Whistleblowing Webinar

In 1998, the Public Interest Disclosure Act introduced statutory protection for whistle-blowers.

- The first is that the dismissal of an employee will be automatically unfair if the reason, or principal reason, for their dismissal is that the employee made a 'protected disclosure'.

- In addition to this, workers are also protected from being subjected to any detriment on the ground that they have made a protected disclosure.

The definition of 'worker' means that the whistleblowing provisions apply to an extended class of workers including not only employees but also some contractors, trainees and agency staff.

1. What amounts to a protected disclosure?

In order for a whistle-blower to qualify for protection, the first question is whether or not they have made a **qualifying disclosure** and, that question then needs to be broken down further into what amounts to a qualifying disclosure.

There are four components to a qualifying disclosure:-

- **Disclosure of information:** the worker must make a *disclosure* of information. While 'disclosure' isn't defined in the legislation, we know that merely gathering evidence or threatening to make a disclosure is not enough.

- **Subject matter of the disclosure:** the information which is disclosed must relate to one of six listed types of failure, wrongdoing or malpractice in section 43B(1)(a)-(f) of the ERA:-

    1. a criminal offence has been committed, is being committed or is likely to be committed;

    2. a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject;

    3. a miscarriage of justice has occurred, is occurring or is likely to occur;

    4. the health or safety of any individual has been, is being or is likely to be endangered;

    5. the environment has been, is being or is likely to be damaged; or

    6. that there has been, is being or is likely to be deliberate concealing of information about any of the above.

- **Reasonable belief:** the worker must have a *reasonable* belief that the information they have disclosed demonstrates one of failures or acts of wrongdoing mentioned above.

- **Public interest:** the worker must have a reasonable belief that the disclosure is in the public interest.

The Court of Appeal considered how to interpret the public interest in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979 and set out that the Tribunal has to determine:-

(a) whether the worker subjectively believed at the time that the disclosure was in the public interest and

(b) if so, whether that belief was objectively reasonable.

The case makes clear that "public interest" need not be as wide as "the general public" and can be a relatively small group of the employer's staff impacted by the relevant malpractice alleged.

In cases where the disclosure relates to a breach of the worker's own contract of employment four factors to consider are:-

1. The numbers in the group whose interests the disclosure served.
2. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.
3. The nature of the alleged wrongdoing disclosed.
4. The identity of the alleged wrongdoer.

2. What is the difference between a qualifying and a protected disclosure?

In order for a qualifying disclosure to become a protected disclosure, it must be made to an appropriate person or organisation listed in the Employment Rights Act, which includes:-

- the worker's employer;
- the person responsible for the misconduct;
- the worker's legal adviser;
- Government ministers;
- a person prescribed by the Secretary of State; or
- a person who is not already covered, provided that the following conditions are met:-
  - the worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true;
  - the worker must not make the disclosure for the purposes of personal gain;
  - the worker must have previously disclosed substantially the same information to their employer or to a prescribed person; or
  - reasonably believe, at the time of the disclosure, that they will be subjected to a detriment by their employer if they make disclosure to the employer or a prescribed person; or
  - reasonably believe (where there is no prescribed person) that material evidence will be concealed or destroyed if disclosure is made to the employer; and
  - in all the circumstances, it must be reasonable for them to make the disclosure.

3. How does the Public Interest Disclosure Act interact with unfair dismissal laws?

Employees will automatically be regarded as unfairly dismissed if the reason, or the principal reason, for dismissal is that the employee made a protected disclosure.

In Jhuti v Royal Mail Group Ltd ET/2200982/2015, it was confirmed that a dismissal will be automatically unfair where it can be shown that there is a causal link between the disclosure and the decision to dismiss. This will be so even if the final decision maker was actually unaware of the original disclosure, so long as the disclosure was made to someone more senior in the organisation's hierarchy and as in this case, this formed part of the background to the decision.

The qualifying period of service (usually required for an unfair dismissal claim) does not apply so this is something that employers need to be aware of from day one of employment.

The Tribunal will look at whether or not the whistleblowing caused the dismissal by asking two questions:-

1. Was the making of a disclosure the reason (or principal reason) for the dismissal?

2. Was the disclosure in question a 'protected disclosure'?

If the answer to both questions is yes, the employee will have been unfairly dismissed.

4. What are the potential penalties for employers?

- No financial cap on compensation

- No requirement for a minimum period of service.

The Employment Tribunal can award compensation for career-long losses which generally arises in two scenarios:

- Where the employee has been stigmatised in some way on the job market because of their disclosure and the resulting publicity, so that employee may not realistically be able to find another role either in their industry or at a similar level of seniority or remuneration; and

- Where on medical grounds, an individual is unlikely to work again or to work in the same capacity.

5. What should employers be doing about whistleblowing?

- Have an easily accessible whistleblowing policy (or other appropriate written procedure) which will ensure they are ready to handle workers concerns.

- Develop a culture where staff feel able to make disclosures by ensuring that they know who to go to and that they will not face any detriment for disclosing.

- Consider providing training to the relevant managers on how they should response to a disclosure.

You can view the UK government's whistleblowing guidance for employers and code of practice **here.**

Cases:-

Timis v Osipov [2018] EWCA Civ 2321

Zabelin v SPI Spirits (UK) Ltd ET/2207084/20

Jhuti v Royal Mail Group Ltd ET/2200982/2015

Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979

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