Reconsidering the qualifying disclosure

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Tribunal statistics indicate that the number of whistleblowing claims has suffered a relatively modest diminution since the introduction of the new fees regime. Given their continued prominence, it is an opportune time to consider the state of the law on qualifying disclosures, and examine a number of recent appellate decisions culminating in Barton.

The number of claims fell by just over 10% from 2013 to 2014. The absence of a need for qualifying service, the (remote) possibility of obtaining interim relief and the availability of uncapped compensation all contribute to the continued attractiveness of such claims.

The Geduld guidance

A qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show at least one of six possible types of wrong (s.43B ERA). *Geduld* was the first reported case to consider the meaning of 'information' in this context.

In her judgment in the EAT, Slade J held that given that s.43F deploys both of the terms 'information' and 'allegation,' they must bear different meanings. Disclosing information must connote the conveying of facts. For example, a disclosure of information about the state of a hospital would be: 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.' A statement that 'you are not complying with health and safety requirements' would be no more than an allegation. Similarly, a statement of an employee's position to the effect that she is dissatisfied with the way she is being treated and contemplating resigning and claiming constructive unfair dismissal would not amount to a disclosure of 'information' for the purposes of s.43B. It has been suggested that this distinction may be elusive in many cases, and may also operate to the disadvantage of less articulate employees. Certainly, there have been at least 10 appeals complaining that the tribunal misapplied the *Geduld* guidance.

The Norbrook nuance: 'embedded communications'

In *Norbrook*, the employee sent an email in the following terms to the respondent's health and safety manager: 'Could you please provide me with some advice on what my territory managers should do in terms of driving in the snow. Is there a company policy and has a risk assessment been done [para 6, p.542]?'

The respondent's health and safety manager replied informing the claimant that there was no applicable company policy or risk assessment. In response, the claimant wrote on the same day: 'I was hoping for some formal guidance from the company. The team are under a lot of pressure to keep out on the roads at the moment and it is dangerous. Do I log this as the formal guidance [para 7, p.543]?'

Just over a week later, the claimant sent a further email to a member of the respondent's human resources department in the following terms: 'I am only after a simply [sic] policy statement to increase transparency and help build morale and goodwill within the team. As their manager I also have a duty to care for their health and safety. Having spent most of Monday and Friday driving through snow I know how dangerous it can be. In addition, the time spent battling through the snow is unproductive; they can gain more sales by phoning customers. If they are not going to be paid then I have to put in contingencies for diverting calls to those team members still on the road. In the absence of any formal guidance I take full responsibility for the directions given to my team [para 8, p.543].

While the respondent argued that there was nothing in the language of s.43B which supported the claimant's contention

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that a qualifying disclosure could comprise several disclosures over different days and to different individuals, it accepted that an earlier communication could be relied upon to contextualise a later one.

The EAT held that an earlier communication could be read together with a later one as being embedded in it, rendering the later communication a qualifying disclosure even if taken on their own neither would fall within s.43B. On the facts of *Norbrook* the EAT found that it was clear that the third email was referring to the claimant's earlier communications. As a result, the tribunal had not erred in considering the emails together, notwithstanding that they were sent to different employees of the respondent. The recipient of the third email could not have been in doubt that there had been earlier communications from the claimant about the danger of driving conditions to territory managers.

The Barton correction: disaggregating communications?

Barton is the most recent appellate case to consider the meaning of the term 'protected disclosure'.

In *Barton*, the claimant had been informed by a colleague that the colleague's line manager had emailed a large number of documents to her personal email account which the colleague believed contained confidential data about him. Rather than reporting the matter to his employer, the claimant reported his concerns in writing (by email) to the Information Commissioner's Office and then let his manager know that he had done so.

The respondent then specifically instructed the claimant not to contact the ICO or other external bodies in relation to the matter without the prior authority of his line manager, pending a full investigation by the respondent. The claimant telephoned the ICO to seek advice as to the lawfulness of the instruction. The respondent considered that the claimant had disobeyed a lawful instruction and dismissed him for gross misconduct for this and another conduct-related reason. The claimant relied on both his email and his telephone call to the ICO as protected disclosures.

The tribunal found the claimant's email to have been a qualifying disclosure but not a protected one, while finding that the telephone call was not a qualifying disclosure because it did not contain any disclosure of information.

On appeal, accepting that he had been dismissed for the telephone call rather than the email, the claimant sought to argue that the call had to be considered with the email and that in the light of the email the telephone call was a qualifying and protected disclosure. *Norbrook* was not cited to the EAT, which did not otherwise consider the question of the 'embedding' of the email in the phone call. The claimant did submit, however, that there was a form of associative connection between the email and the telephone call.

It was clear that, on its own, the telephone call could not amount to a qualifying disclosure as it had not conveyed any facts. Even if it had, it could not amount to a protected disclosure since its subject matter did not fall within the description of any matters in respect of which the Information Commissioner is prescribed in the Public Interest Disclosure (Prescribed Persons) Order 1999 and, not having taking any advice about this, there was no basis for the claimant reasonably to believe that he did so, as is required by s.43F(b)(i).

In relation to the question of an associative connection between the two, the EAT held that: 'The claimant cannot create a protected disclosure by aggregation of the email … and the telephone conversation … neither of which were established as protected disclosures. Each disclosure must be considered separately in accordance with the decision in *Bolton School* [para 92, p.35].'

This would appear to be in direct conflict with the *ratio* of *Norbrook* but more in line with the *Geduld* guidance which seemed, at least impliedly, to consider that a disclosure was limited to the purported conveying of information on one occasion, divorced from any previous, surrounding communications.

Bolton, on which the EAT relied in *Barton*, is authority for the proposition that the word 'disclosure' in the ERA must be given its ordinary meaning and that the reference to 'any disclosure of information' in s.43B did not mean that the whole course of the claimant's conduct should be regarded as an act of disclosure. In that case, the claimant had been disciplined for hacking into the respondent's IT system in order to demonstrate the inadequacy of its security and not for informing his employer of this inadequacy. He had argued that his conduct in hacking into the IT system formed part of the disclosure itself and was accordingly protected, a contention that was rejected by the Court of Appeal on the facts (the hacking did not involve any communication of information whatsoever).

'obtaining protection for whistleblowers remains a highly technical exercise, which arguably undermines the legislative purpose for which the statutory provisions were introduced'

The court did not explicitly hold that a disclosure of information must be restricted to a single communication on a single occasion, though doubtless that will be the ordinary case.

Conclusion: where to from Barton?

Insofar as *Norbrook* and *Barton* are each decisions establishing principles of interpretation of s.43B, they do not sit entirely comfortably with one another. The former suggests that successive communications may be read together so as to turn one of them (usually the last) into a qualifying disclosure. The latter suggests that aggregation is impermissible.

One way of reconciling *Barton* and *Norbrook* is to consider whether the communications sought to be aggregated deal with the same subject matter. In *Norbrook*, all three of the claimant's emails dealt with the issue of the safety risks to his territory managers of their being required to drive in the snow. In *Barton*, the claimant's first communication with the ICO related to an alleged breach of the Data Protection Act 1998 by the respondent, while his second communication concerned the question of the lawfulness of his employer's instruction not to contact the ICO. Despite being made to the same body, they could not sensibly be aggregated to form one protected disclosure. Further, so doing could not, logically, overcome the tribunal's finding that the claimant lacked the reasonable belief required by s.43F.

On the other hand, such aggregation did appear to overcome the failure of each individual email in *Norbrook* to amount to a disclosure of information when it would seem equally logical that what is required for this is for a claimant to point to a particular passage in at least one communication which amounts to a disclosure, as the EAT does at para 10 of its judgment. However, if a claimant is able to do this, it is not clear why aggregation is required.

It is likely that this will merit further appellate consideration. Meanwhile, these cases confirm that obtaining protection for whistleblowers remains a highly technical exercise, which arguably undermines the legislative purpose for which the statutory provisions were introduced.

Sheryn Omeri acted for the respondent in Barton in the employment tribunal and the EAT

KEY:

Barton	*Barton v Royal Borough of Greenwich* UKEAT/0041/14/DXA
ERA	Employment Rights Act 1996
Geduld	*Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325
Norbrook	*Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540
Bolton School	*Bolton School v Evans* [2007] ICR 641