

Fecitt & ors v NHS Manchester: whistleblowing

The Employment Appeal Tribunal in *Fecitt & ors v NHS Manchester* (23 November 2010, HHJ Serota QC) held that where a protected disclosure is made and a detriment subsequently suffered, the employer has the burden of proving that the detriment was 'in no sense whatsoever' on the grounds of the protected act. Of concern is that this decision makes it easier for an employer to defend a whistleblowing claim where it has dismissed an employee than where the detrimental treatment in question occurs during employment. Mohinderpal Sethi and Kate Balmer report

The salient facts

The three claimants in this case were all employed by the respondent as registered nurses. In early 2008, they raised complaints that another nurse, Mr S, had been boasting to colleagues of qualifications and clinical experience that he did not have. The respondent accepted that these complaints amounted to protected disclosures because the claimants believed they tended to show that the health and safety of individuals was being endangered. The respondent spoke to Mr S, he acknowledged his wrongdoing and apologised. The respondent decided to take no further action against him.

The claimants were unsatisfied with this outcome and continued to pursue the matter in an appropriate manner. Relations between staff began to deteriorate, with some employees supporting the claimants and others supporting Mr S. As a result of this dysfunctional situation, the claimants were subjected to significant detriments; two were removed from their positions and later redeployed away, while the third was not given any further work.

The tribunal's decision

The tribunal found in favour of the respondent, holding that, although protected disclosures had been made to the respondent by the claimants and the respondent had subjected the claimants to detriments, the detriments were not done 'on the ground that' the claimants had made the protected disclosures and so the two sets of events were not causally connected within the meaning of s.47B of the Employment Rights Act 1996.

It was submitted by both sides that, applying *London Borough of Harrow v Knight* (Mr Recorder Underhill QC, as he then was), the protected act had to have 'caused or influenced the employer to act (or not to act) in the way complained of'. The respondent also submitted that applying *Aspinall v MSI Mech Forge Ltd*, the protected disclosure had to be causative in the sense of being the real reason or core reason for the employer's actions.

Accepting those submissions, the tribunal held that a 'but for' test of causation based on *James v Eastleigh Borough Council* was



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insufficient. The tribunal found that any failure on the part of the respondent to take sufficient steps to protect the claimants from being subjected to a detriment was not 'because' they had made protected disclosures and was not, therefore, 'on the ground that' they had made the protected disclosures.

The EAT's decision

In allowing the claimant's appeal, HHJ Serota QC held that the correct test for causation in whistleblowing was not that set out in *Knight* or *Aspinall*. Instead, causation should be approached on the same basis as other areas of the law relating to discrimination (including victimisation).

The appropriate test was that set out in *Barton v Investec Henderson Crosthwaite Securities Ltd*, as approved in *Igen v Wong*. Where a protected disclosure was made and a detriment subsequently suffered, the employer had the burden of proving that the detriment was 'in no sense whatsoever' on the ground that the claimant had done the protected act; meaning that the protected act played no more than a trivial part in the application of the detriment. This test does not differ from that in *Nagarajan v London Regional Transport*.

Two distinct tests of causation

The EAT's decision in *Fecitt* produces a very odd result indeed, creating two distinct and seemingly irreconcilable tests of causation in whistleblowing claims involving a dismissal on the one hand and detriments during employment on the other. In dismissal claims, under s.103A of the ERA 1996, it is necessary to show that 'the reason (or, if more than one, the principal reason)' for dismissal was that the employee made a protected disclosure. In whistleblowing detriment claims under s.47B, however, once the employee has proved that a protected disclosure was made and a detriment suffered, the burden is always on the employer to show that the detriment was 'in no sense whatsoever' connected to the disclosure.

In view of the conflicting EAT authority of Harrow v Knight, this area appears particularly ripe for consideration by the Court of Appeal

As a result of this decision, a dismissed whistleblower would face a higher hurdle in establishing their case than a comparable whistleblower who has been subjected to some detrimental treatment short of dismissal. *Fecitt* therefore makes it easier for an employer to defend a whistleblowing claim relating to a dismissal, rather than any lesser detriment. This raises the question: could such an outcome have been intended by parliament?

Policy considerations

On the one hand, it could be argued that parliament intended to afford the greatest possible protection to whistleblowers. The EAT certainly took this view, stating: 'Parliament has sought to offer protection to whistleblowers. We consider that we should take a broad view of provisions for their protection.' It could also be said, as the EAT accepted, that there is little distinction between discrimination/victimisation and whistleblowing; accordingly, the relevant tests for causation ought to be aligned where possible. However undesirable it may appear to have two distinct tests under ss.47B and 103A, there is also no denying that these two statutory provisions are themselves worded differently in relation to causation.

There are strong arguments, on the other hand, to suggest that *Fecitt* produces a result contrary to the legislative intention. It is questionable whether parliament intended to provide the same level of protection in discrimination and whistleblowing cases. The two types of legislation have entirely different backgrounds: anti-discrimination legislation is required to comply with European Directives whereas PIDA 1998 is entirely homegrown. Indeed, parliament's intention to afford a lower level of protection may be said to have been made clear in the wording of s.103A.

Under that provision, whistleblowing must be 'the reason' for dismissal, or may be one of a number of reasons, provided it is 'the principal reason'. In the face of such express wording, could parliament possibly have intended the *Igen v Wong* test to apply to whistleblowing dismissals? Arguably, even allowing for the difference in wording between ss.103A and 47B, it would not seem logical for dismissed whistleblowers to be afforded less protection than comparable employees subjected to some lesser detriment.

Implications beyond whistleblowing

Presumably, if *Fecitt* is correct, the same analysis must also be applied to other forms of detriment and dismissal claims throughout the statutory regime. Consequently, the phrase 'on the grounds of' must mean 'in no sense whatsoever' whenever it appears in the 1996 Act. This would set up a significant difference in approach across a range of provisions in Part V of the Act including, for example, ss.44 and 100, which protect

against health and safety-related detriments and dismissals. Such an outcome would appear to make little sense, conflicting once again with the express statutory wording of those sections.

Different approaches to burden of proof

In common with other heads of automatic unfairness in dismissals, if the employee lacks the one-year qualifying period, the burden of proving the s.103A reason is on him (*Smith v Hayle Town Council*). In any other whistleblowing dismissal case there is an evidential burden on the employee to show a *prima facie* case under s.103A, but the persuasive burden remains on the employer: where the employer has relied on other reasons but failed to prove them, that does not mean that the tribunal *must* uphold the employee's s.103A case (which remains subject to the normal rules of proof): *Kuzel v Roche Products Ltd*. In a pre-dismissal detriment case, however, s.48(2) clearly places the entire burden on the employer to show the ground on which any act or deliberate failure to act was done. The EAT in *Fecitt* also did not address the differing approaches to the burden of proof between ss.47B and 103A, let alone the fact that in most discrimination cases the burden will shift.

Conclusion

The judgment fails to recognise the practical difficulties it gives rise to. The EAT makes no mention at all of the interrelationship between ss.47B and 103A, or how to reconcile the divergent tests for causation and burden of proof that emerge as a result of its judgment. Similarly, it fails to explain whether its analysis is limited to s.47B or has wider implications in or beyond the 1996 Act. Employment practitioners are therefore left with a decision that creates real practical difficulties. In view of the conflicting EAT authority of *Harrow v Knight*, this area appears particularly ripe for consideration by the Court of Appeal.

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Cases referred to:

<i>Fecitt & ors v NHS Manchester</i> UKEAT/0150/10/CEA
<i>London Borough of Harrow v Knight</i> [2003] IRLR 140 EAT
<i>Aspinall v MSI Mech Forge Ltd</i> [2002] EAT/891/01
<i>James v Eastleigh Borough Council</i> [1990] IRLR 288 HL
<i>Barton v Investec Henderson Crosthwaite Securities Ltd</i> [2003] ICR 1205 EAT
<i>Igen v Wong</i> [2005] IRLR 258 CA
<i>Nagarajan v London Regional Transport</i> [2000] 1 AC 501
<i>Smith v Hayle Town Council</i> [1978] IRLR 413 CA
<i>Kuzel v Roche Products Ltd</i> [2008] EWCA Civ 380; [2008] IRLR 530