EMPLOYMENT LAW JOURNAL – DECEMBER 2021/JANUARY 2022 #226

WHISTLEBLOWING

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In the past 12 months there have been a number of cases that have considered some of the key features of the whistleblowing regime. The cases have explored the importance of taking a staged approach to the question of whether disclosures qualify for protection and the need to assess the impact of each protected disclosure. The differing thresholds for dismissal and detriment claims have been examined. There have also been cases dealing with when the tribunals will attribute the motivations of other people to the dismissing officer and when employers may take action for the manner of the disclosure rather than its substance. This article provides a round-up of the recent case law developments before looking at what lies ahead for employers with staff in the EU, in the form of the European Whistleblowing Directive.

Disclosures

It is common in whistleblowing cases for claimants to rely on a number of alleged disclosures over a period of time. There is then often a dispute as to whether particular communications amounted to a qualifying disclosure under s43B of the Employment Rights Act 1996 (the ERA). In *Martin v London Borough of Southwark* [2021], the Employment Appeal Tribunal (EAT) provided a helpful reminder of the conditions that must be satisfied in order for a disclosure to qualify for protection and the structured approach a tribunal should take in applying them.

Mr Martin was a teacher who had raised a series of concerns about how he and his colleagues were working in excess of ‘statutory directed time’. The employment tribunal had found that none of these disclosures qualified for protection.

The first alleged disclosure was an email to the head teacher in which Mr Martin said that he had been unable to reconcile working hours with the statutory guidance. He asked to

discuss the calculations but recognised that he might be ‘missing something’. The tribunal considered this to be an enquiry about compliance that was expressed in tentative terms.

The second and third disclosures were made in Mr Martin’s capacity as a school governor and queried the extent to which working arrangements complied with statutory requirements. The third disclosure provided additional information about a meeting agenda item to discuss the concerns and reminded the governors that they were collectively responsible for doing the right thing. The tribunal treated these as queries and a comment.

The fourth disclosure was written to a prescribed person on behalf of all teachers at the school but focused on Mr Martin’s own excess hours. The tribunal saw this as being about his personal situation rather than about teachers at the school generally.

The fifth disclosure notified Mr Martin’s employer that Acas conciliation had started. In the tribunal’s view, this was not made in the public interest.

EAT decision

The EAT remitted the case to a different tribunal to analyse each disclosure with reference to all five elements of the statutory test, namely that:

- there must be a disclosure of information;
- the individual must believe that they are making the disclosure in the public interest;
- that belief must be reasonable;
- the individual must believe that the information disclosed tends to show one of the categories of wrongdoing specified in s43B; and
- that belief must be reasonable.

The EAT noted that tribunals should not draw a rigid distinction between allegations and disclosure of information. The key is that the matters communicated contain sufficient factual content and specificity.

It also emphasised that the requirement for reasonable belief has both a subjective and objective element. Even where a disclosure has been expressed tentatively, as in the case of Mr Martin’s first disclosure, it could still qualify for protection. It is necessary to analyse whether there was a reasonable belief that it was made in the public interest and tended to show specified categories of wrongdoing, ie a belief that was genuine and objectively reasonable.

In relation to disclosure four, there could still be a reasonable belief that a disclosure was made in the public interest even though it also raised personal concerns. Finally, the fact that a disclosure contained information of which the recipient was already aware did not automatically prevent it from qualifying for protection. The EAT decided that the tribunal had not properly analysed each limb of the test in relation to each disclosure and that a staged approach was needed.

Detriment and dismissal

Once a qualifying disclosure has been established, it is necessary to explore whether the individual has suffered a detriment or been dismissed for having raised concerns. An

unusual feature of the whistleblowing regime is that the threshold for the claimant to succeed in showing causation is lower in a detriment claim than in a dismissal claim. This was illustrated in two recent decisions.

Secure Care UK Ltd v Mott [2021]

Mr Mott was a logistics manager in charge of a control room that accepted transport assignments and deployed staff to deliver services to NHS trusts for people with mental health problems. Mr Mott relied on disclosures which he said tended to show that his employer was in breach of a legal obligation or that people's health and safety was being endangered. Three of nine communications were found to meet the test for a qualifying disclosure. The other communications related to general staffing concerns.

Having raised his concerns, Mr Mott was put at risk of redundancy and subsequently brought a claim for unfair dismissal. The employment tribunal applied the wrong legal test, concluding that the dismissal was unfair because the disclosures had a 'material influence' on the redundancy process. This was the test for detriment.

The EAT found that the tribunal should have evaluated whether the 'sole or principal reason' for dismissal was the protected disclosures. This involved looking at the decision maker's mental processes (which would be attributed to the employer). It also upheld the appeal because the tribunal had failed to distinguish between the effect of the disclosures that met the statutory test and those (the general communications about staffing issues) that did not.

Oxford Said Business School v Heslop [2021]

Dr Heslop raised concerns about compliance with legal obligations to the Cabinet Office but her manager, Dr Andrew White, felt her concerns were misconceived. She had previously received strong performance appraisals and there were no material issues in her relationships with colleagues. However, on the same day that she raised her concerns, one of Dr Heslop's direct reports made general criticisms of her and her leadership style.

While Dr Heslop was on holiday, the tribunal found that Dr White gathered information about these criticisms and decided that she should be removed from her post. When she returned, she was invited to a meeting at 8am on her first day back with no prior notice about its purpose. At that meeting, she was told that serious complaints had been made and that she had lost the trust and confidence of a significant portion of the team.

Dr White informed Dr Heslop that he did not want her to continue in her role but failed to provide her with specifics of the criticisms that had been made or the alleged complainants. He asked her to stay away from work (although he tried to present this as being her decision). She resigned after two months and claimed unfair constructive dismissal.

The tribunal formed the view that the steps taken from receipt of the complaints about Dr Heslop's leadership until her resignation amounted to detrimental acts which were materially (more than trivially) influenced by the protected disclosures. The detriment claims therefore succeeded.

However, the tribunal recognised that the test for whether Dr Heslop's constructive dismissal was automatically unfair involved a higher threshold, namely whether the reason

or principal reason for the dismissal was the protected disclosures. Although Dr White's actions were materially influenced by the protected disclosures, the principal reason for his conduct was the complaints against Dr Heslop. The automatic unfair dismissal claim therefore failed.

The respondents challenged the different outcomes in the detriment and dismissal claims. However, the EAT rejected their appeal. It found that the tribunal had applied the correct legal tests to detriment and dismissal. In particular, in considering the detriment claims, while the tribunal was critical of Dr White's behaviour, it had not wrongly conflated the causation test for detriment with whether his conduct had been reasonable or justifiable. It was also open to the tribunal to reach different answers to the question of whether there had been unlawful detriment and automatically unfair dismissal given the different causation tests.

Decision-making and attribution

As illustrated by *Oxford Said Business School*, when applying the test for detriment or dismissal, the tribunal must examine the mental processes and motivations of the decision makers. However, it is not bound to specify whether those motivations are conscious or unconscious. The respondents in that case said the tribunal should have made this distinction but the EAT noted that this is not required by ss47 or 48 of the ERA.

There can be occasions when the motivations of someone other than the decision maker are relevant. In the Supreme Court decision of *Royal Mail Group Ltd v Jhuti* [2019], the employer was found to be liable for automatic unfair dismissal when the employee's line manager hid the fact that she had made a protected disclosure and portrayed her as a poor performer. In effect, the dismissing officer was an innocent decision maker who had been manipulated by somebody in the management hierarchy above the employee. Following that decision, there was debate about the extent to which tribunals should examine the thought processes of other managers. Two recent EAT cases have illustrated that this will rarely be necessary.

University Hospital of North Tees & Hartlepool NHS Foundation Trust v Fairhall [2021]

Mrs Fairhall was a long-serving nurse with responsibility for managing and providing high-quality patient care in the community. She had an unblemished disciplinary record and had received positive assessments from the Care Quality Commission and the Nursing and Midwifery Council.

Her relationship with the trust deteriorated after she raised concerns about a policy change which materially increased the nurses' workload, resulting in staff absences and a decline in the quality of patient care. The concerns were not resolved and Mrs Fairhall expressed a wish to use the whistleblowing procedure. After a short period of annual leave, she was suspended, investigated and dismissed in a process that the tribunal found to be grossly unfair and unjustified.

The trust argued that the tribunal had relied on the conduct of other people involved in the process rather than on matters relating to the mental processes of the decision makers. Its

appeal was rejected. While Mrs Fairhall had made disclosures to a number of people in the management hierarchy, this was not a case in which innocent decision makers had been manipulated. The chair of the disciplinary panel gave evidence which was found to be unpersuasive and unreliable. In particular, she had attempted to 'beef up' the case by suggesting that there had been allegations of dishonesty against Mrs Fairhall that had never formed part of the disciplinary process.

The EAT noted that there can often be a number of people behind the scenes who make it known that they want an individual to be dismissed because of the protected disclosures that they have made. However, it is the reasoning of the decision maker that remains relevant. In this case, the disciplinary chair had gone along with the wish to remove Mrs Fairhall. As nobody else had been called to give evidence, the views of the chair were taken to be representative of the disciplinary panel.

Kong v Gulf International Bank (UK) Ltd [2021]

This case involved a disagreement between the head of legal, Ms Harding, and the claimant, Ms Kong, who was the head of financial audit. Ms Kong queried whether the use of a template adequately captured the risk profile of certain transactions and took into account the bank's regulatory obligations. After several email exchanges, a face-to-face discussion took place during which Ms Harding considered that Ms Kong had questioned her professionalism and integrity.

Although Ms Kong emphasised that it was legal awareness rather than integrity that she was questioning, the relationship broke down and Ms Harding did not wish to take part in mediation. This was not the first occasion when Ms Kong had upset colleagues. She was ultimately dismissed because of her lack of emotional intelligence and the breakdown in the relationship with Ms Harding.

The EAT upheld the tribunal's finding that the decision maker (the group chief auditor) was not manipulated or misled about what had transpired and the reason for dismissal could be separated from the concerns raised about the audit. Although Ms Harding was found to have subjected Ms Kong to detriments because of her protected disclosures, there was nothing to suggest that the group chief auditor's decision had been manipulated or tainted by her perspective.

In any event, Ms Harding, although senior in the management hierarchy, was not responsible for Ms Kong and there was no finding that she was seeking her dismissal. The group chief auditor had concluded that Ms Kong's position had become untenable based on the email evidence and prior experience of her interactions with other colleagues. The concerns raised by Ms Kong were not the reason for the dismissal.

Whistleblowing Directive

These cases illustrate the highly technical nature of the whistleblowing regime and some of the hurdles that whistleblowers need to overcome to bring successful claims. It is worth exploring how those conditions differ from the requirements of the European Whistleblowing Directive, which applies to the reporting of breaches of EU law. EU member states must implement the directive by 17 December 2021, although there is no obligation on the UK to implement it following Brexit.

To qualify for protection under the directive, whistleblowers must, at the time they disclose the information, have reasonable grounds to believe that it is true and falls within the scope of the directive. In some ways this goes further than the conditions contained in UK legislation. However, in practice, an individual who lacks a belief that the information they are sharing is true (the EU test), will also encounter difficulties demonstrating they reasonably believed their disclosure tended to show wrongdoing and/or was made in the public interest (the test in the ERA). So the effect is likely to be similar.

What is more significant about the directive is that it protects much broader categories of people than just workers (for example, the self-employed and those working under the supervision and direction of contractors, subcontractors and suppliers). Individuals who facilitate disclosures (but do not make them themselves) may also qualify for protection from retaliation.

In addition, the directive places a greater onus on employers to take specific action when disclosures are made and to have practical arrangements in place to deal with them. UK legislation focuses on preventing detriment and dismissal but does not require particular internal processes to be followed. Under the directive, disclosures must be acknowledged within seven days and the whistleblower must be advised about follow-up action within a three-month period thereafter. Employers are also required to have internal procedures that allow individuals to raise concerns through a variety of channels, which should then be handled by an impartial person or department.

Although the UK is no longer required to implement the directive, these provisions may bring the issue of whistleblowing into sharper focus and require an assessment of whether existing arrangements are fit for purpose.

Cases Referenced

- Kong v Gulf International Bank (UK) Ltd [2021] EA-2020-000357-JOJ
- Martin v London Borough of Southwark & anor [2021] EA-2020-000432-JOJ
- Oxford Said Business School & anor v Heslop [2021] EA-2021-000268-VP
- Royal Mail Group Ltd v Jhuti [2019] UKSC 55
- Secure Care UK Ltd v Mott [2021] EA-2019-000977-AT
- University Hospital of North Tees & Hartlepool NHS Foundation Trust v Fairhall [2021] UKEAT/0150/20/VP

Citation reference:
Annabel Mackay, 'Whistleblowing: Disclosures, detriments, dismissals and a directive – whistleblowing decisions and developments in 2021', (December 2021/January 2022 #226) *Employment Law Journal*, https://www.lawjournals.co.uk/2021/11/26/employment-law-journal/whistleblowing-disclosures-detriments/, see footer for date accessed