Whistleblowing

Your right to speak out when something is wrong

Overview

Better protection for 'whistleblowers' came with the implementation of the Public Interest Disclosure Act 1998, which amended the Employment Rights Act 1996 ('The Act '), and it is the latter which contains the legal protection for whistleblowers. The 'Act' provides a framework within which workers can make disclosures that are in the public interest, and at the same time gives them protection from victimisation by their employer.

Who is protected?

'The Act' is very wide in its scope. It applies not just to employees, but to a wide category of 'workers'. Freelancers, people on training courses, agency staff and directors, police officers - in fact, almost any category of worker except the genuinely self employed - receive protection under 'The Act'. However, it is a complex and technical piece of legislation which means claims can turn on points of law as often as on issues of fact.

What is the protection?

Under 'The Act', it is unlawful for an employer to dismiss or to subject any worker to a detriment on the grounds that they have made a 'protected disclosure' - that is, passing on information which they reasonably believe shows that their employer, or indeed any other person, company etc, has done something wrong. Making an allegation without disclosing information is generally not enough, although as long as some information is disclosed it does not matter if it was already known to the recipient of the disclosure. Unlike ordinary unfair dismissal protection, protection from dismissal under 'The Act ' arises from day one of employment and compensation is potentially unlimited, depending on how much loss an individual suffers as a result.

When does the protection arise?

To qualify for protection, it is not necessary for the wrongdoing actually to occur, so long as you have a reasonable belief that the information tends to show the wrongdoing has occurred or is likely to occur.

The disclosure must be information which fits one or more of the following definitions:

- That a criminal offence has been, is being or is likely to be committed
- That a person has, is or is likely to, fail to comply with a legal obligation
- That a miscarriage of justice has, is or is likely to occur
- That the health or safety of any individual has, is or is likely to be endangered
- That the environment has been, is being or is likely to be damaged
- That information tending to show any of the above has been, is being or is likely to be deliberately concealed.

These categories have been interpreted widely by the Courts. For example they have even been interpreted as covering disclosures relating to a breach of the complainant's contract of employment. However, from 25 June 2013 the person making the disclosure must reasonably believe that the disclosure was in the public interest. This is likely to reduce circumstances where breaches of the complainant's own contract will amount to protected disclosures.

For a qualifying disclosure to be protected it must satisfy other conditions as follows.

Generally the expectation is that you should initially raise the complaint with your employer. There may however be circumstances where disclosure to other persons or agencies prescribed in 'The Act ' may be appropriate. If a complaint is about health and safety, for instance, the Health and Safety Executive could be approached. If an individual wants to make a disclosure to anyone else it will only be protected if it is reasonable to do so and if certain other conditions are also met.

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Disclosures do not need to be made in good faith to be protected. However, if an Employment Tribunal finds that a disclosure was not made in good faith it may reduce any award of compensation by up to 25%.

Many employers have whistleblowing or reporting wrongdoing policies and our advice is generally that these should be followed. If you are thinking about making any disclosure, whether to your employer or otherwise, then you may wish to take legal advice before doing so.

Difficulties in practice

Even where a disclosure does amount to a protected disclosure under 'The Act', and you have been subjected to a detriment (disadvantage) or dismissed, it does not mean that you will necessarily win your case.

The main challenge in whistleblowing cases is generally establishing that the adverse treatment you have received is due to the disclosure you have made, and that it is not for some other reason. The legislation does put the burden on the employer to show the reason but, we find that employers will often argue that an individual has been disciplined not because they brought to the employers attention some wrongdoing, but because they have not been performing well, or because they have committed some act of misconduct.

Employers will also often try to suggest that disclosures were not made in good faith. These defences by the employer can often be undermined but this greatly depends on gathering as much evidence as possible to dispute them, if they are raised. This argument would now only be relevant to the level of compensation award for a successful claim.

Take advice as soon as possible

At Slater and Gordon Lawyers we have run many whistleblowing cases, including some of the most significant cases in this field. If you are thinking of bringing your concerns about public interest matters to your employers attention, or you feel that after raising a concern, things have taken a turn for the worse, we would recommend that you take advice as soon as possible to maximise the protection available to you. Please also note that strict time limits apply in respect of bringing a claim. Most claims will need to be brought in the Employment Tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct.

In a dismissal case the time limit is three months less one day from the date employment ended. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it was, 'not reasonably practicable ' for the claim to be presented in time. However, this power should not be relied on. Please note that in most cases, this time limit will not be extended where an internal grievance is lodged first.

You may also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded From the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the Tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that

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the time limit for bringing a claim is not affected by compliance with the ACAS Code.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded .

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk.

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