

LEGISLATIVE UPDATE: WHISTLEBLOWING

Current position

Currently under the Employment Act 2006 (**the EA**) a “qualifying disclosure” means a disclosure which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

- (a) that a *criminal offence* has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to *fail to comply with any legal obligation* to which he or she is subject;
- (c) that a *miscarriage of justice* has occurred, is occurring or is likely to occur,
- (d) that the *health or safety of any individual* has been, is being or is likely to be endangered;
- (e) that the *environment* has been, is being or is likely to be *damaged*; or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be *deliberately concealed*.

Unlike the UK, there is currently no requirement for the worker making the disclosure to believe that such disclosure ought to be disclosed in the public interest. A detailed examination of the definition of Whistleblowing can be found in my previous article “[Whistleblowing – more than just hot air](#)”.

The Bill

Amongst other things, the Employment (Amendment) Bill 2023 (**the Bill**) seeks to amend the section 50 definition of “qualifying disclosure” so as to impose a requirement that the disclosure be one that the worker “*reasonably believes ought to be disclosed in the public interest*” and has the tendency to show one or more of (a)-(f) listed above. In addition the worker must declare to the recipient that it is in fact a qualifying disclosure being made.

The Bill also seeks to omit the phrase “*in good faith*” from sections 51 through 56 of the EA, however clause 13 of the Bill states that the Employment and Equality Tribunal may reduce any award by up to 25% (if it considers it just and equitable) where it appears that the protected disclosure was not made in good faith.

As a consequence of Tynwald Select Committee findings and in the interest of greater transparency, the Bill invites the Department of Enterprise to make regulations imposing reporting restrictions on prescribed persons under Schedule 1 of the [Public Interest Disclosure \(Prescribed Persons\) Order 2021](#). This includes Government Departments, the Financial Services Authority, Information Commissioner, the Gambling Supervision Commission and other regulatory bodies.

Finally, the Bill inserts provisions for vicarious liability relating to protected disclosures. This affords whistle-blowers protection against detriment done by their employer, another worker or an agent of the employer.

Process so far

The Bill will not take legal effect until it has been approved and submitted for Royal Assent, prior to which it has been subjected to a number of legislative readings. The First Reading in the House of Keys took place on 27 June 2023 and so remains subject to discussion, however as an employer it would be pertinent to keep this Bill on the radar.

So how does this impact you as an employer?

On the whole, intended amendments to the EA are to be welcomed by employers here in the Isle of Man, as under the current regime the absence of the public interest requirements has afforded whistle-blowers with somewhat of a loophole. The introduction of the public interest test provides an additional statutory hurdle and should remove the self-serving whistleblowing cases where a protected disclosure is based on a breach of the individual's own employment contract.

For those employers understandably concerned by the introduction of vicarious liability, now may be the time to review your whistleblowing systems to ensure you have in place an environment in which your employees feel able to raise protected disclosures without fear of suffering detriment as a consequence. Are your employees and agents educated as regards protected disclosures? Employers should remain alive to both the financial and commercial consequences of a mishandled protected disclosure.

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