WHISTLEBLOWING - MORE THAN JUST HOT AIR

There is a certain degree of sensationalism surrounding the term "whistleblowing" that scares employers and employees alike. It is a term coined in the Elizabethan era to describe the revealing of secret information which was later used in the twentieth century to describe the literal blowing of whistles in an attempt to prevent illegal or immoral activity. The term "whistleblowing" does not appear anywhere in Manx legislation.

Commonly synonymous with "snitching", discussions of whistleblowing causes many to mistakenly attribute certain characteristics or motives to the individual concerned that are rarely the reality. A major pitfall facing employers is the misconception that whistleblowing involves an employee revealing the deep, dark secrets of a company when in reality it can be something as commonplace as an employee raising concerns about management's approach to staffing/handover/evolving job roles and the impact this is having on the wellbeing of the whistleblower or their colleagues. A harsh lesson learnt in a recent Employment Tribunal hearing during November 2022, which will be discussed further in the body of this article.

But what is whistleblowing?

Whistleblowing is used to describe the process of a worker making (the more aptly named) "protected disclosures" regarding the wrongdoing of the company for which they work. Protected disclosures are governed by Part IV of the Employment Act 2006 (**the Act**) and the basic requirements are summarised as follows:

- A "qualifying disclosure" is made;
- By a "worker"; and
- The disclosure is made to the right person, in the right way in, making it "protected".

"Qualifying disclosures" covers disclosures of information where the worker reasonably believes any of the following has or is likely to happen:

- A criminal offence;
- A breach of a legal obligation;
- A miscarriage of justice;
- A danger to the health or safety of any individual;
- Damage to the environment; or
- Deliberate covering up of information tending to show any of the above.

There is no legal requirement for the worker's belief to be proved true, they only need to show that they had a reasonable belief in its truth. It is the employee's good faith and reasonable belief in the disclosure that warrants protection. Employers must therefore be cautious of all disclosures made by workers, even where they know a disclosure to be untrue; that is, a worker may be incorrect as to the facts alleged but may still qualify for protection per ***Darnton-v-University of Surrey*** [2003] IRLR 133. However the factual accuracy of the allegations will assist the Tribunal in assessing the reasonableness of the employee's belief. Further following the decision of the EAT in ***Korashi-v-Abertawe*** [2012] IRLR 4, the test of the reasonableness of a belief necessarily varies with the status of the person making the allegation

Lessons learnt from the Isle of Man Employment & Equality Tribunal

A recent Tribunal decision of November 2022 (Case Number 21/13) serves as a cautionary tale for employers when dealing with protected disclosures and dismissals. In summary this case involved an employee who was found (by unanimous decision) to have been automatically unfairly constructively dismissed because of protected disclosures.

In reaching this decision the Tribunal focused on why the employer had behaved as it did as opposed to the truth of the employee's disclosures concerning the health and safety of himself and another resulting from management's approach to working hours, staffing, handover etc.

When determining whether the dismissal was by reason of the protected disclosure, the Tribunal will ask itself "the reason why" rather than applying a "but for" analysis. There must be a causative link between the protected disclosure and the dismissal in order for it to be automatically unfair. In this case there were a range of factors which enabled a causative link to be established which can be summarised as the employer's behaviour evidencing a "closed mind".

Employers should be wary that the discussions, procedures or negotiations that flow from a protected disclosure are not punitive or that dismissal is pre-determined from the outset. The Tribunal will be looking to satisfy itself that the disclosure materially influenced (that is to say a more than trivial influence) any detriment suffered by the worker. Imposition of changes to employment (in the November 2022 tribunal case it was the employee's Job Description) on a non-negotiable basis will also be considered by the Tribunal as establishing a causative link.

Why should employers care?

First and foremost, protected disclosures provide invaluable insight into a business from those working on the ground and should be embraced by employers as a tool for the continual development and improvement of a company. Whistleblowing allows an organisation to identify and address issues early on and avoid wide scale or public escalation.

A comprehensive whistleblowing system is therefore essential in creating workplace trust and confidence and a safe environment in which employees feel they can raise any issues they witness/experience. Employers should strive for a culture of transparency which encourages employees' active engagement with the interests and activities of the business.

Where an unfair dismissal has occurred in the context of whistleblowing, the statutory cap of a £56,000 compensatory award can be lifted. Employers therefore need to be conscious of the financial implications that ill-handled protected disclosures may have should a claim for unfair dismissal be successful.

Lizzie Beard