

UK Update

Changes to protection for whistleblowers

Legal protection for whistleblowers was introduced by the Public Interest Disclosure Act in 1998. Since then, the legislation has been subject to serious scrutiny and wide interpretation by the Employment Tribunals.

An increasing number of claimants have sought to use it solely to get around the length of service requirement and limits on compensation in unfair dismissal claims.

Furthermore, case law has highlighted the lack of protection for whistleblowers who, as a result of making a protected disclosure, are victimised and harassed by their colleagues, but not their employer.

Amendments introduced by the Enterprise and Regulatory Reform Act 2013 that come into force today, 25 June 2013, seek to limit the abuses of the whistleblowing legislation by self-interested claimants but also to protect genuine whistleblowers from abusive colleagues.

Introducing the public interest requirement

Despite its title (Public Interest Disclosure Act 1998), there has, until now, been no specific requirement that a protected disclosure be made in the “public interest”. This has enabled workers who complain about their individual employment contracts or make the most minor grumbles to claim protection under the whistleblowing rules. The Government has said this was not what the whistleblowing legislation was intended to achieve and that “this loophole” should be closed.

As from 25 June 2013 any disclosure made by a worker will only count as a “qualifying disclosure” if the worker reasonably believes that the disclosure is both “made in the public interest” and fits into of the categories set out in the legislation (eg a criminal offence, a breach of a legal obligation, a miscarriage of justice etc).

This change means disclosures of a personal nature will not be protected. For example, if an employee receives an incorrect amount of holiday pay, in breach of their employment contract, that would constitute a matter of personal, rather than wider, interest. It will be for the whistleblower to show why they believe that the disclosure is in the public interest, and that the belief was reasonable in all circumstances.

The lack of any definition as to what exactly ‘the public interest’ means in the new rules means that this nebulous and subjective concept is left to be interpreted by the Tribunals, and it remains to be seen what approach they will take. The wider the interpretation they decide to adopt, the greater the risk that the amendments will make little difference.

Further information

If you would like further information on any issue raised in this update please contact:

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Removing the good faith requirement

Possibly in a bid to counterbalance concerns that adding a public interest requirement might deter whistleblowers, the requirement that protected disclosures are made “in good faith” has been removed.

Reduction of compensation by 25% if disclosure made in bad faith

The element of good faith is still not being completely eradicated from legislation on whistleblowing. Instead, where a whistleblower has made a successful claim for unfair dismissal or detriment based on a protected disclosure and the Tribunal feels the protected disclosure was not made in good faith, the Tribunal may reduce any award it makes to the employee by up to 25%, if it considers it just and equitable to do so.

These changes could lead to malicious, tactical or self-interested disclosures which, although on the face of it might be “in the public interest”, are made for personal gain. The fact that the reduction in compensation is only a maximum of 25% is not going to discourage anyone and shows that the intention of the legislation is to protect whistleblowers, irrespective of whistleblowers’ motive.

Personal liability of employees and vicarious liability of employers

Recent case law shows that employers could not be held vicariously liable in cases where an employee victimises a whistleblower colleague. This, however, has left whistleblowers who are bullied by other colleagues with little remedy.

As a result, the law introduces both personal liability on employees who victimise their whistleblowing colleagues, and vicarious liability on the employer for the same. Whistleblowers will now have the right:

- Not to be subjected to any detriment by any fellow worker or agent of their employer as a result of their whistleblowing
- To bring a claim in a tribunal against such person as well as their employer
- To treat any such act as done also by the employer, whether done with or without the employer’s knowledge or approval

To protect employees, they won’t be personally liable for their actions if they have reasonably acted in reliance on a statement by the employer. Most importantly for employers, there is a new defence that they took all reasonable steps to prevent the other worker from victimising the whistleblower.

This puts whistleblowing claims in a similar position to discrimination claims. It will be essential for employers to review their whistleblowing policies and provide training to staff to make staff understand that bullying and harassment of whistleblowers is unacceptable and can lead to personal liability.

The future

Changes to the whistleblowing laws are unlikely to stop here. First, we can expect the Tribunals and the Courts to give guidance on how the new law should be interpreted. In addition, the Government has indicated a possible extension to the definition of “worker” to include job applicants, but that won’t be until after a Call for Evidence which the Government has promised this autumn.

Furthermore, the Whistleblowing Commission (set up by Public Concern at Work) last week closed a public consultation on whistleblowing so the results of that are now awaited.

*Whistleblowing policies should be reviewed in light of these amendments. If you require any assistances in this process, please contact **Adam Lambert** or the partner with whom you normally deal.*