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Causation in whistleblowing cases

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A worker has the right not to be subjected to a detriment on the ground that s/he has made a protected disclosure. However, the test of whether the protected disclosure was the reason in the employer's mind for subjecting the worker to the detriment, and the placement of the burden of proving the same, can be confusing. Hopefully, this short note clarifies matters.

The Employment Rights Act 1996, in providing the route to a remedy, sets out that, in any complaint of detriment (all cases, not only public interest disclosure cases), it is for the employer to show the ground on which the act complained of was done. This not only suggests, but plainly states, that the only burden of proof is that on the employer. Assuming that the worker can show that (a) s/he made a protected disclosure and (b) they were subjected to a detriment, they need prove no more. This is in contrast to the familiar shifting burden of proof in discrimination cases in which the worker must prove at least facts from which it could be concluded that discrimination took place, before putting the onus on the employer to explain the conduct. In addition, it is insufficient in discrimination cases to point to only the treatment and the presence of a protected characteristic – the worker must show 'something more', which connects the two. Is it therefore easier to demonstrate a causal link in whistleblowing cases than discrimination cases?

Not quite. The development of the causation test over the years has been to equate it with that in discrimination cases, not least because whistleblowing detriment is a form of victimisation. The Court of Appeal specifically stated in *Fecitt v. NHS Manchester* [2012] that the principles of inferring discrimination were applicable in public interest disclosure cases, if the step-by-step shifting burden did not strictly apply (given that that was set out in the context of EU law and the Public Interest Disclosure Act 1998 is domestic). Subsequently, in *Serco Ltd. v. Dahou* [2017] (a trade union detriment case), the Court of Appeal went further and set out that it is for the worker to show a prima facie case before the burden of proof shifts to the employer, an approach that was also (independently it seems) endorsed by the EAT in *Timis v. Osipov* [2017] (before that case went on to the Court of Appeal for different reasons). Most recently, and finally bringing whistleblowing detriment burden of proof in line (almost) with discrimination burden of proof, the EAT held in *Chatterjee v. Newcastle-upon-Tyne Hospitals NHS Trust* [2019] that the worker must set up a prima facie case in the first instance, and that it does not necessarily follow from the fact of a protected disclosure and the fact of a detriment that the burden of proof shifts i.e. in line with *Madarassy*.

There is one slight exception to the similarity. The EAT held in *Ibekwe v Sussex Partnership NHS Foundation Trust* [2014] that a worker does not succeed in default if the employer cannot show the reason for the detriment. In a discrimination case, a failure by the

employer to provide a non-discriminatory reason for treatment compels as a matter of law a finding in favour of the worker. In whistleblowing cases, it only may result in that finding as a question of fact. The analysis of the Court of Appeal in Dahou was to endorse the approach taken to alleged whistleblowing dismissals as set out in Kuzel v. Roche Products Ltd. [2008] as applicable to detriment claims.

In short, therefore, the approach to the burden of proof in whistleblowing detriment claims is, despite the wording of the burden in the legislation, practically the same as that in discrimination claims.

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