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Whistling to no avail; Protected disclosures post *Kilraine v Wandsworth LBC*

Synopsis

The EAT's decision in *Cavendish Munro Professional Risk Management Ltd v Geduld* [2010] ICR 325 ("***Geduld***") was a problematic development. That was in large part because it encouraged a focus on whether there was a "disclosure of information" without sufficient emphasis on the key issue of whether what was disclosed was reasonably believed to be a relevant failure. Linked to this has been an emphasis on (a) whether there was a disclosure of "facts", and (b) whether what was disclosed amounted to a disclosure of information rather than making of an allegation, statement of a position or some other concept. Subsequent decisions have illustrated the difficulty and fine judgments that may sometimes be involved in drawing these distinctions. There is however no need for a narrow approach given the requirement for a reasonable belief that the information disclosed tends to show a relevant failure. The most recent contribution to this line of cases, in *Kilraine v Wandsworth LBC* [2018] EWCA Civ 1436 ("*Kilraine*"), has focussed on the need for specificity in what was disclosed. But despite emphasising the requirement for an evaluation of whether the information tends to show a relevant failure, it still provides support for an unnecessarily narrow and uncertain view of what constitutes "information". The real danger overall is that whistleblowing legislation may fail to serve one of its primary purposes in providing protection to those who raise the alarm. In addition, the reasoning in *Kilraine* leaves an unsatisfactory difference of approach to the question as to whether there can be ex post facto justification for whether a belief was reasonably held, depending on whether the reasonable belief relates to the belief that the disclosure was made in the public interest or to whether information tends to show a relevant failure.

Whistleblowing as an early warning system

The introduction of the Public Interest Disclosure Act 1998 marked a key shift in recognising the value of whistleblowing protection to good corporate governance. As Richard Shepherd MP put it, when introducing the Private Member's Bill which led to the enactment of the Act:

> "I hope that the Bill will signal a shift in culture so that it is safe and accepted for employees . . . to sound the alarm when they come across malpractice that threatens the safety of the public, the health of a patient, public funds or the savings of investors. I hope that it will mean that good and decent people in business and public bodies throughout the country can more easily ensure that where malpractice is reported in an organisation the response deals with the message not the messenger."[1]

[1] *Standing Committee, Richard Shepherd MP, 11 March 1998, p 4*

However as enacted the legislation required more than simply sounding the alarm. At the time of making the disclosure the worker has to have a reasonable belief that the information tends to show one of the specified relevant failures: past, present or likely future non-compliance with a legal obligation, a criminal offence, miscarriage of justice, endangering health or safety, damage to the environment or deliberate concealment of any of these things[2]. In that respect there is a contrast with the model adopted under the Equality Act 2010 for identifying a "protected act" for the purposes of protection against victimisation. In that context it is sufficient to make an allegation that a person has contravened the Act unless the allegation is both false and not made in good faith[3]. By way of comparison, good faith is no longer a requirement for a protected disclosure, having been replaced by the requirement for a reasonable belief that the disclosure is made in the public interest. Nor is an allegation alone sufficient. There has to be a disclosure of information.

The difference from the Equality Act victimisation model lies in a further key aspect of the whistleblowing legislation. The aim is not only to protect workers who raise the alarm. It is also to encourage relevant matters to be brought to the attention of an appropriate person who may be better placed to investigate the issues. That is likely to require some *information* which can be acted upon or investigated further. As Lord Borrie, a promoter of the Public Interest Disclosure Bill, explained at its report stage, in the context of addressing the clause which became s.43C(1)(b) ERA:

> "This clause is absolutely at the heart of the Bill because this is the provision which will assert and help to ensure that those who are responsible for the concern or malpractice—be it crime, other kinds of illegality, danger to health or safety—are made aware of the concern and can investigate it.
>
> The effect is that if the concern proves well-founded and there is concern on behalf of the public interest, the employer will, in law, be accountable for the response."

Ordinarily the objectives of the legislation in encouraging workers to act as an early warning system (and protecting those who do so), and providing information as a basis for further investigation, work in harmony. However there is scope for problems to arise. At the initial stage, where the worker first raises the alarm, there will often be a lack of detail provided. That may be due to an expectation of being given an opportunity to explain the concerns, and/or a desire to talk through the concerns before committing detail to writing. There may be a concern, before going into further detail, to discuss whether there is merit in escalating the

[2] S.43B Employment Rights Act 1996.
[3] S.27 Equality Act 2010.

matter further without being regarded as a troublemaker[4], or a wish for specific assurances as to confidentiality or as to protection against recrimination.

Suppose a nurse (N) raises an initial concern with hospital management as to conduct of a named doctor (X) which is said to be putting patients at risk, that N does not go into further detail due to concern as to whether confidentiality would be maintained but that he asks to discuss the concerns urgently and not to be rostered to work alongside that doctor in the meantime. On one view, what is disclosed might be said to be so general as to be only an allegation, and the rostering request might be only a statement of position, leaving N without whistleblowing protection were he to be victimised for having raised the concern.

An alternative view is that, although put in general terms, there was a disclosure of information at least that N holds the concerns which he believes indicates that patients are being endangered, wishes to have a meeting to discuss the basis of the concerns, and was sufficiently concerned about it to ask not to be rostered to work alongside X. The legislation only requires disclosure of information which, in the worker's reasonable belief "tends to show" a relevant failure. As emphasised in *Babula v Waltham Forest College* [2007] ICR 1026 (per Wall LJ at para 79), it is significant that the legislation uses that phrase ("tends to show") rather than requiring a reasonable belief that the information "shows" the relevant failure. The test thus affords a degree of flexibility. It allows for the fact that the worker will often only be aware of part of the evidential picture. But it might also potentially entail that what is sufficient to tend to show a relevant failure may be less at the initial stage of raising the alarm, in anticipation of being afforded the chance to expand further, than would be required after the anticipated meeting has taken place.

Geduld

The issue of what may constitute a disclosure of information for the purposes of a protected disclosure was brought into focus by the EAT's decision in *Cavendish Munro Professional Risk Management Ltd v Geduld* [2010] ICR 325[5]. Mr Geduld was a director and employee of an insurance broking company. He was removed from his directorship by the other two directors in circumstances which he maintained involved breaches of his rights as a

[4] See eg the Fifth Shipman Inquiry report, Cm. 6394 (2004) which noted there had been various barriers in the way of those with suspicions about Shipman raising the alarm, including concerns as to being seen as a troublemaker or maverick, fear of recriminations and 'a feeling of impotence grounded in the belief that even if the report is made nothing will be done about it' (para 11.10) and a fear as to a negative impact on career progression (para 11.79).

[5] *Geduld* was preceded by a similar conclusion in *Everett Financial Management Ltd v Murrell* EAT 552/02 which held that expressing a concern and seeking reassurance there was no breach of legal obligation did not amount to disclosure of information.

shareholder, director and employee and amounted to unfair prejudice for the purposes of a possible claim under the Companies Act 2006. He then arranged for his solicitors to send a "without prejudice" letter to his fellow directors, in which he put forward a settlement proposal, reserved his rights and threatened to take steps (i.e. to issue proceedings) in order to protect his position in relation to all the complaints which he had made. The complaints were described only in very general terms, with no factual detail being provided.

In the EAT, Slade J drew a distinction between "information" and an "allegation", as regarded this as borne out by the reference to both these terms in s.43F ERA. Giving information involves conveying facts. To illustrate the point, Slade J referred to a hypothetical example regarding communicating information about the state of a hospital:

a. Communicating information would be “the wards have not been cleaned for the past two weeks;
b. An allegation would be “you are not complying with health and safety requirements”.

In this case, Slade J held that the solicitor’s letter did not convey *information* as contemplated by the legislation. Nor was there any “disclosure”, even in the extended sense provided for in s43L(3) ERA of encompassing bringing information to the attention of any person. The letter alleged that Mr Geduld was an oppressed minority shareholder and referred in general terms to “a number of issues” regarding the validity of a shareholders agreement which had been backdated and unfair prejudice to Mr Geduld “taking into account the events leading up to and immediately after the signature of the agreement”. It stated that his legal position was fully reserved and that he had been advised that his claims were very likely to be successful in Court. Slade J concluded (at paragraph 29) that the letter consisted only of a statement of Mr Geduld’s position that he was an oppressed minority shareholder, and a brief summary of the basis of that position.

The decision has sewn some confusion because of the difficulty of applying some of the distinctions suggested by the EAT. The facts in *Geduld* itself, and the examples offered in that case, themselves illustrate the difficulties liable to arise in focussing on whether there are facts conveyed without regard to the context. On its face the solicitor’s letter might have been regarded as least as containing information as to when the shareholders’ agreement was signed and that it had been backdated. Further, in relation to the distinction between a statement of position and conveying facts, the EAT gave the example of an employee who complains that if not treated better he will resign and claim constructive dismissal. That was said to be a statement of position rather than a disclosure of information. However as a matter of ordinary language,

informing the employer of the employee's position might still entail providing information (as to what the employee will do). Ordinarily, without more, that is unlikely to be something which by itself would reasonably tend to show a relevant failure. But in context, together with other matters disclosed, it might be part of the set of facts tending to show a breach of a legal obligation, for example by indicating the seriousness with which certain conduct is regarded.

It is important however to keep in mind the specific context that applied in *Geduld*. As Slade J emphasised, the letter was written as part of an ongoing unresolved dispute between the parties. It was far removed from a situation of a worker raising the alarm, albeit in very general terms, in relation to a potential relevant failure. In context it is unsurprising that the statement that the solicitors had advised Mr Geduld that he was likely to succeed was not regarded as in reality providing information as to the strength of his case, but instead as a statement of position. It does not follow that in another context the fact of advice having been given could not be a disclosure of information.

Care is thus needed in applying the distinction which was drawn on the facts in *Geduld* between (a) information and (b) an allegation or statement of position. That is particularly so given the myriad of different situations in which whistleblowing may arise. Indeed this is illustrated by the example offered in relation to the statement "you are not complying with health and safety requirements". That may only constitute an allegation as was stated in *Geduld*, but this is context dependent. If a worker alerts the employer that its staff are not complying with health and safety requirements, depending on the context that might be considered as disclosing information at least as to the worker's belief or opinion that such requirements are not being observed. Section 43B sets out no minimum requirement as to the level of specificity required in the information other than the requirement for a reasonable belief that the information tends to show a relevant failure. But that is a question of fact, and will vary depending on all the circumstances.

With that in mind we suggest that four aspects of the reasoning in *Geduld* have proved problematic:

1. The definition of information as conveying facts was capable of being read too narrowly so as to permit fine distinctions such as between present facts and a statement of belief or opinion. A narrow approach might draw support from an analogy with the law of misrepresentation, where a distinction is made between a representation of past or present fact and a statement of opinion or intention. However even in that context a statement of opinion may entail a representation of fact that the person holds the opinion or the intention, or in some

circumstances an implied representation that the person making the representation had reasonable grounds for it[6]. Further, there is no need to take a narrow view of the meaning of "information" given that the statutory formula itself regulates the quality of information which will suffice by reference to the test of whether there could be a reasonable belief that it tends to show a relevant failure. Information as to an opinion or belief might in some circumstances, for example by reason of giving weight to the views of the person holding that belief, be something which tends to show a relevant failure.

2. It was seen as suggesting that making an allegation and disclosing information were alternatives, whereas an allegation might also entail disclosing information.

3. In giving some generic illustrations as to the difference between information or an allegation or statement of position, there was a danger of failing to allow sufficiently for the potential significance of the context, including whether it was raised at an early stage in advance of providing more detail.

4. It did not place sufficient emphasis on the requirement, viewed as a whole, that the information disclosed must be such as the worker reasonably believed tends to show a relevant failure. It is the reasonable belief test which sets the yardstick as to whether the information disclosed is sufficient. As such most of the difficulties in identifying whether what was disclosed amounted to information could be resolved by applying the test of whether it was sufficient to sustain the requisite reasonable belief.

Developments since the decision in *Geduld*, culminating in the Court of Appeal's decision in *Kilraine*, have to some extent addressed these issues but without fully laying to rest difficulties flowing from the *Geduld* line of authority.

Relaxation at EAT level

Subsequent decisions at EAT level may be viewed as having relaxed the potential rigour of the decision in *Geduld*. One aspect has been an acceptance that disclosure of information may include an expression of opinion or belief, as illustrated by the EAT decisions in *Royal Cornwall Hospitals NHS Trust v Watkinson* UKEAT/0378/10/DM, 17 August 2011 and in *Western Union Payment Services UK Limited v Anastasiou* (UKEAT/0135/13/LA, 21 February 2014). In *Watkinson*, the chief executive of the respondent NHS Trust disclosed to its board that an opinion

[6] See Chitty on Contracts (2015), 32nd ed. at para 7-006.

had been obtained from counsel stating that the NHS Trust and a Primary Care Trust (PCT) would be acting unlawfully if they did not conduct public consultation before relocating the provision of 'upper GI' services. The EAT rejected a submission that this was merely an allegation rather than a disclosure of information. It involved conveying information as to what had to be done by the respondent and the PCT to comply with their duty. Further, in circumstances where it was apparent that the respondent and the PCT were determined to avoid a public consultation on the proposed change, the claimant held a reasonable belief that disclosure tended to show that the PCT and/or the respondent were likely to fail to comply with the legal obligation to consult. Strictly it might have been said that the disclosure did not set out the various matters which tended to show that the PCT and/or respondent were determined not to consult. But that would have been a highly technical and artificial approach given the finding that the respondent's board, to whom the disclosure was made, was well aware of this and it was the context in which the disclosure was made.

The approach in *Watkinson* was followed by HHJ Eady QC in *Anastasiou.* The claimant claimed that he had been subjected to detriments as a result of disclosures alleging that misleading statements had been made during two earnings calls. Anastasiou was employed in a senior sales role in a team formed to develop opportunities from the Payment Services Directive (PSD). The employer, Western Union, had an opportunity to provide terminals with software to facilitate money transfers via retail outlets, and to earn commission from this. In the two telephone earnings calls, statements were made to the effect that Western Union expected to have an additional 10,000 retail agent locations operational by the end of 2010. Further, in the second call it was also stated that they would provide an additional 700 agents locations in relation to the Martin McColl convenience store. Anastasiou was interviewed as part of an investigation into a complaint raised by another employee. The ET found that Anastasiou said that it was unlikely (estimated at 30 per cent likelihood) that the 10,000 target would be achieved if there was not a change of approach, and a 70 per cent chance if sales were outsourced, and that the McColl accounts should not be counted towards that target. The ET concluded that he had provided information—derived from his experience and knowledge of what was happening—as to the likelihood of meeting the sales target and as to the appropriateness of including the McColl locations. His evidence was capable of protection as a disclosure of information. The EAT upheld that conclusion.

The acceptance that the expression of an opinion may entail conveying information points to the difficulty in applying the approach set out in *Geduld*. By extension even a bare statement by a

worker that health and safety is being endangered might, in context, amount to disclosure of the fact of the worker's belief or opinion to that effect, albeit in more general terms than the opinion expressed in *Western Union*. Equally Judge Eady noted in *Anastasiou* that it is possible to envisage circumstances where the statement of position could involve the disclosure of information and vice versa, and that whether there was a disclosure of information in a particular case will always be fact-sensitive[7]. To adopt the example given in *Geduld*, where an employee makes clear that he will resign and claim constructive dismissal if not treated better, that might merely be a negotiating position. But depending on the context, it might genuinely provide information as to the employee's intention or relevant information as to how the treatment is regarded. Ordinarily that would be of little importance since it would not be information tending to show a relevant failure. But exceptions may arise. One example might be the case of an employee who complains of unlawful harassment and states that she will resign unless suitable action is taken. Viewed alongside other information that may be provided, that might be regarded as information (rather than only a statement of position) tending to show the serious and unwelcome nature of the conduct identified as being harassment.

Again in *Eiger Securities LP v Korhunova* [2017] IRLR 118. the EAT emphasised that whether there was a disclosure of information depends on the context and circumstances in which the words were written or spoken. The claimant, a broker, challenged the respondent's managing director (Mr Ashton) about using her computer screen in dealing with an external trader without identifying himself. She said that it was wrong for him to log in under her name when she was not in the office, and to trade under her name without making clear that it was not she who was making the trade and identifying that it was Mr Ashton. The EAT held that if the claimant had stopped there it may have been no more than an allegation of wrongdoing. However there had additionally been information given by the claimant that, she said, her clients did not like Mr Ashton talking to them and pretending to be her. In the event the claim failed, as there was not a reasonable belief that the information tended to show non-compliance with a legal obligation. We suggest however that it was not the case that, but for the disclosure as to how the claimant's clients viewed the matter, there would have been no disclosure of information. There would still have been information supplied that the claimant considered these acts to be wrong, albeit that

[7] See also *Greenly v Future Network Solutions Limited* (UKEAT/0359/13/JOJ, 19 December 2013) where HHJ Eady QC commented (at para 40) that "While the distinction between the 'disclosure of information' and the making of 'an allegation' is a valid one, it can require the drawing of quite fine distinctions as between different statements, in circumstances where the broader context may be all important. A disclosure of information may well contain an allegation (as, arguably, does the statement 'the wards have not been cleaned for the past two weeks') and vice versa. The raising of a grievance might, thus, amount simply to the making of a complaint or allegation but it might also—depending on the circumstances—be disclosing information."

this was still not information which sustained a reasonable belief that the information tended to show a breach of a legal obligation.

Kilraine v Wandsworth LBC: rejection of rigid information versus allegation dichotomy

The approach to whether there is a disclosure of information was revisited in *Kilraine* which was the first Court of Appeal authority on the point. Ms Kilraine was involved in projects aimed at trying to raise educational standards in schools. She claimed to have made four protected disclosures: on 21 July 2005, 25 January 2008, 10 December 2009 and 21 June 2010[8]. Shortly after the fourth disclosure she was formally suspended on full pay pending a disciplinary investigation of charges that she had made unfounded allegations against colleagues. She was dismissed a year later, in the light of loss of Government funding. The ET found that the dismissal was genuinely on the grounds of redundancy.

At the outset of the hearing, the ET decided to determine as a preliminary issue, before hearing oral evidence, whether any of the four alleged disclosures qualified as protected disclosures for the purposes of section 43B ERA. By the time the matter reached the Court of Appeal only the claim in relation to the third and fourth disclosures remained in issue. The ET had decided that neither of these amounted to protected disclosures. The conclusion was upheld both by the EAT (Langstaff J) and the Court of Appeal.

In the EAT, Langstaff J (at para 30) disapproved of the way in which the ET had relied in its reasoning on a rigid dichotomy between information and an allegation. He emphasised that this dichotomy is not one that is set out in the statute itself, and that reality and experience suggest that very often information and allegations are intertwined. Instead of seeking to determine into which of these categories a disclosure fell, the relevant question was whether there was a disclosure of information. It was "nothing to the point" if it was also an allegation.

Giving the leading judgment in the Court of Appeal, Sales LJ (at paragraph 30) endorsed these observations. He agreed that it was wrong to regard s.43B(1) as introducing a rigid dichotomy between allegations and information, and stated that sometimes a statement which can be characterised as an allegation will also constitute information. He cautioned that not every

[8] The amendment to require a reasonable belief that the disclosure is made in the public interest was not material in this case, which concerns events prior to 2013.

statement involving allegations will do so. Indeed he specifically agreed with the example given in *Geduld* that the statement "You are not complying with Health and Safety requirements" would be so devoid of specific factual content that it could not fall within s.43B(1) ERA. He did however emphasise the need for an evaluative judgment focussing on whether what is disclosed is sufficient to tend to show a relevant failure, and that (at para 35):

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

As Sales LJ noted, that issue is closely aligned with (and we would suggest forms part of) the reasonable belief test. Indeed, he went so far as to suggest (at paragraph 36) that if the worker subjectively believes that information he discloses tends to show one of the relevant failures and the statement has a sufficient factual content and specificity, such that it is capable of tending to show that listed matter, it is likely that will be a reasonable belief. We suggest that is to go too far. There still needs to be an evaluation of whether in the circumstances, and in the worker's situation, it was reasonable for the worker to believe that there was a sufficient basis for that which was disclosed. To take an extreme example, it would not be sufficient to put forward facts which were known to be false but which on their face would tend to show the relevant failure: *Darnton v University of Surrey* [2003] ICR 615 (EAT). Equally if a statement of the worker's opinion or belief was put forward, there would need to be an evaluation of whether it was genuinely held and whether, in all the circumstances, it was reasonable to hold that opinion or belief. Ultimately, whether there is sufficient "factual content and specificity" in all the circumstances to sustain such a reasonable belief is a matter for the evaluative judgment of the tribunal. It is to be assessed by reference to the yardstick of whether in the particular circumstances what is disclosed could sustain the relevant reasonable belief.

Application to the facts in *Kilraine*

(1) 2009 disclosure: sufficiency of information disclosed

The first of the disclosures still in issue by the time the matter reached the Court of Appeal in *Kilraine* was contained in a letter from Ms Kilraine to the Assistant Director of Children's Services. This set out a complaint that she had not been included in a meeting of the Performance

and Standards Monitoring Group to present an annual report. In the EAT the following passage was relied upon as containing a protected disclosure[9]:

> "I think that it is also important to remind you that what has been achieved over the years has been despite bullying and harassment that was tolerated, and at times, not least at present, encouraged over that time by [various identified parties] and also despite successive and repeated failure to honour LA [local authority] and individual agreements to extend my role and to provide career development. *Since the end of last term, there have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented.* As an example, I have brought to your attention the inappropriate behaviour of [Ms Liz Rayment-Pickard, Ms Kilraine's line manager] … ." (emphasis added by Langstaff J)

In relation to this disclosure ("the 2009 Disclosure"), the ET held that the letter did not disclose any information, and instead made allegations. Although, in the EAT, Langstaff J was critical of the way that the ET had relied on a rigid dichotomy between information and allegations, he upheld its conclusion. He noted that Ms Kilraine's counsel had focussed on the italicised wording in the above passage, and contended that it conveyed information that there had been incidences of inappropriate behaviour. Rejecting the submission that this was sufficient for a qualifying disclosure, Langstaff J reasoned, at paragraph 32, that if one were to take away the word "inappropriate" in the italicised section it said nothing specific at all and did not truly convey any information. He added that if he was wrong as to this, what was said was too vague for it to show or tend to show a relevant failure. On this reasoning therefore, the assessment that there was no information disclosed was distinct from, and prior to, the alternative determination that the reasonable belief test was not satisfied.

In the Court of Appeal, Sales LJ specifically approved both the reasoning and conclusion that there was no qualifying disclosure. He noted that the EAT had identified an error in the ET's approach, in drawing a rigid distinction between allegations and information, and that Langstaff J therefore had to decide whether the error was material[10]. He reasoned that this meant that there had to be an evaluative judgment as to whether the disclosure was of information which tends to

[9] An attempt to rely on a further passage that had been relied upon by the ET was rejected by the Court of Appeal, having not been part of the Grounds of Appeal.

[10] The conclusion that the EAT could substitute its own evaluation might also be regarded as surprising in the light of the approach to remittal required in *Jafri v Lincoln College* [2014] ICR 920 (CA); remittal is required unless (so far as material here) the EAT concludes that the error could not have affected the result. However it is not clear whether this was argued. Further, since by agreement the ET had determined the issue before hearing oral evidence, the EAT was as well placed as the ET to make the assessment. See also *Kuznetsov v Royal Bank of Scotland* [2017] IRLR 350 (CA) were Elias LJ noted (at paragraph 34) that application of the approach to remittal in *Jafri* may be unsatisfactory where there are no findings of fact in issue and the EAT is as well placed as the ET to determine the matter.

show that that a person has failed, was failing or was likely to fail to comply with a legal obligation.[11] He agreed with Langstaff J's assessment that it did not.

Notwithstanding this endorsement, we suggest that some care is needed in applying the EAT's reasoning, in so far as Langstaff J accepted that the passage relied upon had not contained any information at all. That entails, we suggest, an unnecessarily narrow approach to whether there is a disclosure of information. The letter conveyed at least the fact of Ms Kilraine's belief that there had been numerous incidents which she regarded as inappropriate behaviour and that she considered that she had been repeatedly sidelined. It also stated that she had previously documented this. The passage as a whole also conveyed, at least, her belief that there had been a failure to honour agreements to extend her role and provide career development. It also set out her belief or opinion that there had been bullying and harassment and identified specific individuals who she believed had tolerated this. Information may of course be general or specific. That is a matter of degree. Whether it was sufficiently specific could only properly be measured, not in the abstract, but by reference to whether, in the particular circumstances, the information was sufficient to sustain a reasonable belief that it tends to show a relevant failure. Further, it is only by recognising that information may come with different levels of generality, and applying the reasonable belief test in the particular circumstances, that the legislation can be applied with sufficient sensitivity to the context as to provide adequate protection to those who raise the alarm with the reasonable expectation of then being afforded the opportunity to provide further detail.

There was no need for a narrow view as to whether the letter contained information given that, in any event, any information was not sufficient to sustain the reasonable belief. Indeed that was the ground of the alternative basis for Langstaff J's conclusion. Although Langstaff J noted that it was difficult to see how what was said alleged a criminal offence of failure to comply with a legal obligation, in context it is apparent that he was not suggesting that there was a stand-alone requirement that there must be an express allegation. The statute does not require that there be any allegation made. Indeed there may be good reason not to do so; the employee may only have part of the evidential picture and be providing the information so that it can be further investigated. An employee concerned to soften the message may well put forward the information in tentative terms, or in the form of a question, whilst still conveying information. Rather in *Kilraine* the absence of any allegation was taken into account as part of the assessment that what was written did not show a relevant failure (and could not reasonably have been believed to do

[11] Strictly the test is whether there was a reasonable belief that this was the case.

so). Whilst this was set out as an alternative finding, we suggest that the better approach would be to recognise that there was some, albeit general, information provided, but that it was not sufficient to sustain the requisite reasonable belief.

On behalf of Ms Kilraine it was argued that the EAT failed to consider how the 2009 disclosure was embedded in and formed part of an ongoing series of communications between Ms Kilraine and various officers of the Respondent. It was argued that the disclosure should be taken as incorporating by reference other disclosures made by Ms Kilraine at different times, which might be found to contain sufficient relevant factual content. In some circumstances that is a permissible approach: see eg *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540. Further, on its face the 2009 disclosure expressly made reference to having "previously documented" the "numerous incidents of inappropriate behaviour." However this argument was rejected essentially on the basis that it did not reflect the case which was either pleaded or advanced in the evidence. Sales LJ emphasised that if there was an aspect of the context that was relied upon as giving a particular meaning to the disclosure this should be explained in the claim form and in the evidence, so that the respondent would have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to be incorporate by reference any part of the factual background. The approach therefore left scope to argue in other cases, provided that fair notice is given to the respondent, that particular aspects of the context are relevant to the assessment of whether what was said or written was sufficient to sustain a reasonable belief.

(2) 2010 disclosure: identification of the legal obligation

The remaining alleged disclosure in issue by the time the matter reached the Court of Appeal was contained in an email of 21 June 2010 from Ms Kilraine to the HR Officer ("the 2010 Disclosure"). This was to the effect that Ms Kilraine had reported a safeguarding issue to her line manager (Ms Liz Rayment-Pickard) in relation to a particular school and received an unsatisfactory response. The passage relied on by Ms Kilraine was[12]:

> "She did not support me, as she claims, when I reported a safeguarding issue during [a meeting on 16 June 2010]. Her response, which shocked me was 'I can't comment, I am never there during the school day, only before … or after … so I can't comment'. This was, repeated, belittling and I tried very hard to engage her as my line manager in the report."

The ET again concluded that there was no disclosure of information, as opposed to merely allegations, and also held that Ms Kilraine "had not articulated any genuine legal duty to support

[12] As with the 2009 disclosure, the Court of Appeal refused to permit Ms Kilraine to rely on a further passage that had been relied upon in the ET but not before the EAT.

her, or shown that she reasonably believed that there was such a duty." Langstaff J rejected the first aspect of this conclusion. He concluded that although this passage involved making an allegation, it also conveyed information about what was or was not said during the meeting. Again, we suggest that was not the only information conveyed. It also conveyed that Ms Kilraine regarded her treatment as belittling and that she felt unsupported.

Having accepted that there was potentially sufficient factual content, Langstaff J upheld the conclusion of the ET that Ms Kilraine did not hold a reasonable belief that there was any legal obligation to which Ms Rayment-Pickard was subject and which she had broken. In the Court of Appeal Sales LJ noted that Langstaff J had proceeded on the erroneous basis that the ET had reached its conclusion after hearing evidence from Ms Kilraine. However he upheld the conclusion reached, on the ground that Ms Kilraine had no reasonable prospects of satisfying either the subjective or objective elements of the reasonable belief test. Before the ET, the case advanced by Ms Kilraine had been advanced that the information tended to show a breach of her contract of employment. That case was abandoned before the EAT. Instead reliance was placed on an alleged breach by the respondent, acting by Ms Rayment-Pickard, of its duties under s.11 of the Children Act 2004 and s.175 of the Education Act 2002. Each of these impose an obligation to "make arrangements" for ensuring that its functions are discharged having regard to the need to safeguard and promote the welfare of children. However there was no mention of these duties in the agreed list of issues or Ms Kilraine's witness statement and the likelihood was that it was not raised before the ET. As such, Sales LJ accepted that in the absence of anything in Ms Kilraine's case or witness statement to suggest that she had a relevant legal obligation in mind at the time she made the disclosure, she could not satisfy the requirement that the information tended to show a past, present or likely future failure to comply with a legal obligation. Langstaff J also found, and the Court of Appeal agreed, that to say that an individual officer had been unsupportive on a particular occasion in relation to a safeguarding issue was not indicative of a failure on the part of the respondent to make appropriate general arrangements in accordance with the statutory provisions. As such even if Ms Kilraine had held a belief that the information tended to show a breach of the asserted legal obligations, that belief would not have been reasonable.

The reasoning in the EAT and the Court of Appeal lends support to the view that in cases where it is asserted that it was believed that the information tended to show past, present or likely future non-compliance with a legal obligation, unless the legal obligation is obvious it is necessary to identify the source of the legal obligation which the claimant had in mind and how there had been

a failure or likely failure to comply with it. That was the view of the EAT in *Eiger Securities LLP v Korshunova* [2017] IRLR 115. The EAT explained (at para 46) that:

> "The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."

In so far as this indicated that evidentially the identification of any specific legal obligation that the claimant had in mind was an important tool in assessing whether it was indeed believed that there was a breach of a legal obligation, and whether that belief was reasonable, that is uncontroversial. However the decision, and that in *Kilraine*, may be read as indicating that save in obvious cases the claim will fail at the stage of establishing reasonable belief unless the worker had in mind at the time of the disclosure the particular legal obligation at least in broad terms. That approach sits uneasily with the reasoning in *Chesterton Global Ltd v Nurmohamed* [2017] I.R.L.R. 837 in relation to the public interest element of the reasonable belief test. In that context, the Court of Appeal held that once it is established that the worker subjectively believed that the disclosure was made in the public interest, that belief may be shown to be reasonable by reference to factors which the worker did not have in mind at the time of making the disclosure. Consistency would suggest that equally, provided a worker subjectively believed that the information tended to show past, present or likely future non-compliance with a legal obligation, and not merely that the conduct was "wrong", it should be available for a tribunal to find that this was a reasonable belief by reference to a legal obligation which the worker did not have in mind at the time, or a different legal obligation from that which the worker had in mind. However no issue was raised in *Kilraine* as to the impact of the *Chesterton* line of reasoning in relation to ex post facto justification for reasonableness of belief.

Conclusion

The decision in *Kilraine* highlights two important aspects of the test for a qualifying disclosure. First, it provides welcome confirmation that the statutory test for a qualifying disclosure does not require a rigid dichotomy to be draw between "information" and an "allegation" or "statement of position". Even where an allegation is made, there may still be a disclosure of information. The Court of Appeal in *Kilraine* also properly directs attention to the need not only to consider whether there has been a disclosure of information, but specifically for an evaluation of whether the information is such as to sustain a reasonable belief as to a relevant failure. We suggest however that it is also important to recognise that, precisely because the reasonable belief test provides the yardstick for the sufficiency of the information provided, including whether it is

sufficiently specific, there is no need for a narrow approach as to what constitutes information. It may encompass an implicit statement of belief or opinion. The evaluation of whether that, either by itself or together with other matters disclosed, is sufficient to sustain the requisite reasonable belief, will need to be made having regard to all the circumstances. This may include having regard to the identity of the person making the disclosure, the stage at which it is made and whether it has been made initially in general terms in order to raise the alarm with a view to then having an opportunity to expand on the concerns.

Separately, the decision brings into focus an anomalous discrepancy in relation to the scope for after the event justification of a subjective belief. It suggests a divergence in approach between that applied in assessing reasonable belief for the purposes of the public interest test, and in relation to whether the information tends to show non-compliance with a legal obligation. This divergence was not however specifically considered in *Kilraine*. As such we suggest the argument remains open that a subjective belief that there was non-compliance with a legal obligation may be shown to be reasonable by reference to a different obligation, or on different grounds, to those which the person making the disclosure had in mind at the time.

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