Whistleblowing: tackling the moving goalposts

The past 12 months have seen a surge in media interest in whistleblowing claims, and a number of significant changes in the law. The combined effect is a potentially dangerous one for employers, who find themselves facing moving goalposts, with the potential for significant financial and reputational penalties. This article examines the key elements of a whistleblowing claim, in light of the latest legal developments, and concludes with some tips for handling disclosures and avoiding claims.

BLOWING THE WHISTLE

To (ab)use a football analogy, we start by blowing the whistle. In this context, it requires a "qualifying disclosure": a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that one or more infringements has occurred (or is likely to occur).

Information

The whistleblower must convey facts, not merely allegations (Cavendish Munro Professional Risks Management Ltd v Geduld). For example, a hospital worker who informs his employer that "the wards have not been cleaned for the past two weeks." would be conveying information, but the same worker informing his employer that "you are not complying with Health and Safety requirements" would be making a mere allegation.

Similarly, a worker who simply expresses his opinion about a state of affairs will not bring himself within the test. A worker who branded proposed changes to the redundancy scheme "disgusting" was therefore not protected (Goode v Marks & Spencer plc). There is one caveat to this, where the legal obligation which has allegedly been infringed actually involves some element of opinion, such as a company’s obligation to accurately describe its prospects to investors (Western Union Payment Services UK Ltd v Anastasiou).

Reasonable belief

The worker must simply have a “reasonable belief” in the disclosure at the time it is made. This he may have, even if it transpires that the information disclosed was incorrect (Darnton v University of Surrey), or that the information disclosed does not in fact amount to a legal infringement (Babula v Waltham Forest College).

The belief must be objectively reasonable (Babula), but also subjectively reasonable, taking into account the worker’s individual knowledge (Korashi v Abertawe Bro Morgannwg University Local Health Board).

The public interest

This requirement was introduced in July 2013. It was intended to reverse case law in which employees relied on a breach of their own employment contract to make a qualifying disclosure (Parkins v Sodexho), and therefore to remove private employer-employee disputes from the scope of the whistleblowing regime.
However, it seems likely that many private employer-employee disputes will satisfy the public interest test, and will remain within the regime. There are elements of the employment relationship in which there is a general public interest; working hours and discrimination are just two examples. Public interest may also be influenced by the current ‘hot topic’ in the media (zero-hours contracts, holiday pay, bankers bonuses etc). In Goode, a disclosure about proposed changes to the M&S redundancy scheme was made to a national newspaper; this suggests at least the potential for public interest in that case. And in Norbrook Laboratories (GB) v Shaw the disclosure related to driving in dangerous conditions; it seems at least arguable that an employee could establish a reasonable belief in the public interest in those circumstances.

Arguably, the public interest test introduces a two tier system, given the greater public interest in the activities of public sector employers (and perhaps the largest and best-known private sector employers) than smaller private sector employers. There is also an argument based on Parkins that there will be no wider public interest where the breach is minor or trivial. These arguments will need to be addressed in future cases.

Finally, remember that there only needs to be a “reasonable belief” (see above) in the public interest. This may prove to be quite a low hurdle for employees to satisfy.

No good faith?
Until recently, a qualifying disclosure needed be made “in good faith”. This meant that claims failed where the disclosure was motivated by antagonism towards a colleague (Street v Derbyshire Unemployed Workers Centre) or by a desire to improve the worker’s own position (Bachnak v Emerging Markets Partnership (Europe) Ltd No.2).

The “good faith” requirement was removed in July 2013. However, the presence (or absence) of good faith is likely to remain relevant, for three reasons:

i. It may influence whether the worker had a “reasonable belief” (see above).

ii. It may inform the basis for the employer’s actions (see below); were they truly motivated by the qualifying disclosure, or the underlying bad faith of the employee?

iii. If a disclosure was not made in good faith, the tribunal may reduce any award it makes to the worker by up to 25%.

Infringements
The relevant infringements include a person failing to comply with any legal obligation to which he is subject, along with heath and safety issues, environmental damage, criminal offences, miscarriages of justice, and concealment of any of the above.

THE WHISTLEBLOWER

It is not just employees who can blow the whistle: “workers” are also protected (i.e. those who provide personal services to the employer, other than on a purely self-employed basis). This includes agency workers, homeworkers and trainees. Since the Supreme Court’s decision in Clyde & Co LLP v Bates van Winkelhof it is now clear that LLP members are “workers” and can bring whistleblowing claims. Executive directors will be covered, and potentially NEDs (although their position is not yet clear). Those who are not currently protected include volunteers and job applicants.
The protection extends to former workers, where the disclosure is made after termination (Onyango v Berkeley Solicitors) and/or the detriment is suffered after termination (Woodward v Abbey National plc).

Workers who are responsible for monitoring compliance and raising concerns can potentially bring a claim, although this may be difficult in practice. As the EAT has noted, it seems ‘inherently unlikely’ that an employer would wish to dismiss an employee for doing what she was employed to do (Blackbay Ventures Ltd v Gahir).

THE OTHER SIDE

A qualifying disclosure can be to the employer, another responsible person, or a legal adviser. It can also be made to a “prescribed person” i.e. a regulatory body which is prescribed in relation to particular matters within their remit (which, since 6th April 2014, has included MPs).

Following a change to tribunal procedure in April 2010, whistleblowers are now asked when they submit their claim to indicate whether they consent to their claim form being sent to the relevant “prescribed person”. Employers may therefore face wider disclosure at this stage, and the possibility of a regulatory investigation.

A disclosure may also be made even more widely, for example to the media, if certain conditions are satisfied (including that the worker must not make the disclosure for personal gain, and that he has either first made a disclosure to his employer or is excused from the requirement to do so on specified grounds).

Employers typically have policies which specify who disclosures should be made to. It is not possible to use such a policy to place limitations on the employee’s right to make disclosures, for instance, by requiring that a disclosure is raised internally before it is raised externally (Audere Medical Services v Sanderson). Equally, employers cannot rely on confidentiality provisions to prevent a qualifying disclosure being made externally, if the relevant conditions for wider disclosure are satisfied. Confidentiality provisions are void to the extent that they seek to prevent a worker making a protected disclosure.

YELLOW CARD OR RED CARD?

Even if a protected disclosure has been made, a whistleblowing claim is a game of two halves. The worker must then suffer some detriment on the ground that he has made a disclosure. Alternatively, if an employee is dismissed for the sole or principal reason that he made a disclosure, his dismissal will be automatically unfair. He will not need the usual two years’ qualifying service in order to bring the claim, and his compensation is uncapped.

The link between the disclosure and the detriment or dismissal is crucial. If the employer can avoid a link by showing some other grounds for its actions, the claim will fail. Some examples from the case law include where the whistleblower:

• used improper means to investigate his suspicions (e.g. unauthorised hacking into the employer’s computer system) and was disciplined solely because of that (Bolton School v Evans);

• was guilty of misconduct and dismissed on that basis, despite her protected disclosures (Bleasdale v Healthcare Locums plc); and
• was dismissed because of the disruptive manner in which he pursued his complaints, which was separable from the disclosures themselves (Panayiotou v Chief Constable).

Since the repeal of the requirement for good faith, arguments about the grounds for the employer’s actions are likely to become even more important.

Vicarious liability for acts of others
Another of the changes in June 2013 was to introduce the potential for employers to be vicariously liable for detrimental acts committed by its workers (acting in the course of their employment), or its agents (acting with the employer’s authority). The employer will have a defence if it can show that it took all reasonable steps to prevent the perpetrator from acting as he did.

PRACTICAL TIPS
To avoid scoring an own goal, employers should follow these practical tips:

1. Review your whistleblowing policy. Add the new requirement for a reasonable belief in the public interest.

2. Ensure that those who will handle disclosures are trained to respond appropriately.

3. Disclosures should be kept confidential wherever possible; the fewer people involved, the smaller the risk of mishandling, which could lead to a claim.

4. Take care when investigating the subject matter of a disclosure. By interviewing other employees, you may be inviting them to repeat the same information (thus triggering another protected disclosure) (Anastasiou).

5. Control your wider workforce through adequate training and communication. Make it clear that retaliation against whistleblowers is unacceptable.

6. Ensure that the policy is widely known and properly enforced. Monitor compliance and keep records. These steps will prove invaluable if you need to justify your actions to a tribunal.

7. Be aware of the limitations of settlement agreements in this area. Although you can settle existing whistleblowing claims, you cannot prevent future protected disclosures, even following termination of employment.

8. Keep an eye out for future changes. The Government has recently announced proposals for a number of changes in this area. These include:
   - new guidance for employers and individuals;
   - reviewing the effectiveness of the current process for employment tribunals to refer a case to the appropriate regulator;
   - a duty on prescribed persons to report annually on the number of cases they have received and whether these have been investigated; and
giving additional groups (such as student nurses) whistleblowing protection. The Government decided not to extend protection to NEDs, consultants, job applicants and volunteers, but will keep this area under review.

The Government intends to begin implementing the non-legislative changes now, with legislative changes being introduced through the Small Business, Enterprise and Employment Bill, likely by April 2015. So keep your eye on the ball; the goalposts will move again.

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