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[Whistleblowing: guidance to employment tribunals](#)

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[BLACKBAY VENTURES LTD \(T/A CHEMISTREE\) v K GAHIR \(2014\)](#)

EAT (Judge Serota QC, V Branney, R Chapman) 27/03/2014

EMPLOYMENT

The Employment Appeal Tribunal (EAT) has provided guidance on the approach an employment tribunal should take when considering claims following the making of a protected disclosure.

G was employed as a part-time assistant "responsible pharmacist" by B. G was employed for 18 days, after which she was dismissed. Prior to her dismissal, in a number of emails G raised several issues which she said were health and safety concerns about the methods and procedures at B's depot where she was employed.

B asserted that the relationship of mutual trust and confidence had been destroyed and dismissed G. Subsequently, G claimed that she had suffered detriment as a result of making protected disclosures and had been dismissed for having done so.

The tribunal found that G had been unfairly dismissed for making protected disclosures (contrary to the [Employment Rights Act 1996, s.103A](#)) and had suffered detriment (within the meaning of ERA 1996, s.47B). The tribunal awarded G compensation. B appealed.

In the EAT, B argued that the tribunal had inadequately considered the disclosures and whether or not they qualified. B further argued that the tribunal had applied the wrong test on the issue of unfair dismissal. It had wrongly applied the "material influence" test instead of finding what was the principal reason for dismissal.

The EAT summarised the law applicable at the date of the tribunal hearing in 2012 and recent changes occasioned by s.17 of the [Enterprise and Regulatory Reform Act 2013](#). The EAT also summarised the main principles on the definition of "detriment" as well as the distinctions between the disclosure of information (which is capable of being protected), the making of allegations themselves (which are not capable of being protected), and the relevance (or lack thereof) of the manner of disclosure.

The EAT accepted B's argument that the tribunal failed to identify when B took the deliberate decision to subject G to a detriment short of dismissal. Detriment could only begin after the expiry of a period within which B might reasonably be expected to have acted. Most of the complaints were set out in an email just three days before dismissal. It was hard to see what detriment G had suffered in that short time. Not only this, but the tribunal had found as a fact that B had addressed G's complaints promptly.

The EAT rejected B's arguments on unfair dismissal. The EAT found that the tribunal was entitled to find that the principal reason for the dismissal was the making of the protected disclosures. However, the EAT's conclusion on this point must be reconciled with its conclusion that the tribunal had in effect found that G was dismissed for making disclosures that she was employed to make.

The EAT suggested the step-by-step approach that a tribunal should take when considering a claim for victimisation for having made a protected disclosure (see para.98).

In practice, when formulating or responding to a claim:

(i) At the case management stage – if not (preferably) sooner – all alleged disclosures, their nature, and the basis on

which they are said to be protected and qualifying should be separately identified.

(ii) Even if it may appear obvious, it is better to set out the source of the legal obligation (e.g. the statute or regulation breached) to minimise the risk of falling into error.

(iii) The tribunal should be encouraged to make express findings of fact on the complaints and the alleged breaches of obligations, rather than taking a "rolled up approach" which might conflate both culpable and inconsequential complaints.

(iv) Where detriment short of dismissal is alleged, the detriment and the date of the act (or deliberate failure to act) must be identified. If the date is not identified, any failure to act by the employer will be subject to the expiry of a period within which the employer might reasonably have been expected to act.

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