v. London Regional Transport* 1999 ICR 877.

So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment.

84. Under s.48(2) ERA 1996 where a claim under s.47B is made, “it is for the employer to show the ground on which the act or deliberate failure to act was done”. In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy *Kuzel v. Roche Products Ltd* [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure.”

### **Is there a reverse burden of proof in whistleblowing detriment claims?**

14. No, there is not. The EAT states this expressly at [54]. However, if an employer fails to show an innocent ground or reason the tribunal ***may, and no doubt frequently will,*** (emphasis added) draw an adverse inference, but is not bound to do so (see for example *London Borough of Harrow v Knight* [2003] IRLR140 at para 20 and *Kuzel v Roche Products Limited* [2008] IRLR 530 para 40). In *International Petroleum Ltd v Osipov* UKEAT/0058/17 at para 115 Simler P (as she then was) summarised the law as follows:

“(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see *London Borough of Harrow v Knight* at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.”

## The EAT's decision

15. In this case the Tribunal at first instance dealt appropriately with the causation issue. In relation to each of the upheld detriments it determined, as facts, that there was an act or deliberate failure to act which subjected the claimants to detriment. It then identified the dates of the detriment. It assessed whether the claimants had made protected disclosures by that point of time and identified them. The tribunal made express findings about the state of knowledge of the various perpetrators. It analysed and distinguished which disclosures were known of by whom. It carefully analysed and tested the claimed causative link between the disclosures and detriments claimed by reference to each claimant separately and avoided lumping them all together or adopting a broad brush rounded up approach. It explained why many of the claimants' claims were rejected and only 4 detriments were made out.
16. Where there was a detriment of failing to act, the Tribunal carefully considered the chronology so as to ascertain whether the failure to act took place when the period expired within which the perpetrator might reasonably have been expected to do the failed act (as per para 98(7)) of *Blackbay*.
17. The Tribunal considered and rejected the perpetrator's reasons for acting and reasons for failing to act.
18. The tribunal analysed each alleged detriment with conspicuous care, exploring, in depth, by close reference to the evidence and its findings of fact, what the ground was for the act complained of and the state of knowledge of the actor and in doing so, which claimant had made which protected disclosure and established the necessary causal link in relation to 4 of the 26 detriments alleged. It correctly discounted and ignored the alleged disclosures that it found did not meet the test of a qualifying and protected disclosure and checked that the disclosure pre-dated the detriment complained of. It found that the causal link was not made out in 22 of the detriments claimed.

## Judicial proceedings immunity

19. This gives a person absolute immunity from any action brought on the basis that his or her evidence is false or malicious or indeed careless. But is JPI sufficient to mean that what would otherwise amount to a detriment is not to be treated as a detriment for the purposes of a whistleblowing claim by virtue of the evidence being given in judicial

proceedings? The answer is “yes” - the witness statement and oral evidence of the Chief Inspector would have amounted to a detriment but for the immunity granted by JPI. The EAT held [57 and 64] that the Chief Inspector’s “witness statement given in her employment tribunal proceedings is covered by JPI” and the “witness statement attracted absolute immunity, the tribunal ... did not have the jurisdiction to consider [the] detriment ... and it would have been dismissed”.

### **Taking a new point on appeal**

20. The Judicial Proceedings Immunity point was not taken below - what did the EAT make of that? In the first instance Tribunal, the Respondent had not argued that the statement and evidence of the Chief Inspector in her own Tribunal proceedings could not amount to a detriment because of the principle of JPI. This argument was neither pleaded nor raised in the hearing below. The Tribunal made no mention of it in its judgment. Did the Respondent have a right to argue the point, given the importance of JPI as a principle of open justice?
21. The EAT held that there was no direct authority to support the submission that the Appeal Tribunal was bound to allow the Respondent’s appeal because it concerned JPI [60]. There was therefore no mandatory requirement on the Appeal Tribunal to consider the JPI argument.
22. Instead, the decision on whether or not to allow the point on JPI to be argued in the Appeal Tribunal, despite it not having been taken below, was a decision to be made by the exercise of discretion. The Appeal Tribunal considered that overlooking JPI at first instance clearly “constitutes exceptional circumstances entitling serious consideration to be given to raise the matter for the first time on appeal. It however remains discretionary and is not necessarily a trump card” [60].
23. The Appeal Tribunal then balanced a number of factors, following the guidance in *The Secretary of State v Rance* [2007] IRLR 665: that JPI is an important principle because of the important public policy considerations in the JPI principle; the principle of finality of litigation; the importance of parties bringing all relevant points to the tribunal’s attention at first instance; that the issue must have arisen either because of a lack of skill by the represented party or a deliberate tactical decision. Having balanced the factors, the Appeal Tribunal decided to exercise its discretion to allow the JPI point to be argued before it.



## Comment

24. It is often the position in factually-complex cases, that that there can be, and indeed usually are, mixed reasons or grounds for things that are done or not done. Some of the motivations of the perpetrators may not have been to do with the protected disclosures, but where the protected disclosures had sufficient influence to be causative within the meaning of s.47B then a successful whistleblowing claim will be made out.
  
25. It is important when bringing or defending a whistleblowing detriment claim, therefore, to establish a clear chronology of the protected disclosures, the detriments (acts and omissions) and the knowledge of the perpetrators. A careful and close analysis is imperative, as was carried out by the first instance Tribunal in this case. Time invested at the pleadings stage of proceedings will greatly assist in defining the issues and will give focus to the preparation of witness statements and the presentation of the case, whether you are acting for the Claimant or the Respondent.

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June 2021



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