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Whistleblowing law

You should always consult an experienced specialist in employment law and whistleblowing. The below is only a short summary of some of the key areas and not a substitute for proper advice and representation.

Employment Rights Act 1996

The right not to suffer detriment

s47B(1) Right not to suffer detriment – protected disclosure

"A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

http://www.legislation.gov.uk/ukpga/1996/18/contents

Qualifying disclosure

43B Disclosures qualifying for protection

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclo sure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being commit ted or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be main tained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Protection from dismissal

103A Dismissal Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Case Law

Disclosure of information – what must be disclosed ?

Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT*: it is not sufficient that the claimant has simply made allegations about the wrongdoer (especially where the claimed whistleblowing occurs within the claimant's own employment, as part of a dispute with his or her employer). Justice Slade stated:*

> *"... the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around."*

Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."

***'Smith v London Metropolitan University** [2011] IRLR 884, EAT applied Cavendish Munro to rule out the raising of grievances about the claimant's workload as a 'disclosure'.*

Goode v Marks & Spencer plc *UKEAT/0442/09 (14 April 2010, unreported) - where an employee had breached confidentiality by writing to a newspaper about possible changes to be made by the employer to the pension scheme. It was held that he was not a whistleblower because all that he had done was to vent his highly adverse opinion of what the employer was proposing; the only 'information' that he had disclosed was that he was unhappy about it which fell short of the legal requirement of a failure to fulfil a legal duty by the employee.*

Western Union Payment Services UK Ltd v Anastasiou *UKEAT/0135/13 (21 February 2014, unreported) Judge Eady, applying the Cavendish distinction between information on the one hand and the making of an allegation or statement of position on the other, commented that 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.'*

Millbank Financial Services Ltd v Crawford *[2014] IRLR 18, EAT held that there can be a qualifying disclosure of an employer's omission to act, not just of a positive act. Complaints by a probationary employee of failure to give feedback, consult or stipulate the length of the probationary period were held to be covered.*

Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436.
One of four alleged protected disclosures was ruled out by the tribunal as being just an "allegation" (applying the Cavendish case). In the EAT ([2016] IRLR 422) Langstaff J said at [30]:

"I would caution some care in the application of the principle arising out of Cavendish Munro. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the staute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

The case was appealed to the Court of Appeal where it was held that whatever is claimed to be a protected disclosure must contain sufficient information to qualify under the ERA 1996, s43B(1).

It was held that there is a spectrum : although pure allegation is insufficient a disclosure may contain sufficient information even if it also includes allegations. Ultimately, this will be a question of fact for the ET, which must take into account the context and background. At [41] the judgment puts the point neatly by adapting the famous example given in Cavendish itself.
The contrast was made there that if a nurse says to the management that 'the ward is filthy and there are sharps left about' that can be information, whereas if he or she simply says 'You are breaking health and safety law' that would be mere allegation. To this, the judgment adds that if the nurse made the latter remark while pointing to sharps lying around, that should be sufficient.

43C Disclosure to employer or other responsible person

Bolton School v Evans [2006[EWCA Civ 1653, [2007] IRLR 140, *CA an IT teacher, whose initial complaint to the school about computer insecurity had been rejected, hacked into the system to demonstrate the insecurity. He was disciplined which led to him leaving and claiming (constructive) unfair dismissal due to whistleblowing.*

The EAT rejected his claim because he had been disciplined for hacking, not whistleblowing.

The Court of Appeal also rejected his claim. It held that neither the hacking nor informing the headmaster afterwards was a 'disclosure'.

Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 *the EAT upheld a decision by a tribunal that a police officer's dismissal was due to his long-term sickness and his obsessive pursuit of complaints and 'in no sense whatsoever' connected with the whistleblowing disclosures made earlier.*

Martin v Devonshires Solicitors [2011] ICR 352*, where the employee had been dismissed after making multiple allegations of sex discrimination, which would normally have constituted unlawful victimisation; however, these were totally false and caused by her paranoid delusions and it was accepted that the dismissal was because of her conduct, her refusal to accept the falsity and the likelihood of further disruptive behaviour in the future, hence no victimisation.*

Detriment

Bolton School v Evans [2006[EWCA Civ 1653, [2007] IRLR 140*: It is not enough to demonstrate that the employee has suffered as a result of the employer's act or deliberate omission to act. It must further be shown that the employer's act or omission was 'done on the ground that' the employee had a protected status or did a protected act. That is to say, there must be a causal connection between the employee's protected act or status and the employer's decision. What was the reason for the employer's act or omission?*

Fecitt v NHS Manchester [2012] IRLR 64*: The employer must prove on the balance of probabilities that the detriment was not because the employee had done the protected act - meaning that the protected act did not "materially influence" (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.*

Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation.

Blackbay Ventures Ltd v Gahir [2014] IRLR 416

Guidance was set out as follows :

(1) Each disclosure should be separately identified by reference to date and content.

(2) Each alleged failure or likely failure to comply with a legal obligation should be separately identified.

(3) The basis upon which each disclosure is said to be protected and qualifying should be set out.

(4) Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.

(5) The Employment Tribunal should then determine whether or not the Claimant had a reasonable belief that it was made in the public interest (s43B(1) ERA 1996).

(6) Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant.

(7) The Employment Tribunal should then determine whether the disclosure was made in the public interest."

Automatic unfair dismissal

Kuzel v Roche Products Ltd [2008] IRLR 530: *when an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must produce some evidence supporting the positive case. That does not mean, however, that in order to suceed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

Compensation

In Virgo Fidelis Senior School v Boyle [2004] IRLR 268 *the EAT stated that subjecting a whistleblower to a detriment was a form of discrimination and confirmed that awards of compensation for injury to feelings in whistleblowing detriment cases were available and should be based on the guidelines applicable to discrimination cases (see Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102.*

Sources

Harvey on Industrial Relations and Employment Law
(available from Lexis Nexis (www.lexisnexis.co.uk)).

Industrial Relations Law Reports
(available from Lexis Nexis (www.lexisnexis.co.uk))

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