Why Is Whistleblowing Still A Risk?

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Why Is Whistleblowing Still A Risk?

Despite being a world leader in the financial markets, the UK falls short of other jurisdictions when it comes to providing protection for whistleblowers. And with the New York Times stating the roots of a major new global financial crisis could already be taking hold in America, whistleblowers can provide an invaluable check on the behaviour of senior decision makers. But despite the Financial Conduct Authority (FCA) increasing its resources to handle complaints from whistleblowers, those brave enough to stick their head above the parapet are still risking having it ruthlessly removed.

Studies show that blowing the whistle poses a risk for the person disclosing the information due to:

1. the psychological prejudice people have towards whistleblowers, and
2. the lack of legal protection

In this article, we will look at these two factors in detail, examine how other jurisdictions regulate for the protection of whistleblowers and look at the proposed changes to UK law which could provide greater safety for those prepared to speak out against conduct from senior officials which is illegal or breaches their fiduciary duty to clients, shareholders, or both.

"No good deed goes unpunished" – Psychological prejudice towards whistleblowers

A forthcoming study, *Post-disclosure Survival Strategies: Transforming whistleblower experiences,* conducted by Professor Marianna Fotaki of Warwick Business School and Professor Kate Kenny of Queen's University Belfast, found that 62% of whistleblowers stated that they had been demoted, and almost all were eventually dismissed or resigned their post. In addition, many whistleblowers find themselves blacklisted by recruitment agencies, and even if they do manage to secure a position, once word of their actions becomes public, many experience unfavourable behaviour in their new workplace.

Studies show that despite rhetoric praising those who have the courage to stand up to an authoritative figure doing wrong, humans have a natural suspicion against 'moral agents'.

"Moral Agents (good or bad) seem tougher than others and better able to endure life's tribulations. This mental schema means that the suffering of heroes is less salient and less demanding of empathy than that of others. When a normal person is punched our heart leaps, but when Superman or Batman gets punched we shrug it off because we expect them to do the same. It's hard to picture Gandhi whimpering over a bruised knee".

Another study confirms we actively reject and resent those who do the 'right thing' because doing so threatens the self-image of those who turned a blind eye.

Legal protection – it is there, but is it robust enough?

The Public Interest Disclosure Act 1998 (PIDA) came into force on 2 July 1999

PIDA provides two levels of protection to whistleblowers who make what PIDA refers to as a "protected disclosure":

1. a dismissal will be deemed automatically unfair if the reason for that dismissal was that the individual made a protected disclosure, and

1. workers who make a protected disclosure cannot be subjected to detriment for having done so.

The protection against dismissal is also enhanced compared to an 'ordinary' unfair dismissal claim in that there is no requirement to have two years' service with the employer before bringing a claim, and the arbitrary cap on financial compensation (the lower of a year's pay and £83,682) does not apply.

To qualify for protection, a whistleblower must show that:

- They have disclosed information (rather than merely threatening to do so);
- The information must relate to one of six types of 'relevant failure';
- They have a reasonable belief that the information tends to show one of the six types of 'relevant failures';
- They have a reasonable belief the disclosure was made in the public interest; and
- Requirements about the identity of the person to whom the information has been disclosed are met (these are complex, but broadly PIDA encourages disclosures to the employer but does protect disclosures to external third parties in certain circumstances).

Meeting these tests can be a minefield for whistleblowers, which is why seeking legal advice making the disclosure is essential. Whistleblowing claims can be notoriously hard to

prove; roughly 4% of Employment Tribunal claims are successful.

How other countries protect whistleblowers

Having taken a hammering in the 2008 financial crisis, it is no surprise that the United States leads the way when it comes to regulations to encourage and support whistleblowers. The US Securities and Exchange Commission (SEC) is authorised by Congress to provide financial awards to people who come forward with information that leads to a Commission enforcement action in which over $1,000,000 in sanctions is ordered. Awards can be valued at up to 30% of the money collected. The Trump administration shows no signs of rolling back on legislation designed to encourage employees to report wrongdoing, for example, in June 2018, President Trump signed into law the Whistleblower Protection Coordination Act, permanently reinstating the Whistleblower Ombudsman Program.

In Australia, incoming legislation, expected to be in force from January 2019, will force all but the smallest of companies, to put in place a detailed whistleblowing policy and ensure it is communicated to staff. In New Zealand, the State Services Commission recommended changes to the Protected Disclosures Act. Public consultation on the suggestions which would increase whistleblowers' rights have now ended, and decisions will be made in the New Year. And in Canada, The Ontario Securities Commission adopted a whistleblower programme in 2016, which provides rewards of up to $5m.

How the UK can improve whistleblower protection

In May 2018, the CEO of Barclays, Jes Staley, was fined a total of £642,430 by the FCA for trying to uncover the identity of an anonymous whistleblower. However, the penalty attracted significant criticism as it represented only 14% of his total compensation.

Unlike their US counterparts, UK whistleblowers receive no

financial incentive for reporting wrongdoing. And because of the lack of clarity in the law, the risks of blowing the whistle are high. For example, if the internal rules of an organisation (based on FCA requirements) are breached, it does not automatically mean there has been a breach of the law. These types of situations can lead to the person making the disclosure being left without any protection under PIDA.

Lord Godfrey Cromwell, a robust advocate for increasing whistleblowing procedures, has said:

"It is a widely-held misunderstanding that the FCA regulates the whole financial services world. Significant areas – for example bank lending to SMEs – remain unregulated and it comes as a shock to whistleblowers and aggrieved customers alike that the FCA is largely unable to engage in such areas."

In early 2018, the charity Whistleblower UK put forward its proposal for a bill to amend PIDA, to include an independent Office For the Whistleblower. Many leading parliamentarians support the proposal, including Lord Cromwell and Baroness Susan Kramer, along with the Institute of Business Ethics and Public Concern at Work. The organisation is also campaigning to have penalties imposed on those who retaliate against whistleblowers.

BDBF recently acceted for the successful claimant in the landmark Court of Appeal case of *Timis & Sage v Osipov* [2018] EWCA Civ 2321 which held that an employee may bring a claim against a fellow worker for whistleblowing detriment where the detriment is a dismissal. This provides an alternative route for employees who have been dismissed because of whistleblowing in situations where the organisation which employed them becomes insolvent.

However, when it comes to pushing through legislation, or even getting a Bill tabled, at the moment, the great monster of Brexit is standing in the way. Heather Buchanan, director of

policy and strategy for the All Party Parliamentary Group on Fair Business Banking and Finance, told *Global Risk Regulator*:

"Everything is about Brexit right now, It is probably the biggest challenge. Everyone says [there is] no time on the floor for this stuff; it does take a very sustained effort. We can look at legislation going through but the space for new legislation is very difficult right now".

Final words

Blowing the whistle is a risky business and should never be undertaken without legal advice. The price paid by many who have 'done the right thing' has been professional and personal. However, research has shown that those who blow the whistle in their workplaces tend to have a strong moral compass and a desire to confront wrongdoing, therefore, they are left with no choice regarding whether to speak up. The least they can ask for is for the law to provide protection.

BDBF are employment law specialists with particular experience of acting for whistleblowers in the financial services and heal sectors. If you want to find out about making a claim following detriment or dismissal related to whistleblowing, please contact Clare Brereton, Associate (claretaylor@bdbf.co.uk) on 020 3828 0350.

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New Rights For Gig Economy And Zero-Hour Contract Workers

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New Rights For Gig Economy And Zero-Hour Contract Workers

On 17 December 2018, the Government released its Good Work Plan, in which it set out what it states is the biggest package of workplace reforms for 20 years. In presenting its “vision for the future of the UK labour market”, the Government aims to bring employment law into line with changes in technology and the way people now work.

The plan is the result of an independent review of modern employment practices, led by Matthew Taylor, the Chief Executive of the Royal Society of the Arts.

Much of the detail is yet to be clarified, but we’ve set out below what the new rules are likely to mean for employers.

A written statement to be provided to employees and workers

from day one of their employment

Under the Employment Rights Act 1996, employers must provide employees (but not "workers") a written statement of the particulars of employment not later than two months after the employee starts work.

However, the Good Work Plan states that the changing nature of employment relationships and the increase in flexible working arrangements has left many lacking the information needed to ensure they fully understand their employment terms and conditions. To rectify the lack of clarity, the new legislation will state an employer must provide a written statement of particulars from day one to both employees and workers. Leave entitlements, such as time off for sickness and maternity leave, must be included.

Right to request a stable contract

Under the changes, employees and workers will be given the legislative right to request a predictable and stable contract after 26 weeks of employment. The aim of this is to allow people to benefit from flexible working arrangements but be able to plan for their future and benefit from certainty, for example, to help them apply for a mortgage.

In practice, if a staff member has worked for an employer for 26 weeks or more on a zero hours contract but averaging 25 hours a week, they will have the right to ask their employer for a contract guaranteeing those 25 hours.

Employer will need to put procedures in place for dealing with these requests in line with the statutory framework.

Continuous Service break extended

Because employment rights are earned over time, Matthew Taylor identified that many people struggled to build up continuous service due to intermittent working patterns or working for

multiple employers. Under current law, a gap of one week can break the chain of continuous service. New laws will extend the length of the gap to four weeks.

Agency workers

Currently, agency workers can exchange their right to be paid, in the same manner as their permanent counterparts ('opt-out' from this part of the Agency Worker Regulations), in return for a contract with the employment agency guaranteeing pay between assignments. This is known as the "Swedish derogation". However, evidence shows that some agencies use tactics to circumnavigate the need to pay between assignments, for example by contractually stipulating the employee must always be available to work, regardless of the number of hours offered or the location of the job. In addition, in the current climate of full employment, it was identified that agency workers seldom experienced gaps between assignments; however, some agencies continue to use the opt-out as a way of reducing the wage bill.

New legislation will end Swedish derogation and end the ability of agency employers to deny an employee equal pay under the Agency Workers Regulations 2010.

For employers taking on temporary agency workers, this means the agency will need to pay the worker the same rate of pay as the employer would permanent staff. This may lead to an increase in costs, especially for employers who need to take on a number of extra workers over busy periods.

Staff tips

The Plan recognises that gratuities and service charges can be a significant part of staff income. Most employers pass these onto employees; however, it is recognised a small number resist this. Therefore, legislation will be brought in to ban employers from making deductions from staff tips.

Information and consultation arrangements

The Information and Consultation of Employees Regulations, provides the right for employees, in certain circumstances, to request their employer make arrangements to inform or consult them regarding organisational issues.

New legislation will be introduced to lower the threshold required for a request to set up information and consultation arrangements from 10% to 2% of employees. The 15 employee minimum threshold for initiation of proceedings will remain in place. This change aims to make employees feel more involved in the workplace, thereby improving job satisfaction.

This change will mean employers will need to be prepared to consult more freely and more often.

Increase in Employment Tribunal fines

New laws will increase the maximum fine for employers who deliberately breach employment law or have shown malice, spite, or gross oversight, from £5,000 to £20,000. In addition, employers who repeatedly flout employment law may be subjected to sanctions.

It was noted that the Employment Tribunal do not use their power to fine for aggravated breach as widely as they could; therefore, new guidance will be provided to judges on how current powers can be used. Once the sanctions are in force, obligations will be placed on the Tribunal to consider their use in appropriate circumstances.

Employers should take note of this new ‘hard line’ against aggravated or repeated breach of employment law and ensure they seek legal advice when undertaking dismissals and other actions which could lead to a claim.

Holiday pay

The report identified that some seasonal and atypical workers

(including those participating in the gig economy) faced challenges in benefiting from their full holiday pay entitlement. To ensure the average hours for an entire year are reflected in holiday pay calculations, legislation will be introduced to extend the holiday pay reference period from 12 to 52 weeks.

Employers will need to plan ahead and adjust their payroll practices accordingly.

Umbrella companies

Umbrella companies, which act as an intermediary between employers and workers are seen to work well in highly-skilled, highly-payed sectors. However, the Taylor Review recognised that although they reduce the cost and administrative burden of managing payrolls, they can fail workers in low-skilled, low-paid roles. One reason for this is the lack of certainty regarding which entity is technically the employer is in situations where an umbrella company is engaged. As such, workers can be unsure who to approach regarding their rights.

To counter this, legislation will be introduced to allow the Employment Agency Standards Inspectorate to cover umbrella companies. They will have the power to investigate complaints and take enforcement action if required. A particular focus will be on situations in which fair pay is not being granted. This will reduce the instances of unfair competition based on unlawful wage reduction.

If you have any questions regarding how these new changes may affect your business, please do not hesitate to call us on 020 3828 0350.

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EAT confirms a loose causation test in claims for discrimination arising from a disability

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EAT confirms a loose causation test in claims for discrimination arising from a disability

In *Sheikholeslami v University of Edinburgh,* the EAT confirmed that a looser causation test was appropriate in determining whether unfavourable treatment had arisen from the claimant’s disability.

Section 15 of the Equality Act provides that an employer cannot treat an employee unfavourably because of something arising from their disability. By way of example, dismissing an employee with severe depression for appearing

unenthusiastic at work could be discrimination arising from a disability. The treatment is not motivated by the depression, it is motivated by the consequences of that depression. An employer may have a defence to discrimination arising from a disability if they can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. If the employer did not know and could not be reasonably expected to know a worker had a disability, then section 15 is not engaged.

in *Sheikholeslami v University of Edinburgh,* the Employment Appeal Tribunal held that whether 'something' arises by consequence of a disability is a loose test, finding that the Employment Tribunal should have considered the links between the claimant's disability and her behaviours and said that there could still be a connection even if there was more than one link in the chain of causation.

The background

In 2007, Ms Sheikholeslami, the claimant, accepted a prestigious position as Professor and Chair of Chemical Process Engineering at the University of Edinburgh. She began to suffer from severe work-related stress and depression and became too ill to attend work.

The claimant raised a grievance for sex discrimination in 2010. A diversity review concluded that there were cultural problems at the School of Engineering. The claimant asked to be transferred from the School of Engineering, but her request was not accepted. The Employment Tribunal ('*ET*') found that the claimant became disliked and distrusted by the School of Engineering, whose staff believed that she had "over-egged" her grievance.

The claimant's health continued to suffer, and in 2012 she was dismissed on the grounds that her work permit had expired. The university had not sought to follow its own dismissal procedures or to extend the work permit on the basis that the

claimant was not prepared to return to work.

The section 15 claim

The claimant bought claims for sex discrimination, a failure to make reasonable adjustments and that the University's failure to extend her work permit, failure to follow its own dismissal procedures and dismissal of the claimant was less favourable treatment arising from her disability.

The ET rejected her claims. The claimant's discrimination arising from a disability claim failed because, whilst the ET accepted that the University had not applied to extend the claimant's work permit because she refused to return to work, in its view, there was insufficient evidence to link her refusal to return to work with her disability (rather than her refusal being linked to the fact that she felt she had been badly treated).

On appeal, the EAT found that the ET had applied too narrow a causation test. The ET did not consider that there may be more than one link in the chain of causation between the reason for the dismissal and 'something' that had been caused by the claimant's disability.

Here it was the claimant's disability that caused her to be absent from the university and the perceived hostility of the claimant's colleagues was linked to the cause of her disability. The EAT found that because the claimant's disability, its cause and effects were all so interlinked, the ET should have considered whether her refusal to return was a consequence of her disability, which was a looser test. The EAT found, applying a looser test, that there was a link between the consequences of the claimant's disability and her dismissal.

What this case means

The case demonstrates that the test for whether an employee has been treated unfavourably as a consequence of their

disability is a loose one, particularly where the disability has been triggered by work and employers should think broadly about whether a disability could be linked with a reason for a dismissal.

BDBF are employment law specialists with expertise in claims by university professors. For more information please contact Senior Associate Rolleen McDonnell, (rolleenmcdonnell@bdbf.co.uk) on 020 3828 0350 or Senior Associate Samantha Prosser (samanthaprosser@bdbf.co.uk) on 020 3828 0373.

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Beware the 'curse' of twitter – a warning for regulated professionals

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Beware the ‘curse’ of twitter – a warning for regulated professionals

In recent years the power of regulators has increased dramatically. All regulators are more proactive in taking enforcement action against individuals in breach of rules in previously uncharted areas, for example the personal use of Twitter. In recent months, the Solicitors Regulation Authority (SRA) issued clear communications regarding the high standards of behaviour it expects from law firms and solicitors. For example, a Warning Notice regarding the use of threatening drafting in non-disclosure agreements. The SRA believes this could discourage individuals from making disclosures to regulators and law enforcement agencies. In addition, they issued guidance making it clear that instances of sexual harassment within law firms should be reported to the SRA.

Suspension of a solicitor because of a series of posts on Twitter

An example of enforcement action by the SRA demonstrates the power of regulators extends beyond the office into personal lives. The Solicitors Disciplinary Tribunal suspended Deborah Daniels for 18 months as a result of her activity on Twitter. This case is specific to solicitors, however all regulated individuals should understand how their online activity can affect regulatory status.

Sending offensive and wholly inappropriate tweets

In 2016 and 2017 Ms Daniels, a partner in a firm based in Yorkshire, sent a series of tweets from her personal twitter account. These tweets were, by her own admission, offensive and wholly inappropriate. In particular they expressed hostility towards and/or a hatred of Islam, Catholicism and Judaism. Similarly, she used the same twitter account to comment on photographs of a woman wearing a niqab and a drag artist/person of transgender in a way that was offensive, wholly inappropriate and/or discriminatory. Consequently, in doing so she breached two of the mandatory principles with which she was expected to comply. Namely 'act with integrity' and 'behave in a way that maintains the trust the public places in you and in the provision of legal services'.

The factor that justified the immediate suspension from practice was the content of one of the twitter posts. In March 2017, Ms Daniels commented on an article about a photograph of a woman wearing a niqab and a drag artist/transgender person sitting together on the New York subway. Disapprovingly, her comment included the words 'they both look stupid and unemployable and therefore pointless'.

Most importantly, the reference to them being 'unemployable' was particularly concerning for the Tribunal. During the hearing, Ms Daniels had been unable to provide reassurance that she did not discriminate based on appearance during recruitment to her firm. Accordingly, it found that there was a need to protect the public and a suspension order was necessary. As a result the Tribunal identified a link between an opinion posted online and the potential to cause harm to the public. Particularly if this opinion manifests itself in the recruitment of individuals into the legal profession.

Personal tweets

Although the tweets were sent from Ms Daniels' personal twitter account, that account clearly identified her as a

solicitor and the Tribunal found that they were capable of damaging (and did in this case damage) the trust placed in the legal profession by the public. The Tribunal accepted that tweets can be drafted and posted spontaneously, without regard for the wider ramifications. However, in this case Ms Daniels' conduct was 'persistent and protracted' and it was 'highly predictable' that such behaviour would cause harm to the legal profession. Moreover, they did not accept the excuse that the 'curse' of twitter (being the ease with which users can post messages) was partly to blame for her actions.

Not paying regard to public opinion

An aggravating factor was that Ms Daniels continued to tweet inappropriate messages despite members of the public raising concerns both about the content of her twitter posts and that they were authored by a solicitor. On more than one occasion a member of the public tagged the SRA in a reply to one of Ms Daniels' tweets, however she still did not cease. Consequently, the Tribunal found this to amount to serious misconduct.

Ramifications of offensive personal tweets

This case serves as a useful reminder to regulated professionals that personal conduct has the ability to impact on their regulatory status, with potentially severe consequences including law enforcement. It is also consistent with case law in the Employment Tribunal. An employer can dismiss an employee fairly for conduct on Twitter and other personal social media accounts where the employer can be identified and therefore there is a risk of damage to its reputation.

BDBF are employment law specialists. If you have any queries about social media policies, please contact Clare Brereton, Associate on claretaylor@bdbf.co.uk or 020 3828 0350.

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Can a contract insist on variations being made in writing?

The Supreme Court has confirmed that a contract can validly prohibit variations being made to it orally.