Whistleblowers beware: It ain’t what you do, it’s the way that you do it

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In Kong v Gulf International Bank (UK) Ltd the Court of Appeal decided that the dismissal of a whistleblower for conduct closely related to her whistleblowing disclosure was not automatically unfair.

What happened in this case?

Ms Kong was the Head of Financial Audit at Gulf International Bank (UK) Ltd. Her job was to carry out risk-based audits of all of the Bank's business activities. She reported to Mr Mohamed, the Group Chief Auditor, who was based in Bahrain.

Ms Kong prepared a draft audit report in which she was critical of the use of a particular legal template governing one of the Bank's new financial products. Ms Kong felt it was unsuitable and did not contain sufficient safeguards. Ms Kong sent this report to Ms Harding, the Bank's Head of Legal, and others. It was accepted that the concerns raised amounted to whistleblowing.

Ms Harding was unhappy with the concerns raised by Ms Kong and confronted her about it. She entered Ms Kong's office without an appointment and without knocking. She was agitated and began discussing the legal template issue. In the course of the discussion, Ms Kong questioned Ms Harding's legal knowledge regarding the right type of agreement to be used. Ms Harding became upset and left, slamming the door on her way out.

After the meeting, Ms Kong sent an email to Mr Mohamed raising her concerns about the legal template and the fact that Ms Harding had not responded to those concerns but, instead, had become agitated towards her. In the meantime, Ms Harding complained to the Head of HR and the CEO, alleging that Ms

Kong had impugned her professional integrity. Ms Harding gave the impression that she couldn't work with Ms Kong anymore and she sought to limit interactions with her from this point onwards.

The CEO and Head of HR decided to dismiss Ms Kong. They prepared a document setting out their concerns. This included the incident with Ms Harding, plus nine other incidents, which, they said demonstrated that Ms Kong"had little emotional intelligence when dealing with colleagues", was "dogmatic in her approach" and that her "ability to listen and build relationships with colleagues is limited".

On 3 December 2018, the CEO, Head of HR and Mr Mohamed told Ms Kong that she was to be dismissed because her behaviour, manner and approach had resulted in colleagues not wanting to work with her. The dismissal letter referred to her questioning of Ms Harding and said that this fell "well short of the standard of professional behaviour expected" and was contrary to the principles of treating colleagues with dignity and respect. The letter went on to say that the dismissal was not connected to the initial concerns she had raised. Indeed, these concerns were reflected in the final version of the audit report.

Ms Kong brought a claim alleging she had been subjected to detriment and automatically unfairly dismissed because she had made whistleblowing disclosures.

What was decided?

<u>Employment Tribunal:</u>

On the detriment claim, the Employment Tribunal accepted that Ms Harding had treated Ms Kong detrimentally and this treatment had been influenced by the whistleblowing disclosures. However, the claim failed because it was out of time.

On the dismissal claim, the Tribunal accepted that Ms Harding's complaint about Ms Kong had been motivated by the whistleblowing disclosures and that this complaint was the principal cause of the dismissal. However, Ms Harding did not take the decision to dismiss. The dismissal decision makers had decided to dismiss, primarily, because Ms Kong had questioned Ms Harding's professional integrity, rather than because of the whistleblowing disclosures. The Tribunal concluded that this conduct was genuinely separable from the disclosures. The Tribunal also went on to consider whether it was possible to attribute Ms Harding's motives to the Bank but decided that it was not. Therefore, the Tribunal dismissed the claim.

Ms Kong appealed the Tribunal's decision on the dismissal claim to the Employment Appeal Tribunal (**EAT**).

EAT

The EAT upheld the Tribunal's decision. They agreed that it was right not to attribute Ms Harding's motives to the Bank and the focus should be on the motives of the dismissal decision makers only. Ms Kong argued that dismissing her for questioning Ms Harding was, in effect, dismissing her because of the whistleblowing disclosures as the two were inseparable. However, the EAT disagreed. They said that Ms Kong's concern that the Bank was in danger of breaching regulatory requirements by using a legal agreement which was unsuitable for a new financial product was separable from how that state of affairs had come about, who was responsible for it and whether they deserved criticism in that regard.

The EAT dismissed the appeal and Ms Kong appealed to the Court of Appeal.

Court of Appeal

Ms Kong argued that it wasn't open to the Tribunal to separate her conduct in making the disclosures from the disclosures

themselves.

The Court of Appeal did not agree. It said that, in principle, there can be a distinction between the whistleblowing disclosure itself and the conduct associated with making the disclosure. The role of the Tribunal is to identify the reason or reasons that operated on the mind of the decision maker when deciding to dismiss. Tribunals should be able to identify a feature of the conduct relied upon by the decision maker that is genuinely separable from the whistleblowing disclosure.

Provided they can do this, the principal reason for the dismissal will be the conduct, not the whistleblowing disclosure. Importantly, the Court said there is no objective standard against which such conduct should be assessed. Nor does the conduct in question have to reach a particular standard of unreasonableness in order to be separable.

In this case, the Tribunal had not erred in deciding that Ms Kong's conduct was the reason for her dismissal.

What does this mean for employers?

Ultimately, this is a helpful decision for employers as it suggests that the separability principle can be drawn quite widely. Whistleblowers often deliver unwanted messages that some will not like. It is not unusual for difficult conversations to follow, especially with those at the heart of the concern itself. And often such conversations will not be instigated by the whistleblower. Indeed, in this case, it was Ms Harding who confronted Ms Kong.

Employers should nevertheless be careful not to view this decision as giving them carte blanche to dismiss a whistleblower just because they have ruffled someone's feathers. It is worth remembering that in this case there was reference to other incidents that the decision-makers had factored in when deciding to dismiss. The Courts will

continue to pay close attention to an employer's reasons for dismissal to ensure that the real reason is not, in fact, the disclosure itself.

The decision may be appealed to the Supreme Court. Watch this space.

Kong v Gulf International Bank (UK) Ltd

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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