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Employment
Has bringing a whistleblowing claim just got easier?

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The last few months have seen a number of interesting decisions which appear to make it a little easier for workers to meet the criteria for bringing a whistleblowing claim.

What is a whistleblowing claim?
Workers are protected from detriment and dismissal on the grounds of having made a "protected disclosure". A protected disclosure will be one qualifying for legal protection (a "qualifying disclosure"). In order to qualify for such protection it must be a disclosure of information which, in the reasonable belief of the person making it, is made in the public interest and tends to show that a wrongdoing has been committed.

The types of wrongdoing covered are criminal activity, a failure to comply with a legal obligation, a miscarriage of justice, the endangering of health and safety and damage to the environment.

What is the "public interest" test?
The words "in the public interest" were inserted into whistleblowing legislation by the Enterprise and Regulatory Reform Act 2013 for disclosures made on or after 25 June 2013. The purpose of the introduction of the public interest test was to reverse the effect of a case called *Parkins v Sodhexo Ltd* so that a worker cannot rely on a breach of his own employment contract where there are no wider public interest implications.

Up until now there have been no decisions on what constitutes the "public interest". However, following the Court of Appeal's decision in *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed* it seems that it's wider than might have been expected.

A breach of the worker's own contract of employment can fall within the "public interest" test
The Court of Appeal has held in Chesterton that an estate agent's complaints about the manipulation of accounts which potentially adversely affected the bonuses of 100 senior managers amounted to a protected disclosure in the public interest. While he was principally concerned with his own position, Mr Nurmohamed did have other senior managers in mind and, as a section of the public would be affected, the public interest test was satisfied.

Mr Nurmohamed was employed as a senior manager at the Mayfair branch of Chestertons, the estate agent. Following changes to the company's commission structure, he made disclosures to the area director and the HR director on three separate occasions in which he complained about manipulation of the company's accounts, which he believed had an adverse effect on his commission income, and the commission income for around 100 senior managers. The effect of the manipulation was to make the company appear more profitable, to the benefit of its shareholders.

He was dismissed and brought various claims against Chestertons. At first instance the tribunal found that he had been automatically unfairly dismissed and that Chestertons had subjected him to detriments on the grounds that he had made protected disclosures. The tribunal noted that there was no authority on the meaning of "in the public interest" and held that it was not required that a disclosure had to be of interest to the entirety of the public, as it was inevitable that only a section of the public would be directly affected by any given disclosure.

Chestertons appealed against the finding that the disclosure was made in the public interest, arguing that 100 senior managers did not comprise a sufficient section of the public to satisfy the public interest test. The EAT disagreed, holding that the tribunal's reasoning had been correct. It also held that there was no need for the tribunal to determine objectively whether a disclosure is of real interest to the public. The public interest test can therefore be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made, provided that the worker's belief that the disclosure was in the public interest was objectively reasonable.

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Guidance on whether a disclosure qualifies for protection

The Court of Appeal agreed with the tribunal and the EAT and refused Chesterton's appeal. It set out some useful guidance on the way to approach the issue of whether a disclosure qualifies for protection.

- The first question for the tribunal to ask is whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and then whether that belief was reasonable.
- In doing so, the tribunal must recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest.
- Although it is necessary for the worker to believe that the disclosure is in the public interest the particular reasons why the worker believes that to be so are not of the essence. Interestingly, according to the Court that means that "a disclosure does not cease to qualify simply because the worker seeks...to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it".
- While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest this does not have to be his/her predominant motive in making it.

The Court declined to provide "any general gloss on the phrase "in the public interest". It reasoned that Parliament had chosen not to define it and therefore the intention must have been to leave it to employment tribunals to apply "as a matter of educated impression". However, it did state that the disclosure of a breach of a worker's contract of the Parkins v Sodhexo kind may be in the public interest, or reasonably be regarded to be so, if a sufficiently large number of other employees share the same interest. This was subject to the warning that tribunals should be cautious to reach such a conclusion because the broad intention behind the amendments in 2013 were that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection enjoyed by whistleblowers.

Factors to consider when weighing up a worker's belief

The Court identified four factors which might be useful in weighing up the reasonableness of a worker's belief that a disclosure was in the public interest:

- The numbers in the group whose interests the disclosure served.
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed (disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than disclosure of trivial wrongdoing affecting the same number of people).
- The nature of the wrongdoing disclosed (deliberate wrongdoing is more likely than inadvertent wrongdoing affecting the same number of people to be in the public interest).
- The identity of the alleged wrongdoer (the larger or more prominent the wrongdoer, the more a disclosure about its activities will engage the public interest).

One of the features which led the Court to conclude that the disclosure was in the public interest was the fact that the disclosure was of deliberate wrongdoing which took the form of mis-statements in the accounts to the tune of £2m-£3m. It reasoned that if the accounts were statutory accounts the disclosure of such a mis-statement would "unquestionably be in the public interest". It conceded that the fact that the accounts in question were only internal made the position "less black-and-white", but made the point that internal accounts feed into statutory accounts and Chestertons was "a very substantial and prominent business in the London property market".

A worker may have two employers for the purposes of whistleblowing protection

In Day v Health Education England and others the Court of Appeal held that a worker may have two employers for the purposes of whistleblowing protection.

Dr Day was a junior doctor working as a Specialist Registrar in medical training. Health Education England (HEE) (a statutory body responsible for education, training and workforce planning for NHS staff in England) placed him in a training post with Lewisham NHS Trust. While working for the Trust Dr Day made a number of complaints alleging that serious understaffing at the hospital was affecting patient safety. He then brought a claim against the Trust and HEE arguing that his claims were protected disclosures and that he had suffered detriment as a consequence.

HEE applied to the tribunal to strike out the claim as having no reasonable prospect of success on the ground that Dr Day was not HEE's worker under either the general definition of worker or the extended definition in relation to the whistleblowing provisions contained in the Employment Rights Act 1996 (ERA 1996). Under the extended definition of worker Dr Day had to show that he was introduced or supplied to do work by a third person (HEE) and his terms of engagement were substantially determined by the

person for whom he worked, by the third person (HEE) or by both of them.

The tribunal found that, while it was arguable that HEE had introduced or supplied Dr Day to the Trust, HEE did not substantially determine Dr Day's terms. This was the job of the Trust. It struck out Dr Day's claim.

The EAT dismissed his appeal, but the Court of Appeal remitted the issue of whether HEE had substantially determined Dr Day's terms of engagement to a fresh tribunal to consider. It concluded that HEE could be Dr Day's employer for whistleblowing purposes, even though Dr Day had a contract with the Trust. The Tribunal had fallen into error in seeing its task as being to identify the single body which played the greater role in determining Dr Day's terms of engagement.

The Court of Appeal's decision confirms that an individual can have two employers for the purposes of bringing a whistleblowing claim. Just because an individual qualifies for whistleblowing protection under the general definition of "worker" in relation to one party, does not mean that they do not have protection against another party too under the extended definition of "worker".

Irrelevant that employer believed that disclosure was not protected

The Court of Appeal has considered whether an employment tribunal had correctly decided that the reason an NHS Trust had dismissed a doctor was that he had made protected disclosures in *Beatt v Croydon Health Services NHS Trust*.

Following the death of a patient Dr Beatt, a consultant cardiologist, made a number of claims relating to staffing levels and experience, as well as patient safety. The Trust found his claims to be unsubstantiated and unproven, noting that he had failed to provide any examples to back up his claims even though he was requested to do so. The Trust also alleged that some of his claims had been made as part of a campaign against a colleague and were accordingly vexatious. As a result it brought disciplinary proceedings against Dr Beatt which culminated in his dismissal for gross misconduct.

At first instance the tribunal held that Dr Beatt had made a number of protected disclosures and that these were the reason for his dismissal. The EAT found that the tribunal's reasons had failed to identify why it did not believe the Trust's evidence that conduct had been the reason for dismissal. Dr Beatt appealed. The Court of Appeal restored the judgment of the tribunal. The Trust's argument that it did not believe that Dr Beatt had made a protected disclosure and therefore this could not be the reason why he had been dismissed failed. The Court held that a disclosure will be protected provided it complies with the legal requirements. This is an objective test and so the employer's genuine belief that an employee's disclosure is not protected is irrelevant.

Conclusion

The Court's decision in *Chesterton* will offer comfort to prospective whistleblowers as it shows that the public interest requirement is perhaps less onerous than it was intended to be. Provided that an employee can show that a breach of their contract affects a sufficiently large number of employees sharing the same interest they can potentially pass the "public interest" test.

In another piece of good news for potential whistleblowers the decision in *Day* shows that it is possible for an individual to have two employers for the purposes of bringing a claim. Protection can be gained under both the general definition of "worker" and the extended definition if relation to the whistleblowing provisions.

Finally, an employer must always ensure that it does not let its view of a whistleblower as a difficult colleague or an awkward personality cloud its judgment as to the merit of the disclosures in question. The employer's conclusion that an employee's disclosure is not protected will not necessarily be the same as the conclusion drawn by the tribunal.

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