

WHISTLEBLOWING – AN OVERVIEW

1. The Public Interest Disclosure (Northern Ireland) Order 1998 (“PIDO”) amended the Employment Rights (Northern Ireland) Order 1996 (“ERO”) by introducing provisions protecting workers from suffering detriment on grounds of having made protected disclosures. (Article 70B). The detriment provisions are modelled on the trade union detriment provisions so some of the legal authorities in relation to trade union detriment have been found to be relevant in this sphere. PIDO also introduced another category of automatic unfair dismissal namely dismissal by reason of having made a protected disclosure. (Article 134A ERO). Unfair dismissal includes constructive dismissal.
2. ERO was amended by The Employment Act (NI) 2016 commenced by The Employment Act (NI) 2016 (Commencement No1) Order (NI) 2017.
3. Harvey deals with whistleblowing at Divisions CIII and DII. The key text book in this area is Whistleblowing Law and Practice by **Bowers**. At Pages 22 and 23 of **Bowers** is a flow chart which can be very useful in these cases as the authorities have made it very clear that a tribunal must go through a structured process dealing with all elements of the test set out in the legislation by analysing each alleged protected disclosure and reaching clear findings on each one.
4. The 2014 list of Prescribed Persons is in the DfE guidance which was updated in 2017. (www.economy-ni.gov.uk).
5. Public Concern At Work is a charity (which is now known as Protect) which provides guidance and will intervene in some cases. (www.whistleblowing.org.uk).

THE 2017 CHANGES

6. The changes that were brought in with effect from 1 October 2017 in Northern Ireland introduce a specific requirement that the disclosure was, in the reasonable belief of the worker, made in the public interest.
7. The changes in 2017 also introduced changes to ERO at Articles 70B (1A) – (1E):
 - (i) Personal liability for detrimental acts or omissions committed by co-workers (and agents of the employer);
 - (ii) A defence is available to such a co-worker;
 - (iii) Vicarious liability for such detrimental acts;
 - (iv) The employer’s defence for vicarious liability.
8. Good faith is moved to remedy. This used to be an element of the test of whether or not a disclosure is protected but this was removed from that

assessment in Great Britain by the 2013 legislation and in NI from 1 Oct 2017. The good faith element now relates only to value in that compensation may be reduced by up to 25%. Authorities on good faith from before the changes are still relevant.

IS IT A DISCLOSURE OF INFORMATION?

9. The first element of whether a disclosure is a qualifying disclosure is that the whistleblower must disclose “information” (A67B ERO). A good starting point is the example given in **Geduld**:

“... The ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us a hypothetical was advanced regarding communicating information about the state of the hospitals. Communicating “information” would be: “The wards have not been cleaned for the past two weeks. Yesterday sharps were left lying around”. Contrasted with that would be a statement: “You are not complying with health and safety requirements”. In our view this would be an allegation not information”. (Geduld)

10. Information can include suspicious or allegations. Often there can be communication of a mixture of fact and opinion:

“The whistleblower may have a good hunch that something is wrong without having the means to prove it beyond doubt or even on the balance of probabilities. ... The notion behind the legislation is that the employee should be encouraged to make known to a suitable person the basis of that hunch so that those with the ability and resources to investigate it can do so”. (Bowers)

11. In a decision of the Court of Appeal in **Kilraine**, Mr Justice Langstaff stated as follows:

“The dichotomy between information and allegation is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation that is nothing to the point.” (Kilraine)

THE 6 CATEGORIES OF RELEVANT FAILURE

12. The second element of whether or not a disclosure is a qualifying disclosure relates to the categories of “relevant failure” set out in the legislation. The burden of proof is on the claimant to show this. It is important to note that this is an exhaustive list so that a whistleblower must bring himself within the scope of one or more of the 6 categories set out in the legislation.

13. The 6 categories relate to:
- (i) Crime.
 - (ii) Breach of a legal obligation. (Breach of internal rules may not be enough ***Korshunova [2017] EAT***).
 - (iii) Miscarriage of justice.
 - (iv) Health or safety.
 - (v) Damage to the environment.
 - (vi) Cover-up.

REASONABLE BELIEF

14. (i) Does the worker have reasonable belief that the information and any allegation tend to show a relevant failure for Tier 1 (ie to the employer) disclosure?
- (ii) Does the worker have reasonable belief that the information and allegation are substantially true for Tier 2 and Tier 3 (ie wider) disclosure?
- (iii) Does the worker have reasonable belief that the disclosure was in the public interest?
15. The principles involved in assessing the reasonable belief element are drawn from several authorities such as ***Babula***, ***Darnton***, ***Chesterton*** and ***Khorashi*** but some key points are:
- (i) The test involves both a subjective test of the worker's belief and an objective assessment of whether the belief could reasonably have been held. (***Babula***)
 - (ii) The worker can be wrong yet still hold a reasonable belief. (***Darnton***).
 - (iii) The test of reasonable belief applies to all elements of the test of whether the information disclosed tends to show a relevant failure including whether the relevant criminal offence or legal obligation in fact exists (***Babula***).
 - (iv) Reasonableness of the belief is to be tested having regard not only to what was set out in the disclosure but also to the basis for that information and any allegation made. (***Darnton and Babula***).
 - (v) What is reasonable depends on all the circumstances assessed from the perspective of the worker at the time of making the disclosure and it is for the tribunal to assess this by looking at the whistleblower's state of

mind based on the facts as understood by him at the time. As it is the reasonable belief of the worker making the disclosure you have to look at the individual characteristics of the worker including their expertise or lack of expertise. (**Darnton**)

The **Khorashi** case involved a surgeon and Judge McMullan stated in that case: *“There may be things that might be reasonable for a lay person to have believed (however mistakenly) that certainly would not be reasonable for a trained professional to have believed”*.

- (vi) The truth or falsity of the information disclosed and whether or not the relevant failure in fact occurred may be relevant when assessing reasonable belief. In other words it can be used as a tool to assess the reasonableness of the belief of the claimant at the relevant time (**Darnton**). It can therefore be relevant to the tribunal to find out if the allegation turned out to be true as this may strengthen a claimant’s claim that it was reasonable to make the allegation. If the allegation turns out to be false, it does not necessarily mean that the allegation was unreasonable based on the information and circumstances at the time the claimant made the disclosure.
- (vii) The worker must exercise a judgement consistent with the evidence and resources available, including the expertise and seniority of the worker, their ability to investigate further, and whether it is appropriate in all the circumstances instead to refer the matter to someone else to investigate (**Darnton**).
- (viii) The standard to be applied has to take into account that it is only necessary to have a reasonable belief that the information ‘tends to show’ the relevant failure, rather than that it positively establishes that failure (**Babula**). Note however that reasonable belief in this context relates to whether or not a disclosure is a qualifying disclosure. If a worker seeks protection for wider disclosure under Articles 67F to 67G, there is an additional requirement for a reasonable belief that the information disclosed and any allegation contained in it are substantially true.
- (ix) The burden is on the worker making the disclosure to establish the requisite reasonable belief. (**Babula**)
- (x) There must be more than unsubstantiated rumours in order for there to be a qualifying disclosure. (**Darnton**) This relates to the concept of responsible whistleblowing. The legislation should not be used a cloak to protect malicious gossip or wild unfounded allegations.

PUBLIC INTEREST

16. This element was introduced following the changes in Northern Ireland in 2017 and at the same time the good faith element was moved to remedy only.

17. It is now an express requirement that for a disclosure to be protected it must satisfy the public interest test. The test is whether it is a disclosure of information which, in the reasonable belief of the worker, is made in the public interest and tends to show one of the relevant failures. (Article 67B ERO). The effect of this is to shift the focus of the assessment away from the motive of the person making the disclosure and placing the focus on the character of the disclosure and the issue of whether the public interest is involved.

Chesterton Global Ltd v Nurmohamed [2017] (CA)

18. In the **Chesterton** case the Court of Appeal made clear that there was no clear line between public and private interests. It is for the tribunal to determine as a fact whether there is sufficient public interest in order for the disclosure to qualify for protection under the legislation. The Court of Appeal gave a broad interpretation to the phrase “in the public interest”, and drew a distinction between:

“disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest.”

19. In the Court of Appeal Lord Justice Underhill gave the leading judgment and restored the tribunal level decision giving reasons that were based on the facts that the tribunal had found. He gave guidance on how a tribunal should approach the issue of determining whether the public interest was engaged.
20. He confirmed that there were two elements to the issue of reasonable belief (as expounded in the **Babula**). The first element is subjective i.e whether the worker believed at the time he was making it that the disclosure was in the public interest. The second element is objective ie whether that belief was reasonable.
21. The question of whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of people sharing that interest. The Tribunal is not looking at what was in fact in the public interest but has to look at what could reasonably be believed to be in the public interest.
22. LJ Underhill states that the following four factors can be used as a tool to assess whether the claimant reasonably believed that the disclosures were in the public interest:
- (i) The number of workers whose interests the disclosure served although it is not simply a numbers issue;
 - (ii) The nature of the interests affected, that is, were they trivial or very important interests that were involved;
 - (iii) The nature of the wrongdoing and whether it was deliberate or inadvertent wrongdoing that was alleged;

- (iv) The identity of the alleged wrongdoer: the larger or more prominent the wrongdoer and its relevant community (for example staff suppliers and clients) the more likely a disclosure would engage the public interest.
23. In 2018 there was a case before the EAT of ***Ibrahim*** in which the test in ***Chesterton*** was applied. The claimant was an interpreter in a private hospital and he asked his manager to investigate rumours that he had been responsible for a breach of patient confidentiality. In his emails raising this he stated that he wanted to clear his name and also said that he wanted to restore his reputation. He was later dismissed and part of his claim was that the dismissal was automatically unfair because he had raised protected disclosures.
24. The tribunal found that he had made a qualifying disclosure of information in relation to defamation but that the whistleblowing case should be struck out because he had failed on the public interest issue. He appealed to the EAT and he lost on appeal.
25. The tribunal had made a finding of fact that the claimant's only concern was a personal one because when he raised his concerns he was only considering false rumours about him and their effect on him. He therefore had no subjective belief in the public interest element. He later raised an argument that there was an issue about the integrity of data protection but there was no evidence that this was a play in his mind at the time of the disclosure.

DISCLOSURE TO THE RIGHT PERSON?

26. Tier 1 (A67C-67E ERO)

- The employer/solicitor/Minister of the Crown;

Tier 2 (A67F ERO)

- Prescribed person – (listed eg regulatory bodies);

Tier 3 (A67G – 67H ERO)

- Wider disclosure:

(i) Is it an exceptionally serious failure? And disclosure is:

- Not for the purposes of personal gain;
- Reasonable in the circumstances (No requirement to look at factors set out below for reasonableness)

(ii) If not exceptionally serious, is wider disclosure justified in the circumstances?

- Not for purposes of personal gain;

- Reasonable in the circumstances;

AND: victimisation by employer, OR possible concealment OR previously told employer/ prescribed person.

- (iii) Factors you must consider for whether wider disclosure was reasonable in circumstances: the identity of person disclosure made to; seriousness of relevant failure; whether failure continuing or likely to occur; whether disclosure is in breach of confidentiality owed to a third party; any action by person worker has previously disclosed to; whether worker complied with whistleblowing procedure.

DETRIMENT CLAIMS

27. A worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. (Article 70B ERO).
28. Since 1 October 2017 the claimant can claim against a co-worker or against the agent of the employer. (Article 70B(1A-1E) ERO).
29. There is no qualifying period for bringing such claims. Injury to feelings is available for these claims and there is no cap on compensation.
30. There is an exclusion in ERO ie the detriment provisions do not apply where the worker is an employee and the detriment in question amounts to a dismissal (A70B(2)). This exclusion applies to claims against the employer only. (**Osipov**)
31. Detriment is determined using the **Shamoon** test which is whether a reasonable worker would, or might, take the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged. There is no requirement to show financial detriment.
32. The detriment suffered must be on grounds of having made a protected disclosure. In the **Nagarajan** case the House of Lords sets out the correct approach which requires the tribunal to consider the mental processes of the respondent and the reason why detrimental acts or omissions occurred. The tribunal must consider the reasons for the act ie the factual basis on which it was done. The test is whether the fact of disclosure was a material (ie more than trivial) influence on the deliberate act/omission that caused the detriment.
33. The authorities make it clear that is important for the tribunal to distinguish between on the one hand detrimental acts which occur as a consequence of the disclosure which do not result in liability and on the other hand detrimental acts done on grounds of having made a disclosure.
34. Employers can seek to draw a distinction between the disclosure itself and the manner of the disclosure. In this regard an analogy with Trade Union detriment

cases may be helpful. In the case of *Lyon v St James Press Ltd [1976]* the EAT decided that Trade Union activities should not be allowed to operate as a cloak or excuse for conduct which would ordinarily justify dismissal. Wholly unreasonable extraneous or malicious acts done in support of Trade Union activities might be a ground for dismissal which would not be unfair.

35. Detriment can occur after termination of employment in line with a settled line of authorities relating to victimisation generally. A detriment can come after termination as long as there is a close enough connection between it and the disclosure. By similar reasoning, a disclosure can come within the scope of the legislative protection, even it is made after termination of employment. See *Onyango v Berkley Solicitors [2013] EAT*. In that case Mr Onyango, a solicitor, left his employer. He then sent a letter of claim and made a report to the Legal Complaints Service. This was the protected disclosure relied upon and it was made after he left. His ex-employer retaliated by making allegations of fraud and dishonesty which led to him being investigated by the Solicitors' Regulatory Authorities. Mr Onyango succeeded in his claim that he should be allowed to bring a whistleblowing case against the employer as there was a sufficient connection between the protected disclosure and his former employment.
36. The burden of proof in whistleblowing detriment cases operates in the same way as it operates in Trade Union detriment cases. Article 71(2) of ERO covers the burden of proof in detriment cases. This is in contrast to discrimination cases generally where the initial burden is on the claimant to prove facts from which the tribunal could conclude that an act of discrimination occurred.
37. Thus the initial burden is on the claimant to prove:
 - (i) that he made protected disclosures, and
 - (ii) that he suffered detriment.

If he proves those two elements the burden shifts to the employer to provide an explanation which is not tainted by the fact of the claimant having made protected disclosures.

LIABILITY OF CO-WORKERS AND VICARIOUS LIABILITY

38. Before the changes that came in to effect in Northern Ireland on 1 October 2017 an employee could not sue a co-worker personally for any detriment and therefore vicarious liability could not attach to the employer. This was in contrast to other areas of discrimination where there was specific provision made in the relevant legislation for liability of co-workers and vicarious liability on an employer.
39. Following the 2017 changes an employee can sue a co-worker personally for detriment. An employer can also be vicariously liable for any such detrimental acts whether or not the employer knew of the acts.

40. A similar regime is introduced in relation to agents of the employer.
41. There is a statutory defence available to the employer just as there is in discrimination law generally. The employer has a defence if the employer can show that it took all reasonable steps to prevent the co-worker from doing the act in question or from doing acts of that description. Factors relevant to this defence may include whether an employer has a whistle-blowing policy and whether the workforce knew about the policy through training and refresher training.
42. The co-worker also has a defence to a detriment claim against him personally. The co-worker can avail of the defence if he can show he committed the detrimental act in reliance on a statement by the employer that doing the act did not contravene ERO and that it is reasonable for the worker to rely on his statement.

Timis and Sage v Osipov [2019] (CA)

43. Osipov was the CEO employed by an oil and gas exploration company. Timis was the non-Executive Director of the company and major shareholder. Sage was a non-Executive Director and exercised management functions. Osipov made several protected disclosures about the way the company was operating in Africa and three days after his last disclosure he was sacked with immediate effect by Sage. Timis had directed Sage to sack the claimant but Sage agreed with and was involved in the decision to dismiss. He was therefore found to be a party to the act of dismissal.
44. Osipov brought a claim to the tribunal saying that he had been automatically unfairly dismissed by the company and also that both Timis and Sage had subjected him to detriment culminating in the dismissal. He succeeded against all three respondents in that he succeeded in the dismissal claim against the company and in the detriment claims against Timis and Sage. The company then became insolvent.
45. The two non-Executive Directors had directors' insurance and it was therefore worthwhile for the claimant to pursue them for compensation.
46. The issue for the appeal was whether or not the claimant could claim for the losses flowing from the detrimental acts to include the dismissal and its aftermath. The EAT said that it could and the Court of Appeal upheld that.
47. The Court of Appeal held that a co-workers' liability for detriment can be wide and a detriment can include a dismissal.
48. The Court of Appeal decided that the exclusion in the legislation which states that an employee cannot claim for detriment if that detriment is a dismissal relates to claims against the employer only. Detriment can include dismissal and can be made against a fellow employee. Compensation can include compensation for loss flowing from the dismissal that results from a prior

detrimental act. This is subject to the rules on remoteness and quantification of losses.

49. Underhill LJ summarises his decision as follows:

“1 *It is open to an employee to bring a claim under [A70B ERO] against an individual co-worker for subjecting him or her to the detriment of dismissal, ie for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section [70B (1B)]. All that [A70B(2)] excludes is a claim against the employer in respect of its own act of dismissal.*

2 *As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, [A134A ERO] does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and quantification of such losses will apply.”
(Emphasis added)*

50. There are a couple of practical points that emerge from this decision:

- (i) Injury to feelings compensation is not available for unfair dismissal claims against the employer. However, if dismissal is one of the detrimental acts or a consequence of the detrimental act then effectively injury to feelings can be claimed for dismissal.
- (ii) An individual co-worker's personal liability can extend to the detriment of dismissal with its associated potential value. Under A70B (1E) of ERO a worker can avail of protection from personal liability if the detriment caused to the co-worker was because he was relying on a statement from an employer that this would not contravene the whistleblowing provisions. It must be reasonable for the co-worker to rely on such a statement however.
- (iii) The test for causation is easier to satisfy in a detriment case than in an unfair dismissal claim. For detriment the claimant has to show that the making of the protected disclosure was more than a trivial influence on the detrimental act whereas in unfair dismissal the claimant has to show that the making of the protected disclosure was the principal reason for the dismissal.
- (iv) The employer can be vicariously liable for detriment. The employer's “reasonable steps” defence is available for detriment cases.
- (v) The practice point to take from this is that you need to be clear as to what precisely is the claim that is being advanced and who is being sued for what. Does the claim involve personal liability for detriment and vicarious liability and/or is it a dismissal claim?

51. It is now open to a claimant to argue that the dismissal was either itself a detriment or was a consequence of his detrimental treatment.

DISMISSAL FOR MAKING A PROTECTED DISCLOSURE

52. The right not be unfairly dismissed is found at A134A of ERO. There is no requirement for one year's service and no cap on compensation.
53. Dismissal by reason of a protected disclosure is automatically unfair. The remedies of interim relief, re-engagement and re-instatement are available.
54. Where there are mixed reasons for dismissal the whistleblowing provisions only apply where the protected disclosure was the principal reason for dismissal. The question for the tribunal is: why did the employer dismiss the claimant?
55. When looking at the reason or principal reason for the dismissal the tribunal focuses on the mental processes of the employer to determine the reason.

Royal Mail Ltd v Jhuti [2018] (CA)

56. This case concerns a detriment and a dismissal claim. The decision of the Court of Appeal is currently under appeal to the Supreme Court.
57. Ms Jhuti worked for Royal Mail and was in her probationary period. Soon after she started her employment she observed irregularities in the way existing customers were given discounts to encourage them to try new products and this was in breach of OFCOM guidance. She reported her concerns in two emails to her line manager. He responded by having a long meeting with her, put her under pressure to withdraw her allegations under the threat of failing her probationary period, and he got her to write an email to him to say essentially that she had made a mistake.
58. In the next few months he became critical of her performance, imposed targets and areas for improvement which she said were unreasonable and basically set her up to fail so it looked like she was underperforming. She complained to HR and said that she thought that he was treating her badly because she had raised these concerns of wrongdoing.
59. She went off sick because of her treatment and ultimately she was dismissed for poor performance by another manager. The other manager was a Ms Vickers and she was sent a file by HR which did not include the two key emails which Ms Jhuti had initially sent to her line manager in which she had detailed the allegations of wrongdoing.
60. Ms Vickers followed up the claimant's claim that she thought she had been set up to fail by her line manager because she had made disclosures. Ms Vickers asked the line manager to respond and he was able to produce the email that he had got Ms Jhuti to send him where she agreed that she had made a mistake. He therefore misled Ms Vickers because he did not send the initial

emails and HR had not included those. On the information before Ms Vickers therefore Ms Jhuti was liable to be dismissed for poor performance. The tribunal found Ms Vickers' actions and decision to be reasonable on the information before her. The tribunal also found that the actions of the line manager amounted to detrimental treatment which effectively caused the dismissal or, at the very least, contributed to it, because he had misled the person who took the decision to dismiss.

61. The tribunal found that the reason the line manager had treated Ms Jhuti badly was because she had made protected disclosures. He treated her detrimentally in relation to her performance and gave misleading information to Ms Vickers so Ms Vickers innocently and reasonably decided she should be sacked for poor performance. The protected disclosures did not affect that decision she made because she did not have the full picture.
62. Ms Jhuti therefore won the detriment case against her line manager and the employer was found to be vicariously liable for that. She failed in the unfair dismissal claim however because the tribunal had to look at the mental processes of the person taking the decision and they found Ms Vickers to be blameless.
63. In the Court of Appeal Underhill LJ analysed the history of the legislation and the authorities relating to dismissal claims and in particular a previous decision of the Court of Appeal in the case of **Orr**. In the **Jhuti** case the Court of Appeal decided that the unfair dismissal case should fail despite the fact that the dismissal was essentially due to the line manager's manipulative conduct, (a so-called **lago** situation). The exercise for the tribunal in an unfair dismissal claim is to consider only the mental processes of the person who took the decision to dismiss.
64. Underhill LJ sets out three separate scenarios for these manipulation cases by referring to the status of the manipulator and gives his view of the likely outcome in each case:
 - (i) A colleague with no relevant managerial responsibility for the claimant procured their dismissal by giving false evidence and the decision maker is innocently and reasonably misled. In that case LJ Underhill's view is that even though the employee has suffered an injustice at the hands of the manipulator the employer has not acted unfairly.
 - (ii) The victim's line manager is a manipulator but is not responsible for the dismissal then, following the **Orr** decision, the employer does not have the manipulator's motivation attributed to it.
 - (iii) The manipulator is a manager with some responsibility for the investigation but is not the actual decision-maker. In that case there would be a strong case for attributing to the employer both the motivation and the knowledge of the investigator even if the person taking the dismissal decision does not know about the nefarious motivation of the manipulator. The reason is that the conduct of the investigation is

essentially part and parcel of the process of dismissal. He distinguished the *Jhuti* case in that the line manager was not an investigator but he had simply given information to the decision maker in response to her query.

Constructive Dismissal

65. You look at the reason for the conduct which amounted to breach of contract and if that conduct was by reason of a protected disclosure. If it is a breach of the implied term of trust and confidence, you look at how important the protected disclosure was in any erosion of trust and confidence.

REMEDY

Good Faith

66. This concept is relevant to remedy following the changes in 2017. The only time good faith cannot be in issue is when someone discloses to a legal adviser in the course of seeking legal advice. (This includes *PCAW/Protect* according to their website).
67. The burden of proof is on the employer to show the absence of good faith on a balance of probabilities. It is a question of fact for the tribunal. Once this issue is raised it goes to the value of the case in that the compensation can be reduced by up to 25%.
68. It no longer goes to the heart of whether or not any disclosure is protected.
69. Good faith is not simply equated with honesty. You look at the motive of the person making the disclosure to see if there is an ulterior motive. If there are mixed motives, good faith can be negated if the ulterior motive was the dominant or predominant one. Examples of ulterior motives which have been found to negate good faith are personal antagonism, pursuing a personal campaign and seeking to obtain a personal advantage.

Automatic Unfair Dismissal

70. In unfair dismissal cases the usual remedies of re-engagement, re-instatement and compensation are available to a claimant. Interim relief is also available. The basic award can be recovered from the employer and there is no ceiling on the compensatory award.
71. The tribunal can apply a reduction to any compensation awarded for contributory conduct and it is also open to the tribunal to find that compensation should be reduced on the basis that a fair dismissal would have occurred in any event for reasons unconnected to any protected disclosure.

Detriment

72. If the worker succeeds in his detriment case the tribunal must make a declaration to that effect and may make an award of compensation. In contrast to dismissal claims, injury to feelings can be claimed and is assessed using the **Vento** principles. (***Virgo Fidelis v Boyle [2004]***).
73. Whilst there is no principle that whistleblowing injury to feelings awards should be higher than any other forms of discrimination, the EAT in the case of ***Virgo Fidelis*** made the comment that detriment suffered by whistleblowers should normally be regarded by tribunals as a very serious breach of discrimination legislation. One particularly important factor could be the adverse effect on a claimant's future employability because they have the reputation of being a whistleblower.
74. In 2018 in the case of ***Small v Shrewsbury and Telford Hospitals NHS Trust***, the Court of Appeal held that the tribunal itself should have considered whether to award compensation for long term loss of earnings to the claimant. Mr Small was an agency worker on a temporary assignment in a hospital Trust. He made a protected disclosure and as a consequence his contract was terminated early. He gave evidence that he had had great difficulty in getting employment because he gave prospective employers the reason for the early termination of his previous contract. There was therefore evidence before the tribunal that he was likely to suffer a loss into the long term ie longer than the period of his original contract. The tribunal itself had found that there were "career ending" consequences of the termination of that contract by the relevant Trust. The tribunal had therefore been wrong to limit itself to compensation to the end of the original contract term.

Time point

75. This is a trap for the unwary as the test is the much stricter test which applies unfair dismissal cases and this applies to detriment as well. So whilst the whistleblowing protections appear to be structured like the anti-discrimination legislation, time limits are strictly applied.
76. Any claim for unfair dismissal must in the normal way be brought within three months of the effective date of termination. The tribunal can only extend time if it was not reasonably practicable for the employee to claim within the three months and if any late claim was brought within a further reasonable period.

Employment Judge Órla Murray

April 2019

Appendix 1 - PRINCIPAL AUTHORITIES

- (1) Babula v Waltham Forest College [2007] EWCA Civ 174.
- (2) Blackbay Ventures Ltd v Gahir 2014 IRLR 416 EAT.
- (3) Cavendish Monroe Professional Risks Management Ltd v Geduld [2009] UKEAT/0195/09.
- (4) Chagger v Abbey national 2010 IRLR 47
- (5) Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 879 (CA)
- (6) Darnton v University of Surrey [2003] IRLR 133 EAT.
- (7) Ibrahim v HCA International Ltd EAT 0105/18
- (8) Parkins v Sodexho Ltd [2002] IRLR 109 (EAT)
- (9) Royal Mail v Jhuti [2018] IRLR 251 (CA)
- (10) Korashi v Abertawe Bro Morgannwg University Local Area Health Board (EAT/0424/09, 12/09/11).
- (11) Korshunova [2017] IRLR 115 EAT
- (12) Kuzel v Roche Products Limited [2008] EWCA Civ 380.
- (13) Lyon v St James Press Ltd 1976 IRLR 215 the EAT.
- (14) Melia v Magna Kansei 2006 IRLR 117.
- (15) Nagarajan v London Regional Transport [1999] ICR 877.
- (16) NHS Manchester v Fecitt and others [2011] EWCA Civ 1190).
- (17) Onyango v Berkley Solicitors 2013 IRLR 338 EAT.
- (18) Shamoon v The Chief Constable of the RUC [2003] UKHL11.
- (19) Simpson v Castlereagh Borough Council 2014 NICA 28
- (20) Small v Shrewsbury and Telford Hospitals NHS Trust (CA)
- (21) Timis and Sage v Osipov 2019 IRLR 52 (CA)
- (22) Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 (CA)
- (23) Virgo Fidelis Senior School v Boyle 2004 IRLR 268.

Appendix 2 - Northern Ireland Decisions

1. AB -v- Ulster Bank 02250/13IT & 00724/13IT
2. James Frederick Brown v Department for Infrastructure 2844/10
3. Garbhan Downey -v- Culture Company 2013 Limited 00749/13IT
4. Andrea Headley -v- Southern Cross Health Care & Others 02694/11IT & 01216/12IT

Andrea Headley -v- Southern Cross Health Care & Others [2014] NICA 34
5. Paul Keogh -v- Banbridge and District Citizens Advice Bureau 00458/12IT, 03010/11IT, 02973/11IT & 01463/11IT

Paul Keogh -v- Banbridge and District Citizens Advice Bureau [2014] NICA 32
6. Mary Sarah McGuigan -v- Board of Governors of Wellington College & Other 00059/14IT
7. Grainne McKeown -v- Belfast Metropolitan College 01750/13IT
8. Brendan McFerran v Invest NI 423/08, 598/08
9. Clare Ryan -v- University of Ulster 00339/14IT
10. Glenn Sharkey -v- GarCel NI Ltd 01293/13IT
11. Constantine Talalaev -v- Randox Laboratories Ltd 00881/13IT
12. Paul Smith v The Simon Community NI 00578/16