nicholsons
human resource services

No. 49

HR Broadcast – Whistleblowing: What does it really mean?

An employee believes that his employer or somebody within the organisation has done something at least improper and possibly illegal. He tells an external authority with potentially damaging consequences for the employer.

The employee is protected from any retaliation by the employer as long as the disclosure is a 'protected disclosure'. Any dismissal or any other form of action as a consequence of the protected disclosure having been made would amount to a detriment to the employee. He would be entitled to claim to an Employment Tribunal that he had been the subject of victimisation because of making a protected disclosure.

The usual two year rule before employment claims can be made would not apply and damages could be unlimited. The danger to the employer of making some kind of knee jerk reaction is therefore very considerable.

Quite often there will be a complex scenario where the employer is contemplating disciplinary proceedings against the employee only to find that the employee, by way of response, blows the whistle. The employer may continue with the disciplinary proceedings, perhaps ending with the dismissal of the employee, only to find that this is met with a claim for victimisation and in addition a claim of unfair dismissal. A dismissal because of whistleblowing will be treated by the tribunal as being automatically unfair and not requiring two years continuous service.

However, the rules relating to precisely what amounts to a protected disclosure are strict, and the risk for an employee is that the disclosure might not satisfy the rules required to provide employment protection leaving that employee wide open to disciplinary action.

The starting point is that there must be a 'qualifying disclosure'. This is defined in the Employment Rights Act. It is a disclosure of information which in the *reasonable belief* of the worker is made in the *public interest* and tends to show that a criminal offence has been committed or is likely to be committed, that the health and safety of any individual has been endangered or is likely to be endangered, that the environment has been damaged or could be damaged, and so on, including as the sixth category that information tending to show any of the previous five categories has been deliberately concealed. The two critical criteria are in italics.

Until 2013 the public interest test did not apply and an individual could rely on the breach of his own contract of employment, where the breach was of a personal nature, and there were no wider public interest implications.

The law was changed so that in future whistleblowing had to be in the public interest before it could be regarded as a legitimate act by the employee and one for which the employee would have the benefit of legal protection.

nicholsons
human resource services

No. 49

HR Broadcast – Whistleblowing: What does it really mean?

Of course, defining what a reasonable belief of the worker might be and what is in the public interest is very difficult. A very recent case has provided some guidelines to how these two matters should be approached by employment tribunals.

Reasonable belief is determined by looking at what the worker himself believes, not what an outsider looking on might conclude is a reasonable belief. So it is not for a tribunal to identify what a reasonable person would believe but whether that worker, making the disclosure, reasonably believed he was acting in the public interest.

Perhaps more importantly, the Employment Appeal Tribunal attempted to define just how wide an interest needed to be to make it public. The particular case involved an alleged manipulation of business accounts to the detriment of some 100 employees who were senior managers in this business. The Tribunal was satisfied that the claimant had more than himself in mind and was also thinking about his colleagues, and further, that those 100 colleagues were a section of the public and the test was therefore satisfied.

So, the state of the law at present, and subject to any further appeals, is that it does not matter how small the affected group might be as long as it is not just the single individual. If that is correct then it raises the question whether a group of two people might satisfy the need for a disclosure to be in the public interest; the complainant and one other?

That would not sound like what most of us would understand to mean *in the public interest* but this does appear to be the state of employment law at present. From an employer's point of view this means that if an employee himself reasonably believes that a disclosure would affect at least one other person then he would satisfy the public interest obligation - a very low threshold.

Please contact Andy Tomlinson or Danny Miller if you think you may have a public interest disclosure situation to discuss.