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WHISTLEBLOWING: SENSIBLE REFORMS, BUT MORE TO DO?

EMPLOYMENT

The Public Interest Disclosure Act 1998 (PIDA) is a classic example of a good idea let down by wobbly drafting. Despite its title, PIDA was quickly found not to require disclosures to be in the public interest at all. The newly-minted Enterprise and Regulatory Reform Act 2013 (ERRA) attempts to cure this problem, and deal with some of PIDA's other quirks. Taken together with recent judicial clarifications of PIDA's scope, this has done much to make the whistleblowing provisions more coherent, but many aspects of the law remain puzzling.

OVERVIEW OF PIDA BEFORE ERRA

PIDA created protection for some whistleblowers by inserting provisions into the Employment Rights Act 1996 (ERA). In broad outline, a worker making a disclosure about serious failings of his employer will qualify for protection from any retaliatory action. So far, so good. The list of serious failings about which a disclosure may be made is closed but, significantly, alongside the categories one would expect, such as criminal activity or breaches of health and safety, or environmental, standards, is the potentially very wide category of breaches of a legal obligation. In 2002, that was held by the Employment Appeal Tribunal in *Parkins v Sodexho* [2002] IRLR 109 to include private contractual obligations with no wider public interest element. Since damages for whistleblowing, as for discrimination, are uncapped, it was this decision that opened the way for the very wide (anecdotally at least) use of the whistleblowing provisions by those without a viable discrimination claim to seek substantial damages above the relatively low unfair dismissal maximum award.

A disclosure could only be protected if the worker made it in good faith (s.43C of ERA), and reasonably believed that the disclosure showed the relevant failing (s.43B of ERA). The second test has proved relatively easy to satisfy, but the first has been more problematic. How does one judge whether a disclosure is made in good faith? What if the whistleblower's motives are mixed? From a policy perspective, why should it matter what the motives are, provided the employer's wrong is exposed?

A good example is the EAT's decision in *Street v Derbyshire Unemployed Workers' Centre* [2004] ICR 213. Despite the apparently serious allegations of corruption in that case, the whistleblower's personal animosity towards her manager was held to have been the primary motivation for her disclosures. This was enough to take them outside the statutory protection. Where this left, for instance, whistleblowers who genuinely wanted to bring wrongdoing to light, but who were also interested in improving their negotiating position, was unclear.

THE REFORMS IN ERRA

Both the public interest test and the requirement of good faith have been substantially remodelled by ERRA. By s.17, only disclosures which are reasonably believed by the whistleblower to be in the public interest will now be protected. This raises the obvious question: what is in the public interest? It might be said that it will always be in the public interest for contracting parties to be held to their bargains, but that would lead inexorably back to the pre-ERRA position where minor breaches of employment contracts have been relied on to found whistleblowing claims. What precisely the Employment Tribunals will look for in determining public interest will take some time to emerge from decided cases, but the legislative desire seems clear.

The other major change is the wholesale removal of the requirement of good faith. Recognising the force of the policy question posed a moment ago, and spurred into action by recent disclosures of appalling failures in the NHS, the Government has concluded that this is an unhelpful bar to the raising of genuine concerns. There is, however, a monetary sting in the tail for those blowing the whistle to get a better severance payment or because of a vendetta. Where a whistleblower wins a detriment or dismissal claim, but the disclosure was not in good faith, the Tribunal will now be empowered to reduce any compensation by a maximum of 25 per cent.

One other reform is also worthy of note, dealing with vicarious liability. Unlike the law prohibiting discrimination, in which the acts of a victim's managers and colleagues will found a claim against the employer unless a closely-drawn statutory defence is made out, PIDA gave no such right of action to a whistleblower stigmatised by his or her colleagues. That anomaly is amended by s.19 of ERRA, which places whistleblowing and discrimination on the same footing.

The new public interest requirement and the abolition of the good faith requirement both come into force on 25 June 2013. The imposition of vicarious liability is likely to come into force over the summer, but no commencement date has yet been announced.

OTHER DEVELOPMENTS

It has been clear since the Court of Appeal's judgment in *Woodward v Abbey National plc* [2006] ICR 1436 that detrimental treatment occurring after employment has finished, such as the giving of a poor reference, can found a whistleblowing claim. What was left uncertain until the EAT's recent decision in *Onyango v Berkeley Solicitors* [2013] IRLR 338 was whether a disclosure made after employment could also be protected. The EAT's answer was that it could be, keeping employers on risk for a potentially unlimited period after employment.

It is worth pausing to consider the related topic of so-called "gagging" clauses, given the recent widespread press coverage. Under s.43J of ERA, any contractual provision which attempts to bar the making of a protected disclosure is void. This is the reason why one often sees confidentiality and non-disparagement clauses in employment contracts and settlement agreements with specific carve-outs for genuine whistleblowing. Although the Government has announced a ban on "gagging" clauses in NHS settlements, neither the NHS furore nor the passing of the ERRA alters the current position.

PROSPECTS FOR FURTHER REFORM

There are three areas in which further reform is possible. The first deals with the sort of person covered by the whistleblowing regime. We have used the term "worker" throughout this article, and this is defined by s.43K of ERA to include a slightly wider group of individuals than would ordinarily be caught by the employment law concept of a "worker". In particular, agency workers and a number of NHS contracting relationships are covered. The definition is to be further widened by s.20 of ERRA to add yet more NHS arrangements, but two significant types of relationship remain outside the regime. The first is job applicants. There is substantial anecdotal evidence that whistleblowers (like those alleging discrimination) can be perceived as trouble-makers and can struggle to find work. Unlike those alleging discrimination, however, candidates for employment who are victimised because of a prior protected disclosure have no recourse. The Government will shortly begin a consultation on whether to extend the reach of the whistleblowing regime to cover applicants, so this is an area to watch closely. The second group is LLP members, who were found by the Court of Appeal in *Bates van Winkelhof v Clyde & Co LLP* [2012] IRLR 992, to be outside the regime's protection. The point will be considered by the Supreme Court later this year.

The second spur to reform is the new Whistleblowing Commission, set up by the campaigning charity Public Concern At Work. The Commission has raised a number of interesting questions about how best to ensure genuine concerns are raised, including whether financial rewards for whistleblowers should be available, whether specialist tribunals for whistleblowing complaints should be established, whether whistleblowing policies should be mandatory, and whether regulatory bodies should pay more attention to whistleblowing generally. The Commission's consultation is open until 21 June 2013, and its recommendations will make interesting reading.

The third area in which reform might be contemplated is to iron out some of complexities that bedevil any whistleblowing claim. The very technical provisions governing when a disclosure may be made to someone other than an employer; the requirement that a disclosure must be of information, rather than a mere allegation of wrongdoing; and the discrepancy in the causation tests for detriment as opposed to dismissal, are all areas of difficulty that might profitably be reconsidered.

WHISTLEBLOWING POLICIES

Many companies see the effective, fault-free reporting of wrongdoing as a key part of their risk management and corporate governance structures. They are right to do so. Given the focus of Government, the press and many regulators on whistleblowing, it is vital that companies regularly review their policies, both for content and to check the relationship between the whistleblowing, grievance, data protection and anti-bribery policies is coherent. Clear guidance on the proper channels for raising concerns and how to respond to and investigate concerns, and clear assurances that the raising of genuine concerns will not be punished are all key parts of any policy. In light of Onyango and the legislative reforms addressed above, companies may wish to spell out the new scope of the whistleblowing regime as applied to their own particular circumstances, so that employees and managers (and regulators) know the importance their employer attaches to whistleblowing.

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JUNE 2013

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