

Appeal No. UKEAT/0163/15/RN

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 27 August 2015

**Before**

**MR RECORDER LUBA QC**

**(SITTING ALONE)**

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MR D UNDERWOOD

APPELLANT

WINCANTON PLC

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

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For the Respondent

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## **SUMMARY**

### **VICTIMISATION DISCRIMINATION - Protected disclosure**

One of the Claimant's claims that he had made protected disclosures - and been subject to detriment and an automatically unfair dismissal as a result - was based on a written complaint that he and three other lorry drivers at a haulage depot had made. It was a complaint that the distribution of overtime to drivers at that depot was being dealt with unfairly and in breach of their contracts of employment (for a variety of reasons and with a range of effects).

At a Preliminary Hearing, the Regional Employment Judge struck-out that particular claim because such a complaint, concerning only a group of workers with an identical grievance about particular terms of their contracts, could not meet the "public interest" test in the amended **Employment Rights Act 1996** section 43B(1).

Appeal allowed. The Regional Employment Judge's Order had been made before the judgment in **Chesterton** [2015] IRLR 614 EAT and was inconsistent with it. The Employment Appeal Tribunal had decided that *prima facie* it was at least possible for a matter to be "in the public interest" even if it was concerned only with a contractual dispute between a group of employees and their employer. Although that decision was subject of an appeal to the Court of Appeal (listed for October 2016) it should meanwhile be followed and claims should meanwhile be tried to determine whether, in fact, in any particular case, the Claimant had had a reasonable belief that the matter had been raised by him "in the public interest".

## MR RECORDER LUBA QC

### Introduction

1. This is an appeal by a Claimant from the striking-out of a claim made to the Employment Tribunal Service in respect of what was alleged to be a protected disclosure. In short, it is said to be a whistle-blowing claim, or an element of one, which was wrongly prevented from being tried on its merits because it was the subject of a strike-out order.

### The Essential Background

2. The Respondent is a large road haulage company. The Claimant is a Class 1 HGV driver whom the Respondent employed from November 2012 until June 2014 when he was dismissed. His appeal against dismissal was considered by his employers in July 2014 but was unsuccessful. In September 2014, the Claimant submitted a claim form to the Employment Tribunal Service in which he contended, among other matters, that his dismissal was an automatically unfair one because he had been dismissed for making protected disclosures. Further, that he had been subjected to other detriments for the same reasons. The protected disclosures in question go well beyond the single disclosure with which this appeal is concerned.

3. As to the matter which is subject of the present appeal, the claim form says this at paragraphs 4 and 5 of the attachment marked "Details of Claim":

**"4. On 22 November 2013 the Claimant and three others collectively submitted a written complaint to the Respondent under the whistleblowing procedure concerning "victimisation, favouritism, forms of bullying, unfairness, stress caused by aforementioned, morale caused by aforementioned".**

**5. A major concern detailed in the letter of 22 November 2013 was that overtime was not being allocated fairly so that some drivers were suffering reduced income. The written complaint is a qualifying disclosure under section 43B(1)(b) of the Employment Rights Act 1996. The legal obligation that the complainants believed was being breached was the implied duty that the Respondent would not act arbitrarily, capriciously or inequitably. Unfair allocation of overtime affected a number of workers."**

4. The letter of 22 November 2013, which is referred to in those passages, has been disclosed in the course of the claim. It was seen by the Employment Judge and it has been seen by me. As indicated in paragraph 4 of the extract, to which I have just referred, it is signed by three other drivers in addition to the Claimant. Paragraph 5 of the extract, from which I have just read, fairly represents a major concern identified in the letter as being the unfair distribution of overtime as between drivers at the particular depot.

5. The Respondent's Answer to the claim was given on 1 October 2014. In relation to the relevant extract from the claim form, from which I have read above, the response was as follows:

**"9. On the 22 November 2013 the Claimant with three others made a written complaint regarding the allocation of overtime. There is no contractual right to overtime, more significantly neither the Claimant nor his colleagues raised this matter under the whistle blowing policy. At best they raised a collective grievance and moreover were aware it was being dealt with as a collective grievance. This grievance was investigated, it dealt with the limited issue of overtime allocation as one aspect of the contract during the weekend. The investigations found that the two drivers cited as receiving favourable hours had [received] slightly more hours on average at the weekend, but by only one to two hours. The Respondent took measures to ensure that the allocation of hours on this particular aspect was subject to further procedures and scrutiny.**

**10. The above grievance does not and cannot amount to a qualifying disclosure under section 43B(1)(b) of the Employment Rights Act 1996 in particular the Respondent refers to paragraph 5 of the Claimant's details of claim and it is an abuse of process to imply there was a breach of the implied duty. The Claimant and his colleagues accepted the Respondent's findings with regards to overtime hours and did not appeal."**

6. On 30 October 2014 the Regional Employment Judge sitting at Huntingdon, Regional Employment Judge Byrne, conducted a Preliminary Hearing at which both parties were represented by their solicitors. He made a series of procedural orders designed to drive the case forward for determination. His orders included the following:

**"Strike Out**

**1. Paragraph 5 of the details of claim alleging that the Claimant's letter of 22<sup>nd</sup> November 2013 amounted to a qualifying disclosure will be struck out, that part of the claim having no reasonable prospect of success, on 14<sup>th</sup> November 2014 in the absence of any written submissions from the Claimant explaining how the matters relied on in that letter fall within the provisions of Section 43B ERA, in particular as to how they are in the public interest."**

7. In response to that order, the Claimant's representatives submitted a letter dated 14 November 2014. It will be observed immediately that that was the last day available to them pursuant to the Judge's Order. The letter extends over a full A4 page of text in relation to this question of striking-out. Before me, the terms of the letter have been relied upon by both parties but I refer to the following passages on which reliance was placed by the Respondent:

**"The Claimant believes that the joint grievance brought by four of the Respondent's employees was in the public interest despite the fact that the subject matter of overtime allocations only affected the Respondent's private sector employees.**

...

**The joint grievance about unfair overtime allocations did not just concern the Claimant and those putting their names to the grievance. They concerned a number of workers at that site and contractual arrangements for a number of individuals. Each of those had his own separate contract. Accordingly, the Claimant contends that his disclosure was in the public interest.**

...

**For the reasons given the Claimant believes that the joint grievance was in the public interest and should not be struck out."**

A longer extract from that letter appears in the Judgment of the Regional Employment Judge to which I shall come shortly.

8. On 15 December 2014, the Regional Employment Judge promulgated a Judgment striking out this part of the claim and his Judgment was accompanied by short Reasons. From those Reasons, it was not entirely clear whether the Regional Employment Judge had received and considered the Claimant's solicitor's letter of 14 November 2014. That, quite understandably, triggered enquiries from the Claimant's representatives and a request from them that the matter be reconsidered. Against that background, the Regional Employment Judge decided to reconsider the matter afresh. Having indicated that he would do so, he received further representations from the Claimant's solicitor dated 7 January 2015. That letter, again, set out at some length a contention that the matter raised by the 22 November 2013 letter did constitute a qualifying disclosure for the purposes of the relevant statutory provision.

9. Having received that material, the Regional Employment Judge then promulgated a further Judgment in these terms.

**“1. The complaints of automatically unfair dismissal for having made a protected disclosure by letter of 22<sup>nd</sup> November 2013 and of detriment for having made that protected disclosure are struck out as having no reasonable prospect of success.”**

10. Accompanying that Judgment, delivered on his reconsideration, the Regional Employment Judge provided Reasons which were sent to the parties on 30 January 2015. It is from the Judgment made on that reconsideration that this appeal is brought. In the meantime, directions have been given for the consideration of the remaining elements of the Claimant’s claims for a five-day hearing commencing on 5 September 2015.

11. By this appeal the Claimant contends that the Regional Employment Judge was wrong to strike-out this one specific element of his claim. He asks that I now so find and that I restore it so that it can be tried alongside his other claims. The appeal is opposed by the Respondent which seeks to uphold the Regional Employment Judge’s Judgment, essentially for the Reasons he gave.

12. The appeal proceeds on the basis of an amended Notice of Appeal, which has been met by an amended Answer. The amendment in each case having been filed pursuant to permission to amend having been granted by the Registrar. On the appeal itself, I have had the great benefit of assistance from Mr Paul Jackson, solicitor appearing for the Appellant, and Mr Jeremy Lewis of counsel, appearing for the Respondent. They have not only provided me with helpful oral submissions but each has provided a skeleton argument, which is in each case directly to the point and also helpful. I will not, in the course of this short extempore Judgment, be in a position to thoroughly deal with each and every aspect of the various submissions made to me. It is in the interests of these parties, and in the interests of justice generally, that I do

immediately proceed to give this extempore Judgment so that the parties will know where they stand in relation to the main hearing, which is imminent, before the Employment Tribunal. The Judgment may not, therefore, be as carefully crafted and as detailed as it would have been had I had the opportunity to reserve it.

### **The Relevant Law**

13. The first significant legal material to which I should refer is that governing the power of the Employment Tribunal to strike-out a claim before it. That power is given by Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. The power to strike-out is explicitly contained in and constrained by the terms of Rule 37. The strike-out in the instant case was made pursuant to the Regional Employment Judge's powers under Rule 37(1)(a). That provides:

**“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**

**(a) that it ... has no reasonable prospect of success;**

**...”**

14. The claim which the Regional Employment Judge struck-out was a claim which purported to be within the terms of section 43B as amended of the **Employment Rights Act 1996**. The provisions of that section are as follows:

**“43B. Disclosures qualifying for protection**

**(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following -**

**(a) that a criminal offence has been committed, is being committed or is likely to be committed,**

**(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**

**(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**

**(d) that the health or safety of any individual has been, is being or is likely to be endangered,**



(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”

I note that the words in square brackets were inserted in to the terms of section 43B by section 17 of the **Enterprise and Regulatory Reform Act 2013** with effect from 25 June 2013. In the instant case, as is clear from the passages from the claims form to which I have already referred, reliance was placed exclusively on section 43B(1)(b). The relevant legal obligation with which it was said that the Respondent was failing to comply was the legal obligation, express or implied, contained within the contracts of employment of the Respondent’s drivers.

### **The Employment Judge’s Reasons**

15. The Regional Employment Judge’s reasoning is concisely set out in the Written Reasons he delivered on 30 January 2015. The structure of the Reasons is first of all to give the procedural background to the determination that the Regional Employment Judge was about to make and to reflect the direction that he had earlier made, the terms of the response received from the representatives for the Claimant and the fact that the Regional Employment Judge had considered them. The ratio of his reasoning, if I can put it in that way, is contained within a single substantial paragraph: paragraph 8. That paragraph has unsurprisingly been the focus of this instant appeal and its terms are as follows:

“8. With reference to those submissions and the pleaded case the fundamental difficulty the Claimant has in seeking to pursue the claims set out in paragraph 5 of the details [of] claim is that they cannot be said to be in the public interest. The letter of 22<sup>nd</sup> November 2013 makes specific reference to a dispute between the Claimant (and other employees) with the Respondent over the allocation of overtime between employees. That is a dispute between the Claimant and the Respondent with reference to the terms and conditions of employment between them and, I accept, also a dispute between the Claimant’s fellow employees and the Respondent. However, can it be said to be in the “public interest”? In my view it cannot be said to be so. Indeed in my view it falls squarely within the provisions of the *Parkins v Sodexo* case in that it is a dispute between the Claimant and the Respondent with reference to the terms of employment existing between the Claimant and the Respondent. How can that be said to be in the public interest? It is not something which the public are affected by, directly or indirectly. The Claimant appears to argue that because other employees are affected by the dispute they are members of the public and therefore the disclosure is in the public interest. However the reason the dispute resonates with the claimant’s fellow employees is only because those fellow employees are in the same employee/employer relationship as is the Claimant with the Respondent. There is no “Public interest”. It does not

“relate to or concern the people as a whole”. (Definition of the meaning of “Public” contained in the Collins English Dictionary Fifth Edition 2000). In those circumstances it cannot be said to be in the *reasonable* [REJ Byrne’s emphasis] belief of the Claimant to be in the public interest. It is the interest of the Claimant who is in dispute with the Respondent over his terms and conditions of employment and the allocation of overtime but does not satisfy the statutory definition and cannot be said to be a “reasonable” belief in all the circumstances.”

It is for those reasons that the Regional Employment Judge made the strike-out order that he did.

### **The Appeal**

16. Having set out the reasoning of the Regional Employment Judge, I turn to the points raised on the appeal. There are some five separately expressed grounds of appeal in the amended Notice of Appeal. I can deal with two of the grounds of appeal quite shortly. By ground 2 it is contended that the Regional Employment Judge wrongly failed to have proper regard to the evidence and material before him in reaching the determination which he did. As originally expressed, this had been a contention that the Regional Employment Judge had paid no regard to the terms of the November 2013 letter said to constitute the qualifying disclosure as between the Claimant and Respondent. Given the nature of that allegation, it is no surprise that this ground of appeal was allowed to proceed to a Full Hearing. However, it has become clear that the Regional Employment Judge did have the advantage of access to and consideration of that document.

17. In those circumstances, the ground of appeal has been amended. It has not, however, been withdrawn. It is contended by Mr Jackson that the point is nevertheless a good one in that in paragraph 8 of his Written Reasons, to which I have referred, the Judge does not go in to any detail as to the content of the letter of November 2013. He does not refer, as it were, to any primary material and, moreover, he does not refer to paragraph 4 of the claim form (referring only, in his Judgment at paragraph, 5 to paragraph 5 of that claim form). In my judgment, there

is nothing whatsoever in this amended ground of appeal. It is perfectly plain that the Regional Employment Judge had before him all of the material in question. He had the full claim form, he had the letter of November 2013 said to constitute the qualifying disclosure and he had two sets of representations from the Claimant's representative. I have no hesitation in being satisfied that he took their content into account. Accordingly, this ground does not get past first base and I reject it as a ground upon which I can interfere with the learned Regional Employment Judge's Judgment.

18. I can also deal relatively briefly with ground 4. This asserts, in short summary, that the Regional Employment Judge went wrong by treating the claim as being one concerned with a disclosure related entirely to the personal circumstances of the Claimant and his conditions of employment. Unsurprisingly, in advancing this part of his case, Mr Jackson focused on the last full sentence of paragraph 8 of the reasoning, which I remind myself reads:

**"8. ... It is the interest of the Claimant who is in dispute with the Respondent over his terms and conditions of employment and the allocation of overtime but does not satisfy the statutory definition and cannot be said to be a "reasonable" belief in all the circumstances." (My emphasis)**

19. From that passage in particular, Mr Jackson derives the assertion that the Regional Employment Judge has overlooked the fact that there were co-signatories to the letter in question and that the point as to the unfair distribution of overtime was being made generally in respect of the category of employee driving vehicles from that particular depot.

20. I accept the counter-submissions of Mr Lewis for the Respondent. Taken as a whole, it is quite plain from the terms of paragraph 8 of the Written Reasons that the Judge had fully appreciated that the point being made affected not only the terms and conditions of the particular employee but also those of the co-signatories and other employees. That appears not

least from the reference to “other employees” in line 5 of paragraph 8 and the word “employees” in line 6. There is a reference later in the paragraph to “fellow employees”. In those circumstances, again, I am not satisfied that there is anything in this ground of appeal and I would reject the attempt to over-set the Employment Judge’s Judgment on this ground.

21. I then turn to the remaining grounds (1, 3 and 5) which are, in various ways, concerned with the correctness or otherwise of the Employment Judge’s approach to and interpretation of the meaning of “public interest” in this newly amended statutory provision and the operation of the “reasonable belief” qualification. The content of the three grounds (1, 3 and 5) was very helpfully and succinctly summarised by Mr Lewis. Firstly, he summarised ground 1, accurately, as being an attack on the Regional Employment Judge’s Judgment on the basis that he had taken too narrow a view of the meaning of the term “public interest”. As to ground 3, Mr Lewis submitted, in my view correctly, that the pith of it was that the Judge had failed to have regard to the proper approach to the question of the Claimant’s “reasonable belief” in the sense required by section 43B. Finally as to ground 5, Mr Lewis correctly summarised that ground as being an assertion that the Employment Judge had wrongly determined that disputes relating to terms and conditions of employment could never form the basis of a complaint of a qualifying disclosure for the purposes of section 43B.

22. Before I proceed to a determination of those grounds it is important to understand the particular context in which this Regional Employment Judge was having to approach the task of determining this strike-out application. He was labouring under three particular difficulties. First, the terms of the alleged qualifying disclosure are themselves, to use my own language, somewhat opaque. The letter, if it be a letter at all, as opposed to a mere document or note, is set out over two pages of bold typescript. The language is far from easy to follow. It might

properly be described as difficult to follow. This might in part be because it is the result of the work of several contributors, given that there are four signatories.

23. In those circumstances one needs to take a benevolent approach in order to understand what is, in fact, being asserted. It seems that the document is making an assertion of unfair distribution of overtime hours between drivers at the same depot. There appears to be set out a, not altogether clear, set of reasons why that might be happening and similarly a, not altogether clear, set of alleged consequences from the unfairness which is being practiced. Indeed, I have simply made my own attempt to summarise the gist and it is not even easy to be sure that it is a correct summary of the gist. For example, there seems to be a suggestion, and I put it no higher than that, that overtime was being withheld specifically from those drivers who were seen to be awkward by reason of being scrupulous about the safety and roadworthiness of their vehicles. Two extracts to that effect appear on the first page of the letter, for example, this phrase, “a driver was sent home after 6 hrs told he wasnt [sic] to have any more work in fear of him defecting vehicles”, and a little further on, “one driver was doing his trailer checks and told that he does not get overtime because he VORS to many [sic] trailers”. Again, the precise sense or meaning of those assertions is not entirely clear, but that is the nature of the document the learned Regional Employment Judge was having to construe.

24. The second difficulty for the Judge was that he had no direct evidence before him explaining why the Claimant had composed this note and sent it with his fellow signatories and why he believed its content to be in the public interest. Indeed, there was no direct evidence expressly asserting that it was his belief that these matters were in the public interest. I believe that in hindsight the Claimant’s representatives will consider it to have been an error of judgement for them not to have put before the Regional Employment Judge some direct

evidence from the Claimant rather than to make a series of written submissions on his behalf. I do not seek to be critical in any way of the representatives in question. They, for example, may legitimately point to the terms of the original direction or order given by the District Judge, which required them not to submit any such evidence but to make “written submissions” in particular, “as to how they are in the public interest”. It might, with hindsight, have been better had the Regional Employment Judge specifically directed the filing of evidence as to the circumstances of the Claimant’s belief. Whatever the reason, the direct evidential material was not before the Regional Employment Judge as it probably should have been.

25. The third difficulty for the Regional Employment Judge will have been noted already. It is that he was determining this important question, of whether the claim had a reasonable prospect of success, on the basis of paper submissions made from one side only. Not only did he not have the benefit of argument on both sides but there were no authorities cited to him. That is no criticism of the representatives of the parties because, as matters stood at the end of 2014, there was none in point. The Regional Employment Judge was, in those circumstances, having to do the best he could to construe the limits and application of the newly amended statutory provision absent any guidance. The only matter capable of being treated as being within judicial knowledge was that Parliament had intended, by the amendment, to reverse the effect of the Sodexo case. That case, it will be recalled, had held that a qualifying disclosure was capable of being made in relation to a breach of a contractual obligation relating to the Claimant alone. As appears from the language used in paragraph 8 of the Written Reasons, against the unhappy background I have described, the Regional Employment Judge somewhat trenchantly treated the question before him in this case as being whether the Claimant could say that any alleged mistreatment of distribution of overtime to him could conceivably be in the wider public interest.

26. Just three months after the Regional Employment Judge reached the conclusion he did, this Employment Appeal Tribunal gave Judgment in the case of **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed** [2015] IRLR 614. That was a case heard in March 2015 by this Employment Appeal Tribunal in which Judgment was promulgated by Supperstone J on 8 April 2015 in a Reserved Judgment. Very briefly, the facts of the **Chesterton** case were that a senior manager raised a concern that certain commission payments, which senior managers were entitled to receive, had been unfairly miscalculated because they were based on accounts of the company which had not been properly drawn. The position of the Claimant in that case, Mr Nurmohamed, was that there were some 100 senior managers within the company who were similarly affected by this incorrect drawing of the accounts with the consequent effect on the monies to be paid to the employees. The Employment Tribunal in that case had heard the full claim. In the course of what was obviously a lengthy Judgment, at paragraph 147 the Employment Tribunal itself had said this:

**“147. We are not aware of any case law in existence as yet, which identifies the proper meaning of public interest. In the circumstances we have had to consider for ourselves what it might mean. It is clear to us that it cannot mean something which is of interest to the entirety of the public since it is inevitable from the kind of disclosures which arise from time to time such as disclosures about hospital negligence or disclosures about drug companies that only a section of the public would be directly affected. With this in mind, it is our view that where a section of the public would be affected, rather than simply the individual concerned, this must be sufficient for a matter to be in the public interest.”**

27. It went on to identify, in that case, two potential classes of persons who might be affected. That is to say: (1) the 100 senior managers; and/or (2) anyone else who came to rely upon the accounts prepared by or for the company. It determined that the claim succeeded, i.e. that the disclosure made by Mr Nurmohamed counted as a disqualifying disclosure made in the public interest, and disclosed with Mr Nurmohamed while having the reasonable belief that they were made in the public interest.

28. Chestertons appealed from that Judgment of the Employment Tribunal and the appeal came before Supperstone J. The head note of the Industrial Relations Law Report [2015] IRLR 614 properly summarises what Supperstone J held. It is expressed in the following terms:

**“The tribunal had not erred in finding that the disclosures had satisfied the public interest test, despite potentially only Mr Nurmohamed and his fellow managers having been affected by the alleged accounts manipulation.**

**The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. It is clear from the parliamentary materials that the sole purpose of the amendment to s.43B(1) of the 1996 Act by the 2013 Act was to reverse the effect of *Parkins v Sodexho Ltd*, in which it was held that a breach of a legal obligation owed by an employer to an employee under his or her own contract of employment might constitute a protected disclosure. The words “in the public interest” were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. A relatively small group may be sufficient to satisfy the public interest test. What is sufficient is necessarily fact-sensitive. In the present case, the tribunal had not erred in concluding that a section of the public would have been affected by the alleged account manipulation and that the public interest test had been satisfied.”**

29. Several matters appear from that head note and I was taken to the passages of the Judgment in support of them by each of the representatives before me. To my mind, what leaps from the page, is firstly the importance of the matter being assessed in a *factual* context, secondly, the fact that the Employment Appeal Tribunal has held that public interest requirement *may* be met by a relatively small group of persons and, thirdly, that those persons may constitute employees of the same employer who have the same interest in the matter as that raised by the Claimant personally.

30. I then turn to the second substantive part of the head note from the IRLR report. It is there noted after the word “Observed”:

**“The question for consideration under s.43B(1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest. The test of “reasonable belief” in s.43B(1) has remained the same since the introduction of the public interest test. Applying the *Babula* approach to s.43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker’s belief that the disclosure was made in the public interest was objectively reasonable. In the present proceedings, there had been no challenge to the finding that the claimant had possessed a reasonable belief that he had been making protected disclosures.”**



31. It is apparent from a reference by Supperstone J to the procedural preparations for the hearing before him that the decision in Chesterton was deliberately intended to give substantive guidance to Employment Tribunals as to the correct construction of the newly-amended statutory provision. Indeed, there had been a Preliminary Hearing in that case, presided over by the President of the Employment Appeal Tribunal, and he had directed the parties not only to address the Judge at the Full Hearing on the terms of the newly-amended provision but to assist that Judge insofar as possible by identifying other statutory provisions which had used the same terminology, that is to say the phrase “in the public interest”.

32. Given that the avowed function of the Chesterton case was to give guidance to the Employment Tribunals as to the proper approach to the amended provision, the task that falls to me is to determine - through the prism of the grounds of appeal in the present case - whether the Regional Employment Judge’s approach in the instant claim can stand with the ratio of Chesterton. However, it is right to observe that Mr Lewis, for the Respondent, took the opportunity, very properly, to seek to deflect me from that course. He did so in two respects.

33. First, he argued that, on any view, the decision in Chesterton was distinguishable. The first basis upon which he said it was distinguishable was that it is relatively clear from the report in Chesterton that what was being alleged was the improper manipulation or perhaps even fraudulent adjustment of the company’s accounts. That, Mr Lewis submitted, smacked of the sort of matter which self-evidently might be described as being in the public interest and that, accordingly, it could be distinguished from the present case in which there appeared to be nothing of quite that order.

34. The second basis upon which he sought to distinguish the **Chesterton** case was on the ground that that was a case in which it was *conceded* that the Tribunal below had properly directed itself on the “reasonable belief” question. Accordingly, the decision could not assist me in determining that aspect of the case in the present appeal.

35. A third basis upon which he sought to distinguish the **Chesterton** case emerges from what is said in paragraph [27] in Supperstone J’s Judgment in relation to the submissions of the parties. It appears from that language that a concession was made in that case on which something material may turn.

36. I have carefully considered the submissions from Mr Lewis but I am not satisfied that they individually or collectively amount to grounds upon which I can distinguish the **Chesterton** case as not one relevant to the instant case.

37. As Mr Lewis himself recognised, and as **Chesterton** itself makes absolutely clear, these cases are cases in which factual determinations fall to be made and the application and interpretation of the public interest test becomes one of fact and degree. Certainly there will be different facts in each case and there will be different aspects of what might be broadly described as public interest considerations. True it is that in the instant case no criminality or fraud is transparently alleged but it is possible in my judgment to see the present case, through the prism of the rather confusing terms of the letter of November 2013, as being one in which it is suggested that a cohort of drivers are being mistreated and being deprived of overtime (which they might otherwise have legitimately expected to receive, or at least legitimately have expected to be treated fairly in consideration for) for reasons which include, at least tentatively, the possibility that they are being too onerous in detecting defects in their vehicles or carrying

out checks. That might be thought to be a matter of some public interest to other road users. I put it no higher than that, but I am simply, for present purposes, explaining why I am not satisfied that this case can be distinguished from **Chesterton** on the basis that Mr Lewis invites such distinction.

38. Very carefully, clearly and professionally Mr Lewis then went on to develop a further argument that, if I was satisfied **Chesterton** could not be distinguished, I should be prepared to entertain the possibility that it had been wrongly decided. He reminded me that the **Chesterton** case is itself subject of further appeal to the Court of Appeal. My enquiries have ascertained that it is in the list for hearing in October 2016. It must follow that either Supperstone J himself or the Court of Appeal gave permission to appeal on the basis that an appeal, and indeed a second appeal, would have a real prospect of success. However, that is no evidence in support of the contention that the decision of Supperstone J was wrong. Nor was it deployed by Mr Lewis in that way.

39. He invited me to hold that **Chesterton** ought not to be followed and applied in the present case on what I understood to be four different but linked grounds. First, he suggested, that Supperstone J had wrongly understated the exceptional nature of the protection given to those who make whistle-blowing disclosures by the Employment Relations legislation. He reminded me that under these provisions there is, what might be described, as “Day One Protection” for an employee. There are significant sanctions against employers, including personal liability and unlimited compensation. He prepared a note supplementing his skeleton argument which indicated how much more onerous upon employers and how much more generous to employees the rights and remedies were in relation to claims based on protected disclosures.

40. In those circumstances, he invited me to say that Supperstone J had been wrong, firstly, not to give attention to those matters expressly on the face of his Judgment, and, secondly, in not taking them into account in formulating what appeared to be a relatively wide approach to the newly amended statutory provision. For my part I am not persuaded that the learned Judge in that respect erred. It seems to me that I ought to give due deference to the fact that the Judgment delivered by Supperstone J was a Judgment given in a case on an appeal from a fully argued claim below. It had been the subject of a very full Judgment by the Employment Tribunal. It had been the subject of special directions intended to set it up for a Full Hearing. It was the subject of a Judgment reserved by the learned Judge. In this jurisdiction there is a tendency to comity between Judges and we will follow each other's decisions at this level unless we are persuaded that they are clearly wrong. In my judgment this basis for suggesting that the Judgment of Supperstone J was wrong is not made out.

41. The second basis upon which Mr Lewis submitted I ought not to follow the decision of Supperstone J was on the basis that he had been taken only to incomplete citations from the *Hansard* debates on the passage of the Bill which had introduced the amendment. True it is that, in the course of his skeleton argument, Mr Lewis had set out a further set of extracts from *Hansard* going beyond those set out at paragraphs 18 and 19 of the Judgment of Supperstone J. I do not accept that this is a basis upon which I can find that the Judgment of the learned Judge was wrong. I am fully confident that those appearing before him on that occasion drew his attention to those passages of *Hansard* which they believed to be relevant. The learned Judge has reproduced those he believed to be most in point. In a sense, Mr Lewis is arguing that **Chesterton** was *per incuriam* because not all of the relevant extracts appear in the Judgment. That, in my judgment, will not do. This is not a case of *per incuriam* in the sense that a

statutory provision has been overlooked or a binding authority has not been cited to the court. I could not, on this basis, say that Supperstone J had been wrong.

42. Thirdly, Mr Lewis, again, with propriety and professionalism, suggested that Supperstone J had been wrong to refer in his Judgment at paragraph 16 to a passage of Mummery LJ's Judgment in the **Bladon** case. After all, submitted Mr Lewis, that was a dictum handed down at least a decade before the amendment made by the new statutory provision. I reject that criticism. Supperstone J was explaining, in paragraph 16, the context in which the provision had been understood before the amendment was made. Indeed, that is precisely why in the next paragraph of his Judgment he turns to the amendment in his chronological treatment of the history.

43. The fourth criticism made by Mr Lewis was that the learned Judge in the **Chesterton** case had been wrong to look too closely at the question of who was affected by the matter raised in the alleged qualifying disclosure in determining whether the matter was in the public interest. He went so far as to say that that sort of focus missed the point. I fully understand and, at least as a matter of impression, have some sympathy with that aspect of Mr Lewis' submissions. However, it seems to me disrespectful to Supperstone J that I do anything other than accept that all the points that were reasonably felt appropriate to be taken before him were taken before him and that central to both the submissions made and his Judgment is the meaning and extent of the phrase "in the public interest". He has quite clearly addressed that and, it seems to me, difficult, if not impossible, to suggest that the view he has taken in the circumstances is too narrow. I am not persuaded that this is a ground upon which I can hold that I ought not to follow his Judgment.

44. In those circumstances, I return to the Regional Employment Judge's Judgment in the instant case. I ask myself whether it is conceivable that this experienced Regional Employment Judge would have expressed himself in the way he did in paragraph 8 of his Written Reasons, and would have reached the same decision as he did reach, had he had the benefit of the Judgment of this Employment Appeal Tribunal in the Chesterton case. I reach the unhesitating conclusion that his Written Reasons would not have been expressed in anything like the same way and that he might well have reached an entirely different conclusion. However, it is not appropriate to determine this appeal on that footing. I must do so through the prism of the grounds of appeal as argued.

45. The first ground of appeal, and I have already given a summary of it, is that the learned Judge took too narrow a view of "public" and did so in the context of "public interest". It seems to me that that is self-evidently made out when comparing paragraph 8 of his Written Reasons with the terms of the Judgment of Supperstone J. It is quite clear that both the Employment Tribunal and the Employment Appeal Tribunal in the Chesterton case were satisfied that the "public", for the present purposes, could be constituted by a subset of the public, even if that subset comprised only persons employed by the same employer on the same terms. I must, accordingly, hold that the Judgment of the learned Regional Employment Judge cannot stand on the basis that he too narrowly construed the relevant statutory provision.

46. I then turn to ground 5: did the Judge direct himself that disputes about terms and conditions of employment could not constitute matters in the public interest? I am satisfied that he did. That is transparent from the language he has used in paragraph 8. I do not overlook Mr Lewis' carefully measured submissions about the correct reading of paragraph 8 but I am

satisfied that he reached a conclusion on this point which is not consistent with the decision in the Chesterton case.

47. Finally, I ask myself in relation to ground 3 of the grounds of appeal whether the Appellant has established that the learned Judge took the wrong approach to the question of whether the Claimant had a “reasonable belief” that the disclosure was being made in the public interest. I have already indicated the difficulties under which the Regional Employment Judge was labouring in this respect. However, it seems to me that, particularly in the light of the two misdirections of law that I have mentioned, I cannot be confident that the Judge has correctly approached this matter either. True it is, as Mr Lewis reminded me, that there is reference to the reasonable belief test and, indeed, it is emphasised in bold in paragraph 8.

48. Further, the terms of paragraph 8 expressly refer back to an application of that test. But a fair reading of paragraph 8 taken as a whole, and particularly given its opening words, suggests to me powerfully that this Regional Employment Judge was asking himself the question, as a matter of law, whether it was conceivable that disclosure could be said to be in the public interest where those persons affected by it were exclusively the Claimant and other employees of an employer where there was a mutuality of obligation. Chesterton has precisely held that that can be within the purview of public interest and, therefore, it must be possible that an employee could reasonably hold the belief that such a disclosure was in such public interest.

49. One is always hesitant to disturb the decision or order of an experienced Regional Employment Judge. In my view, this case is one featuring the very special circumstances I have already identified and most important of those is the subsequent promulgation of an authoritative decision directly on the point with which the Regional Employment Judge was

seized. However, I remind myself that, underscoring all of this, the Regional Employment Judge was dealing with a strike-out application. It had to be a case which had no reasonable prospect of success. In the light of **Chesterton**, that cannot confidently be said or have been said of the present case. It may be that at the end of the day, when it comes to full determination, there will be found to be nothing in this particular claim. However, what cannot be said, certainly on the law post-**Chesterton**, is that it has no reasonable prospect of success. For those reasons, perhaps expressed at too greater length, I have no hesitation in deciding that the order of the learned Regional Employment Judge must be disturbed. This appeal will be allowed and the claim in question will be remitted to the Employment Tribunal for determination along with the Appellant's other claims at the forthcoming hearing of the Employment Tribunal.

### **Costs**

50. This was an appeal from a strike-out of an aspect of the Appellant's claim. The Appellant having been successful, I am asked by the Appellant's representative to make an order that the Respondent pay costs in an amount no greater than the fee paid by the Appellant. My power to make such an order arises under Rule 34A of the **Employment Appeal Tribunal Rules 1993**, sub-rule (2A). That provides that, if the Appeal Tribunal allows an appeal in full or in part, it may make a costs order requiring the Respondent to pay to the Appellant an amount no greater than the fee paid by the Appellant under a notice issued by the Lord Chancellor. Mr Jackson, on behalf of the Appellant, makes an application pursuant to that provision.

51. Mr Lewis resists the application. His first basis for doing so is that the provision is only triggered when the fee is paid "by the Appellant". Mr Jackson, in the course of his submission,



made it quite plain that the fee was in fact paid not by the Appellant but by Mr Jackson, the Appellant's representative. Moreover, in the course of exchanges it became clear that Mr Jackson had made such payment without the prospect of repayment, that is to say by way of gift for the benefit of the Appellant. In those circumstances, it is Mr Lewis' contention that payment was not made pursuant to the notice by the Appellant and instead payment was made by the Appellant's representative. Unless the representative is agent for the making of the payment, there is no payment by the Appellant.

52. In my judgment that submission is unsound. It matters not, for the purposes of the provision in Rule 2A or for its policy purposes, that one carefully identifies who physically made the payment which the Appellant was directed to make under the notice. The payment may well be made by a third party. It may be made by an agent for the Appellant. It may be made by a friend of the Appellant. It may be made simply by way of gift without expectation of repayment. It does not seem to me that any of those alternatives affects the power to make the order. I am, therefore, satisfied I have jurisdiction.

53. The sub-rule sets the maximum amount I may order, that is to say the totality of the fees, and I am told in this case that the fees are £1,600; that being £400 for the appeal and a further £1,200 for the hearing. As to the £400 fee, Mr Lewis draws my attention to the fact that this was a strike-out made of his own motion by the Employment Judge pursuant to Rule 37 of the **Employment Tribunal Rules**. It was not the result of any application made by the Respondent. In those circumstances, the Respondent was in a dilemma when the strike-out order was made given that the only way of overturning it was for the Appellant to bring the appeal. The Respondent was in a no-choice situation and, in those circumstances, submits Mr

Lewis, I ought not to make an order for repayment of the £400. I agree with those submissions of Mr Lewis, which seem to me to be well-founded.

54. That leaves the question of the £1,200 hearing fee. The great bulk of the costs in this case have been incurred in relation to the hearing. The hearing was not necessary. It could have been conceded by the Respondent that the Judgment of the learned Judge was made in error. It was not necessary for the matter to be opposed by an Answer, certainly not after the decision in Chesterton was available, and it was certainly not necessary in the sense of being absolutely required that the Respondent appear at the Appeal hearing to resist the appeal. In those circumstances, it seems to me right that I should make an order that the Respondent pay an amount in relation to the fee for the Full Hearing.

55. The question is whether I should order the totality of the £1,200 to be paid. This is a case in which, as is nowadays commonplace, the successful party has won on some grounds but not others. It is said by Mr Lewis that, arithmetically, there were five grounds of appeal: two failed, three succeeded. In my judgment that overemphasises the degree of failure on the Appellant's part. True it is that ground 2 of the grounds of appeal should have been abandoned rather than have been the subject of amendment and true it is that ground 4 failed. It seems to me that some adjustment in relation to costs ought to be made to reflect that fact and, accordingly I shall direct that the fee be repaid to the extent of £1,000. That allows a discount of £200. So, my order will be that the Respondent shall pay to the Appellant £1,000 by way of costs.

56. Having made an order for the payment of costs by the Respondent, the question that then arises is as to when payment should be made. In the ordinary course, payment would be

made punctually pursuant to the arrangements usually applicable for costs orders in the Employment Appeal Tribunal. However, this is an appeal arising from an interlocutory order - that is to say a strike-out - the substantive claim has not yet been determined. The Employment Tribunal itself has a jurisdiction in relation to costs. What Mr Lewis invites me to do is to “hold fire” in relation to the potential enforcement of my order for costs until the outcome of the Tribunal below is known. That is because that Tribunal may exercise a cost jurisdiction adversely to the Claimant and, in those circumstances, the Respondent would wish to set off the £1,000 that I have ordered be paid. It seems to me that there is a good deal of merit in that. I also take into account a feature that I have also had to consider as part of the application for costs itself, namely that the Appellant himself is not out of pocket. In those circumstances, it seems to me that I ought to accede to the application made and I will direct that the order for costs that I make will not be enforceable until 14 days after the Employment Tribunal’s order disposing of the Appellant’s claims or such further period of time as that Tribunal may direct.